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Addressing Hidden Foster Care: The Human Impact and Ideas for Solutions

Can the separation of a parent and child, without a court review or due process and often without a plan for reunification, after the insistence and involvement of a child welfare agency ever be truly “voluntarily”?

By Angie Schwartz and Cathy Krebs

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“Hidden foster care” is the term recently coined by Professor Josh Gupta-Kagan to describe a practice that has existed for decades, the practice through which a child welfare agency tells a parent that unless the parent places his or her child with a friend or relative, the agency will remove that child and place the child into foster care. In addition to this coercion of the parents through the threat of removal, the agency often tells the relative that unless the relative takes the child into his or her home and takes action to protect the child, often by seeking guardianship of the child through a family or probate court, the child will end up in foster care with strangers. The practice and language are a little different in each state, but the end result is the same: The child and the parent are separated, without a court review or due process and often without a plan for reunification. And because the foster care system was bypassed, the relative or friend who took custody of the child is left to care for the child without the supports and services that the child welfare system provides to support children who have experienced abuse and neglect and without assistance in navigating

contact and reunification with the parent. While there can be benefits to avoiding the foster care system, and the foster care system itself can be very problematic, hidden foster care raises many concerns, including the infringement of a parent and child's "fundamental right to family integrity with few meaningful due process checks" (Josh Gupta-Kagan, "[America's Hidden Foster Care System](#)," 72 *Stan. L. Rev.* 1 (Aug. 19, 2019).)



Hidden foster care can look different in different jurisdictions, though the end result is the same.

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It is unclear how many children are in the hidden foster care system because most states do not track or report these cases. However, Child Trends found the following: "We compared the frequency of kinship diversion to the frequency of entry to foster care. In some jurisdictions, for every 10 children entering foster care, an additional 7 were diverted,

while in others there was an equal split—for every child entering foster care, another child was diverted.” (Karin Malm, Kristin Sepulveda & Samuel Abbott, *Variations in the use of kinship diversion among child welfare agencies* (Child Trends 2019)). Further, through his research, Professor Kagan found that “the number of children who pass through hidden foster care each year is roughly comparable with the number of children removed from their families, brought to court, and placed in formal foster care each year.” (Gupta-Kagan, *supra*, at 15.) Thus, hidden foster care mirrors the official foster care system, separating tens of thousands of families across the country, but without the court review, due process, or services provided through the foster care system. It is literally “hidden” in that it is invisible to the federal agencies that track foster care and to child welfare courts and lawyers, who never see these cases because they never enter a juvenile court.

The decision about whether to formally place a child with a relative through foster care or encourage that relative to take the child in without the involvement of the child welfare system has broad implications for the child, the parent, and the caregiver. While there can be benefits to bypassing the foster care system, such as avoiding burdensome licensing requirements for foster care placements and retaining family autonomy over decisions, at the point that a child welfare agency is essentially insisting that a parent and child will be separated, it is unclear how “voluntary” the decision is and how much family autonomy has been preserved. Hidden foster care occurs as a result of the government’s insistence on a child being moved away from a parent. Once this occurs, the big concern around hidden foster care is whether that separating of the parent and the child after the insistence and involvement of the child welfare agency can ever be truly “voluntarily” or whether the parent is coerced by the state with the threat that the child will enter foster care if the parent does not. Courts have considered this issue with varying outcomes. The Third

Circuit, in *Croft v. Westmoreland County Children and Youth Services*, stated, “Defendants repeatedly have characterized Dr. Croft’s decision to leave as ‘voluntary.’ This notion we explicitly reject. The threat that unless Dr. Croft left his home the state would take his four-year-old daughter and place her in foster care was blatantly coercive. The attempt to color his decision in this light is not well taken.” (103 F. 3d 1123 (1997).) However, contrast that to the Seventh Circuit’s decision in *Dupuy v. Samuels*, which declared, “We can’t see how parents are made worse off by being given the option of accepting the offer of a safety plan. It is rare to be disadvantaged by having more rather than fewer options.” (465 F.3d 757 (2006).) Nevertheless, despite the court’s finding in *Dupuy*, it is difficult to imagine how parents, when told by the state that they will be taken to court and their children taken from them unless they agree to a change in custody, could ever be acting in a way that is voluntary, particularly without the provision of a lawyer with whom the parent could consult to discuss the likelihood of success if the child welfare agency did attempt to formally remove the child, as well as legal assistance in negotiating the terms of a safety plan.

Financial incentives play a big part in hidden foster care. When the foster care system is diverted, the state saves money on things like monthly financial assistance to the caregiver, respite supports, case management, court reports, monthly visits to the home, and the reunification supports and services to the child and parent. Once a child enters hidden foster care, the state often closes the case completely, which can be a help for social workers who often carry burdensome caseloads. Despite these incentives, it should not be assumed that child welfare agencies are unconcerned about this hidden foster care. Many social workers are attempting to adhere to the wishes of the family to avoid the loss of control that can result once a child is in foster care. Other times, systems feel their hands are tied by licensing rules that may prevent the child from staying with family

members if a formal case is opened. Child welfare agencies exist to protect children, and often when leaders and social workers understand the human impact of hidden foster care, they are interested in addressing it.

Hidden foster care can look different in different jurisdictions, though the end result is the same. In some jurisdictions, a parent may be asked to sign a safety plan and to transfer physical but not legal custody to a relative or friend, while in others, a parent may be told to go to probate or family court to arrange for a formal guardianship. Even when a guardianship does occur, there is not true court oversight of the transfer because a court overseeing a guardianship does not generally consider fitness of the parent, and the guardianship is presumed to be voluntary if both the parent and guardian are in agreement.

The Human Impact

My entire family has dealt with the impact of the child welfare system essentially dropping my grandchildren at my house and urging guardianship as opposed to providing supports and services to my grandchildren and my daughter to help them reunify. In fact, in about 2 years when I asked for services to help my daughter reunify, at her request, we were denied because we had a guardianship.

—Kinship caregiver

Hidden foster care has a big and long-reaching impact on parents, kinship caregivers, and children. Parents and caregivers are not generally provided with full information about what entering hidden foster care will mean. Parents are not told that they might be giving up the right to be given reasonable efforts to prevent a child's removal, and certainly that issue is never litigated given that the case does not go to juvenile court. In addition, parents who chose to transfer custody of

their children are not generally given a plan for reunification or services to address the issues that led to removal. There might be no plan for visitation. Children might remain with family or friends for a few days or they might remain with them permanently. For example, there is generally no due process provided in guardianship proceedings that occur outside the juvenile or dependency system. And, in places like California, probate guardianships can be incredibly difficult to undo, making the transfer of legal custody a long-term and often permanent decision that occurs without any legal representation of the parent or the child. As a result, parents could literally lose their children forever without a court ever reviewing their fitness.

Caregivers are also not given full information. They often do not understand that in bypassing the foster care system, they will not receive full foster care payments, including clothing allowance, or assistance with child care or mental health and other services. In addition, caregivers are not given support to navigate visitation between a child and parent or a plan (or support) for reunification.

In addition, children can lose many rights and protections by entering hidden foster care, including the right to remain in their school of origin, payment to caregivers for transport to the school of origin, and the right to extended foster care. Hidden foster care also means that children eligible for protections under the Indian Child Welfare Act will not receive them. While services within the foster care system, such as services to address trauma, can be challenging to access, children in hidden foster care do not even have the right to such services.

Her girls were taken from her and I was pushed into guardianship—and once that happened, [my daughter] felt cut off. There was no support for her to reunify. My daughter felt like if she had been given the opportunity to reunify, she would have reunified. But instead, the social worker found me

—a grandma willing to provide a safe place for my grandchildren—and that was it.

—Kinship caregiver

I felt pressured to do things on their timeline and in their way

—we didn't get any support or really any options.

—Kinship caregiver

Solutions

One of the first ways to address hidden foster care is to begin tracking it. The federal government does not currently require states to collect data on hidden foster care, and states are not doing so on their own, but we need to begin requiring data so we can better understand how many families are affected in each state, how long children remain out of their parents' custody, and the outcome of each case. Josh Gupta-Kagan states, "Given its prominence and the severity of its infringement on family integrity, gathering basic data regarding hidden foster care is essential to future development and evaluation of policies governing this practice." (Gupta-Kagan, *supra*, at 6.)

To ensure that the transfer of custody is truly voluntary, parents and children must have a right to a lawyer before agreeing to any bypassing of the foster care system. Any action by the state that facilitates a change in custody for a child must trigger the right of parents and children to a lawyer. Parents must understand the weight of evidence against them and their likelihood of success at a hearing to remove their children. They must understand what rights they are giving up and ensure that they can consult with a lawyer before signing any safety plan. In addition, attorneys appointed to parents and children must ensure that all parties' constitutional and statutory rights are fully represented as well as giving a voice to the children and families that

interact with the system and ensuring that educational, mental, physical, and emotional needs are met.

Additional safeguards that need to be in place include that parents should be given a basis for any demand that they place their children with a family member or friend. States should define “voluntary” transfers of physical custody to help ensure that the placement of children truly is voluntary. There also needs to be limits on safety plans and the amount of time that a child spends in a voluntary placement without review by a court or officer outside the child welfare agency, and parents need to have a clear path for what they need to do in order to reunify with their children. Finally, parents and caregivers need to have an option to challenge the basis for a voluntary placement.

Kinship caregivers need clear and comprehensive information regarding options related to court systems, funding, and services prior to agreeing to take children into their home. One survey in California revealed that many caregivers could not even identify whether the children they cared for were in foster care or whether they were caring for them under an informal arrangement. Many caregivers agree to take children informally without any understanding of what they are giving up—for example, financial support, respite care, and services.

Social workers, case managers, emergency response teams, probate judges, dependency judges, minors’ attorneys, and attorneys who practice in probate and family courts also need training on hidden foster care in order to understand how it occurs in their jurisdiction and to develop protocols and practices to provide checks and balances to prevent it from happening without appropriate due process and protections for the child and parent. In addition, state laws may need to be amended to allow for a child who is in hidden foster care to be able to access the formal system in order to ensure that the child, parent,

and caregiver can all receive appropriate representation and supports and an opportunity to reunify.

To address hidden foster care in your state, one approach is to convene all relevant stakeholders—including parents; kinship caregivers; children; lawyers for children and parents; the department of social services; advocacy organizations for parents, kin, and children; and judges—to discuss how this issue plays out in your state and to develop specific recommendations. Talking through the human impact of hidden foster care and hearing from all of the directly affected communities is the first step toward your state ensuring that family integrity is respected, that families are not left in legal limbo, that children are kept safe, that family choice is honored, and that parents, children, and kin are receiving the services and support to which they are entitled.

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