

AMERICA'S HIDDEN FOSTER SYSTEM – HOW IT HURTS CHILDREN AND FAMILIES

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AGENDA

- ❖ Introduction—Introduction of Panel Members; What Is Hidden Foster Care. Where, How and Why It Used. What Harms It Causes.
- ❖ Legal Background—Due Process Litigation, Scrutinizing “Voluntary” Arrangements, *Miller v. Youakim* Litigation.
- ❖ How Hidden Foster Care Affects Children in Kinship Living Arrangements. Overview of Foster Care and Other Benefits Issues, Access to Services and Support. The Impact of Family First Preventive Services Act. Accessing Legal Status for Children and Kinship Caregivers.
- ❖ Challenging Hidden Foster Care
 - In Juvenile Court Cases
 - In Civil Rights Cases for Parents, Children, and Relatives
 - Legislation
 - Data gathering
 - Recommendations for Reforms
- ❖ Q & A (Discussion)

HIDDEN *FOSTER CARE* SYSTEM

- CPS seeks **change in custody** to protect a child
 - During or after an investigation
 - But no legal custody change
- CPS **uses state power** to make that custody change happen
 - “If the parent(s) refuse to sign a valid safety plan, an out of home placement must be sought by Law Enforcement or Ex parte Order to keep the child safe” (South Carolina Department of Social Services, Form 3087, Safety Plan)
- Child **lives with kinship caregiver**
 - 32% of *formal* foster children (Children’s Bureau, Foster Care Statistics 2017)
- **Unknown duration** : sometimes the child returns home, sometimes the child stays permanently with the kinship caregiver
 - Texas (2014): 40% reunified within one year, 12% were petitioned



HIDDEN FOSTER CARE *SYSTEM*. HOW BIG IS THIS, REALLY?

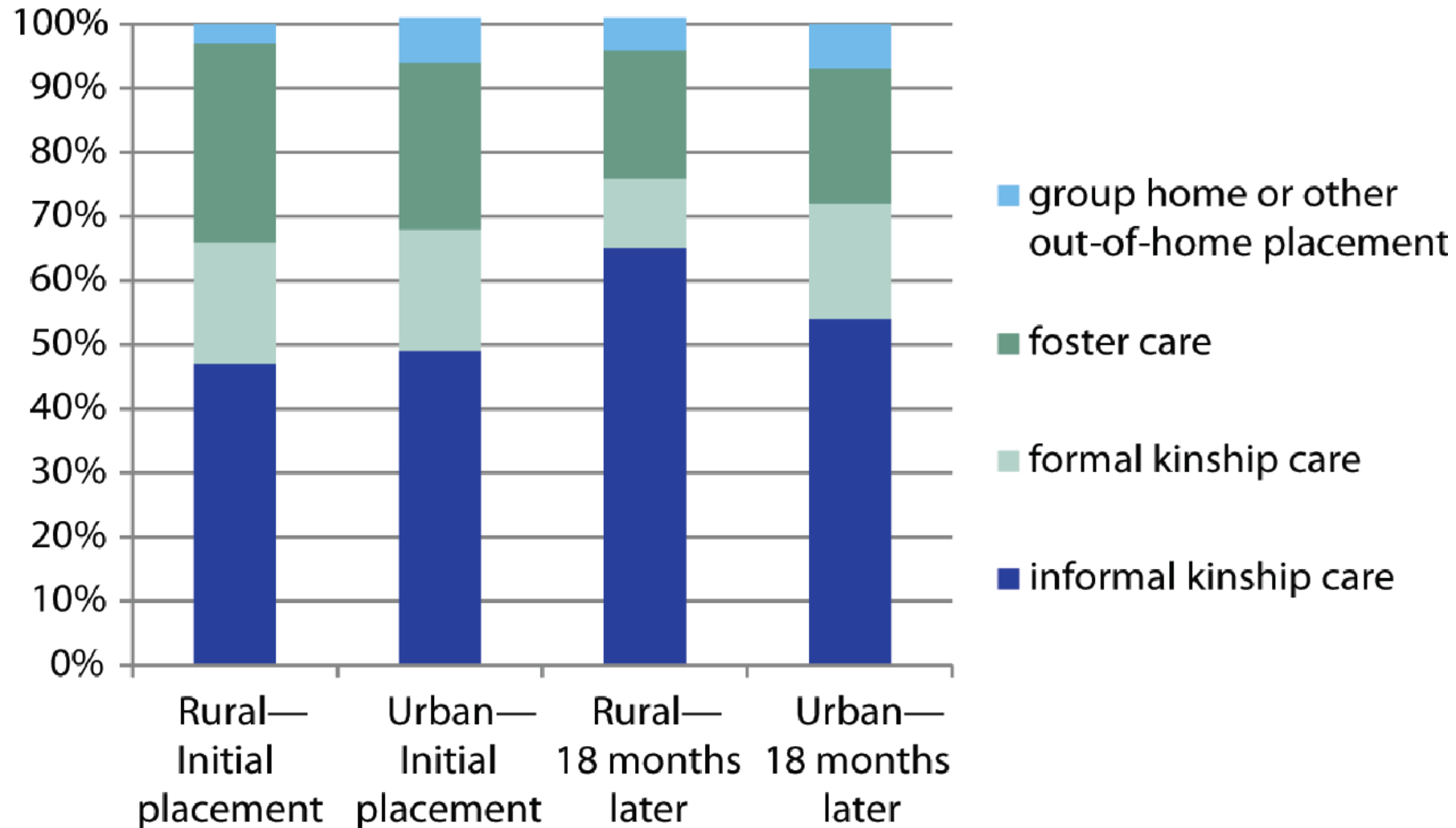
- “We compared the frequency of kinship diversion to the frequency of entry to foster care. In some jurisdictions, for every 10 children entering foster care, an additional 7 were diverted, while in others there was an equal split—for every child entering foster care, another child was diverted.”

Child Trends, Variations in the use of kinship diversion among child welfare agencies (2019)

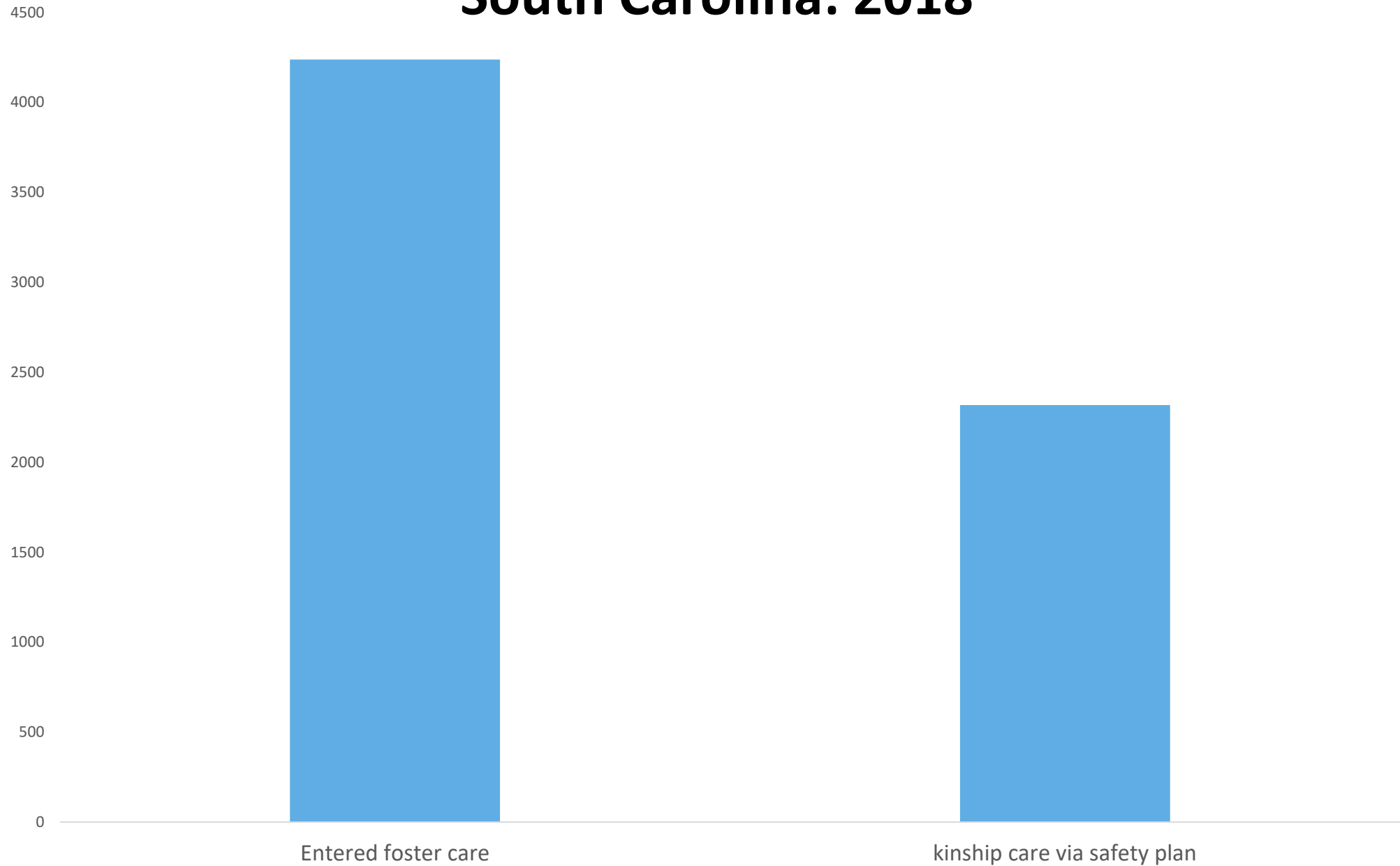
- “quite common,” “increasing,” “often,” “increasingly important”

Child & Family Social Work, Child Trends, Journal of Family Social Work, Child Welfare

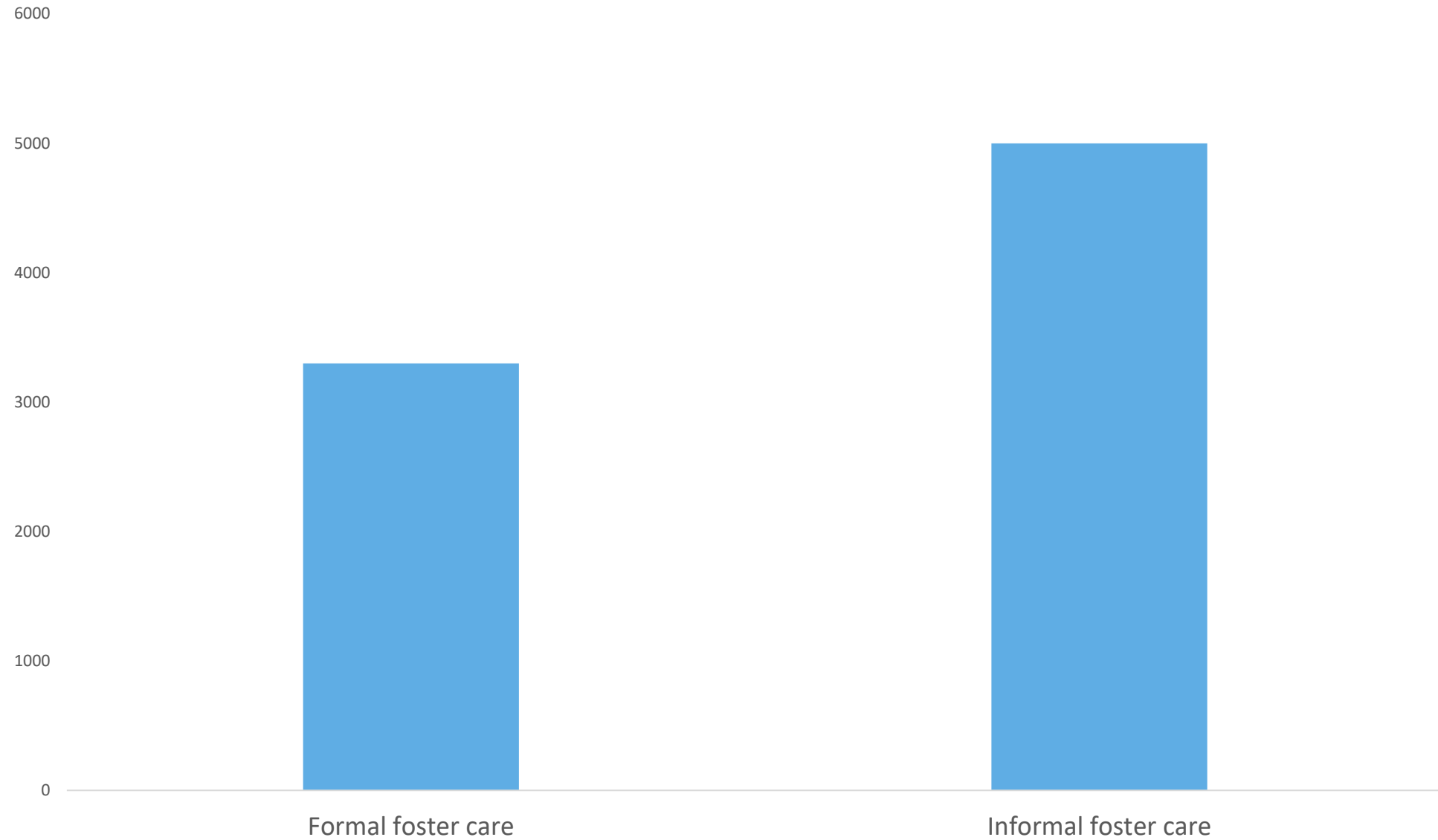
Out-of-home placement settings after maltreatment report and 18 months later (2008-09)



South Carolina: 2018

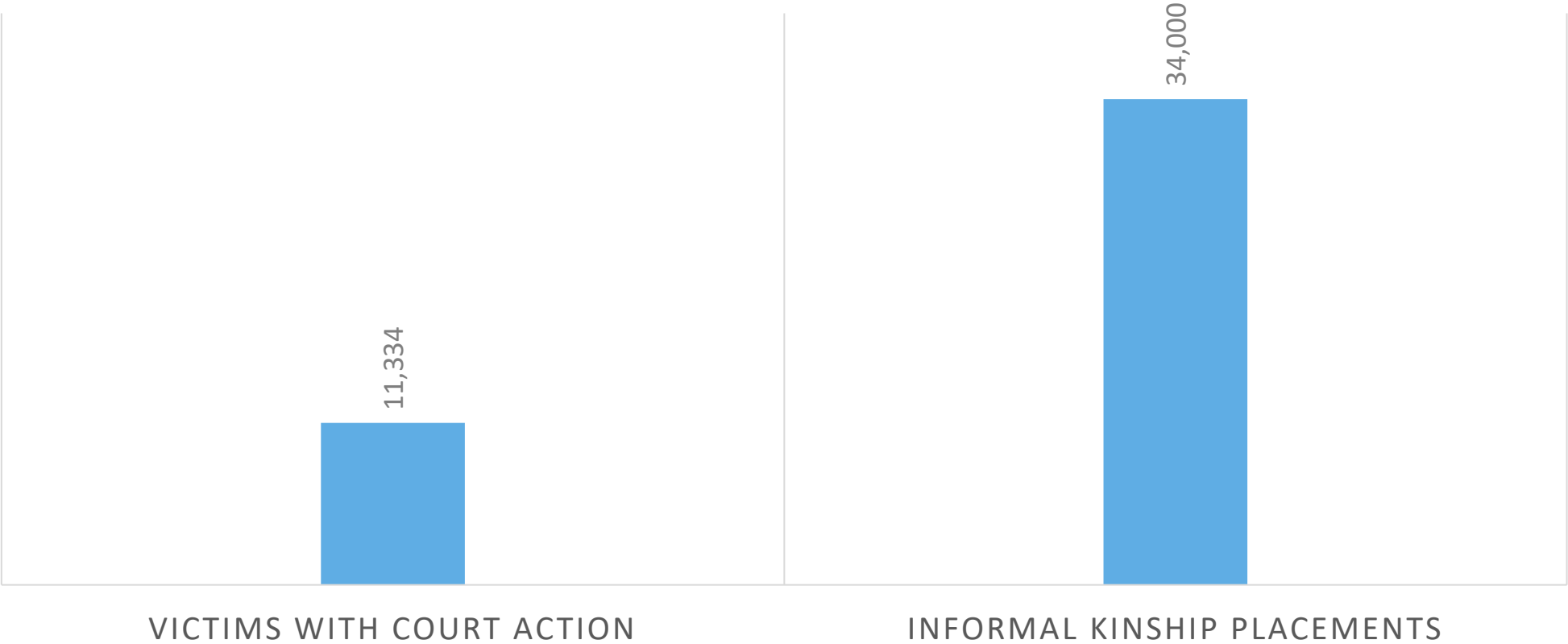


Virginia: July 2016-December 2017



EVERYTHING'S BIGGER IN TEXAS

TEXAS: 2014



IMPACT OF HIDDEN FOSTER CARE: Parents, Children, Kin Caregivers

- Parent-child separation → similar trauma of removal and harm to parent-child relationship and uncertainty about living arrangement
- No neutral decision-maker to review separation, visitation, conditions of reunification, etc.
- No counsel
 - Family may be disempowered regarding key decisions
- No agency obligation to provide services to prevent removal and achieve reunification
- Kinship caregivers lose foster care maintenance payments, supports, and often no legal relationship established
- Family may be left with an unclear custody situation
- BUT - may be less invasive and thus preferred to formal foster care and court oversight

HIDDEN FOSTER CARE SYSTEM: Lack of Accountability

- **Hidden from Family Court Oversight**
 - No lawyers for parents, children or kin
 - No reasonable efforts to prevent removal
 - No reasonable efforts to reunify
 - No mechanism to challenge the need for a separation at the outset
 - No mechanism to challenge the ongoing need for a separation
 - No limits on duration of separation
 - No periodic reviews
- **Hidden from policy/systemic oversight**
 - How many?
 - What happens to the kids?
 - What racial disparities exist?

HOW HAVE THE COURTS CONSIDERED HIDDEN FOSTER CARE: “LAWFUL THREAT” OR COERCION ?

- *Croft v. Westmoreland County CY* (3d Cir.): “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.”



Due Process: “ Lawful threat ” or Coercion?

Dupuy v. Samuel (3rd Cir.):

- It is not a forbidden means of “coercing” a settlement to threaten merely to enforce one's legal rights. . . . This just notifies the parents of the **lawful measures** that may ensue from their failure to agree to a plan **There is no suggestion that the agency offers a safety plan when it has no suspicion at all of neglect or abuse, and even in that case . . . if a child is actually taken, the parents have a very prompt legal remedy.**
- 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

“If you tell a guest that you will mix him either a Martini or a Manhattan, how is he worse off than if you tell him you'll mix him a Martini?”



Safety Plan



Foster Care



“Lawful threat” vs. coercion under *Dupuy*

- *Dupuy*: There would be a due process problem if “it was a threat the agency had no right to make.”
- “For the linchpin of voluntariness to turn on whether a state actor has the legal authority to execute an emergency removal, is to suggest that parents looking down the barrel of the state's gun ought to know whether its chamber is loaded.”

Ryan Shellady, *Martinis, Mannattans, and Maltreatment Investigations*, Iowa Law Review 1613 (2019)

HOW MUCH DO YOU TRUST CPS?

- Did abuse or neglect occur? If so, can the child stay safely at home? What reasonable efforts are required?
- If the child must be removed, where should she stay?
- What must be done for the child to return home?
- Has the parent done enough to reunify?
- If the child does not return home quickly, what should happen?



COERCION IN THE GUISE OF VOLUNTARINESS

- In *Dupuy* the district court had found parents were expressly threatened despite what the form said
- 7th Circuit said parents just had to “call the state’s bluff”
 - but, no parent ever had done so; district found none would!
 - Plus, “mere suspicion” was enough to issue the threat of removal as long as not affirmatively misleading.
 - but, parents had no way to know what evidence the state has gathered

WHY DOES IT MATTER IF DECISION IS VOLUNTARY OR NOT?

- VOLUNTARINESS operates as a waiver of the fundamental right of familial association
- When the right is waived (assume a valid waiver), then no process is required to prove a basis for the separation
- This begs the question, though, because without process there is no way to assess voluntariness
- VOLUNTARINESS is “an amphibian” (to quote Justice Black)
- Only in its narrowest meaning is a decision that’s equivalent to a gun to the head “voluntary.”
- Ordinarily, threats make agreements “less than fully voluntary.”
- This is why we admonish parents in court when they enter pleas.....

**IF WE WERE TO
ASSESS THE
VOLUNTARINESS
OF SAFETY PLANS
THAT SEPARATE
CHILDREN AND
PARENTS:**

- THE "TOTALITY OF THE CIRCUMSTANCES" includes:
 - presence of threats, promises
 - bargaining power
 - education/understanding
 - time pressure to agree (take it or leave it negotiation)
 - access to counsel
 - ability to rescind/modify agreement
- Plus, a forum in which the voluntariness of an "agreement" can be reviewed
- In reality, safety plans are labelled voluntary with effectively NO indicia of voluntariness!

POST-*DUPUY* AND POST -*CROFT* CASES

- Cases present demonstrations of coercive context of the safety plan demand: Hernandez/Trilogy
- Cases show lack of basis for safety plan
- Some cases establish need to due process despite claim of valid basis
- Limit qualified immunity where there is clearly a baseless threat
- Child plaintiffs' cases challenge use of hidden foster care as denial of benefits/case plans for children

*Miller v.
Youakim*,
440 U.S. 125
(1979)

- If states bring children into foster care, states may not exclude kinship families from foster care funding.
 - *Incentive to avoid foster care*
- If otherwise, “the State would have no obligation to justify its removal of a dependent child if he were placed with relatives, since the child could not be eligible for Foster Care benefits. But the same child, placed in unrelated facilities, would be entitled under the Foster Care program to a judicial determination of neglect. The rights of allegedly abused children and their guardians would thus depend on the happenstance of where they are placed.” Congress “meant to protect from unnecessary removal” all children, regardless of with whom they are placed.

Why do states do this? (Part 1)

What is cheaper?



Formal foster care

- Foster care subsidies
- Adoption & guardianship subsidies
- Staff and administrative costs
- *Partial* federal reimbursement for *some* families

Hidden foster care

- No foster care subsidies
- No permanency subsidies
- Limited staff and administrative costs

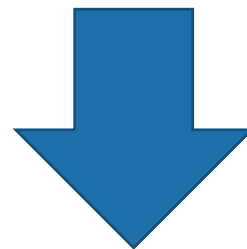
Why do states do this? (Part I1)

FFPSA: Prevent family separations or prevent foster care?

- Children's Bureau (Program Instruction 18 -09)
 - FFPSA seeks to prevent "the trauma of unnecessary parent-child separation"
- Statutory text
 - "candidates": children "at imminent risk of entering foster care . . . Who can remain safely in the child's home or in a kinship placement." 42 U.S.C § 675(13).
 - CPS agencies should use a "foster care prevention strategy" such as having the child live temporarily with a kin caregiver until reunification can be safely achieved, or live permanently with a kin caregiver 42 U.S.C § 671(e)(4)(A)(i)(1).

ONCE DIVERTED, CAREGIVER HAS NO LEGAL RIGHTS WITH RESPECT TO CHILD

- No legal rights to care for child, obtain medical care, enroll child in school, etc.
- No documents like birth certificates, Medicaid cards, vaccination records
- No ability to obtain documents without legal rights
- Often cannot add child to household to get a larger housing voucher without legal custody order
- Often cannot get child care subsidy for after and before school care without legal custody order
- May not be able to obtain TANF benefits because cannot prove relatedness without birth certificates even with birth certificates (especially for paternal family)
- Problems obtaining WIC without a legal custody order
- Problems enrolling in Medicaid without legal custody order



OBTAINING A LEGAL CUSTODY ORDER

- Court proceeding
- Must take off from work or school to attend hearings
- Strained family dynamics resulting from litigation
- High legal hurdles for non-parents to be granted custody
- Temporary orders may not be accepted to get services
- Multiple hearings over lengthy period of time (sometimes years) before a permanent custody order issued
- Even once permanent order is issued, modifications can occur until child becomes an adult



NEGATIVE WATERSHED EFFECT ON STABILITY OF KINSHIP FAMILIES

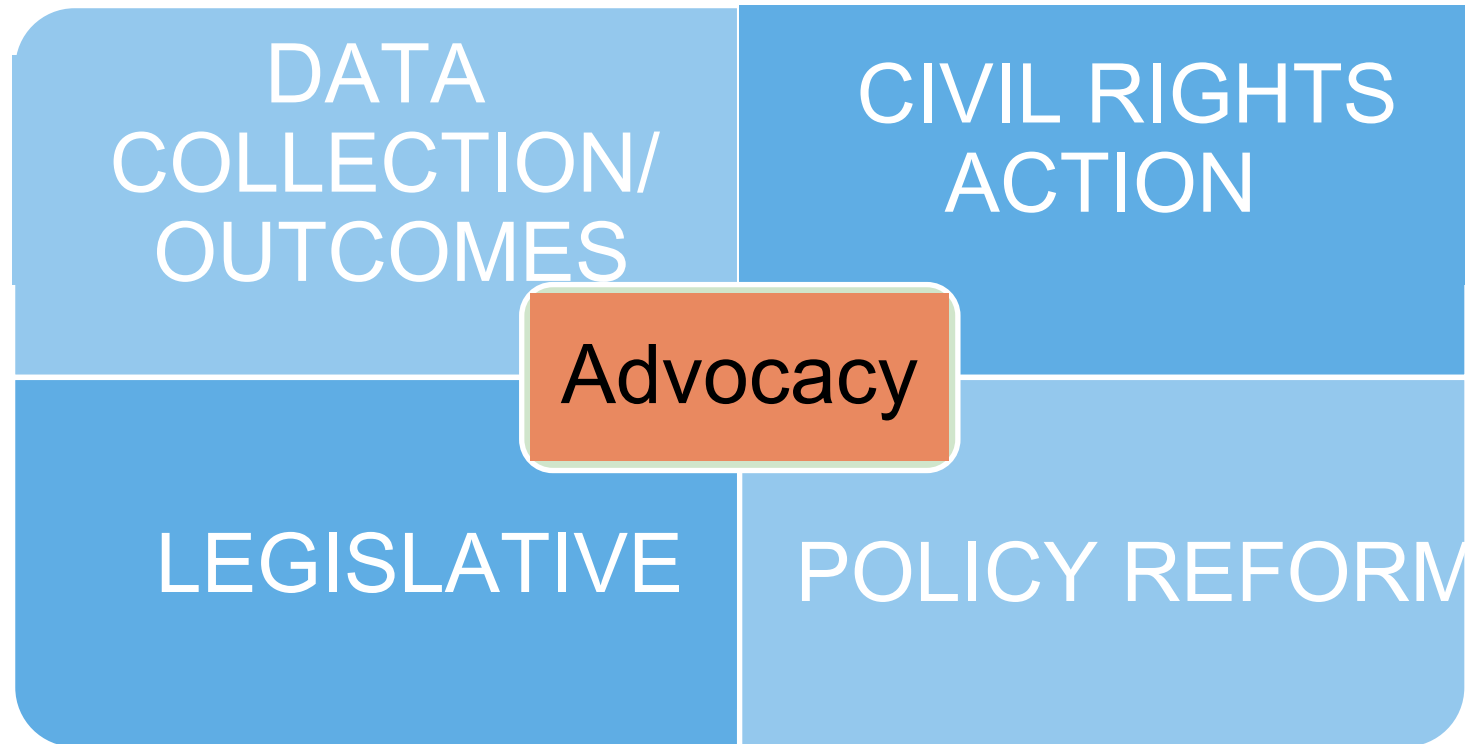
- Caregiver barriers to access legal custody, financial assistance, housing, and getting services for the children leads to:
 - Falling further into poverty
 - At-risk of homelessness
 - Food insecurity
 - Loss of wages or jobs
 - Emotional toll
 - Physical toll



CONTINUED TRAUMA FOR DIVERTED CHILDREN

- Trauma from abuse or neglect in home prior to diversion
- Trauma from the diversion to live separately from their parents
 - No services offered to the children
 - No safe pathway home (reunification services)
- Instability in new home due to factors discussed in previous slides

HOW TO ADDRESS HIDDEN FOSTER CARE



RAISING HIDDEN FOSTER CARE CONCERNS IF THE CASE COMES TO COURT

Questions to ask the caseworker

CIVIL RIGHTS ACTIONS

North Carolina Federal Lawsuit Challenging Diversions

Hogan et al. v. Cherokee County et al. denied the County's motion for summary judgment with respect to plaintiffs' substantive and procedural due process claims in the context of a separation of a child from her parent pursuant to a diversion arrangement, and a jury awarded the parent and child millions in damages for the illegal separation. 2021 WL 535855 (W.D.N.C. 2021).

See Presser, Lizzie. "How Shadow Foster Care Is Tearing Families Apart." *New York Times Magazine* 1 Dec. 2021, available at <https://www.nytimes.com/2021/12/01/magazine/shadow-foster-care.html>

CIVIL RIGHTS ACTIONS (cont'd)

- DC KinCare Alliance has filed 6 federal lawsuits on behalf of 20 relative caregiver and child plaintiffs challenging DC's practice of hidden foster care. The cases bring the following claims:

- Violation of D.C. Child Abuse and Neglect Act
- Violation of D.C. Human Rights Act
- Violation of U.S. Social Security Act
- Violation of Equal Protection Clause of U.S. Constitution
- Violation of Due Process Clause of U.S. Constitution (substantive and procedural)
- Negligence
- Fraudulent Misrepresentation
- Negligent Misrepresentation
- (Equitable Estoppel)

➤ *K.H. et al. v. D.C.*, No. 193124 (D.C.D.C. filed Oct. 18, 2019); *S.K. et al. v. D.C.*, No. 2000753 (D.C.D.C. filed March 17, 2020); *D.B. et al. v. D.C.*, No. 21-00670; *T.J. et al. v. D.C.*, No. 21-00663; *M.S. et al. v. D.C.*, No. 21-00671; and *S.S. et al. v. D.C.*, No. 2100512 (D.C.D.C. filed March 11, 2021)

DATA COLLECTION/OUTCOMES

Currently, the U.S. Department of Health and Human Services does not require states to report data on hidden foster care arrangements; leads to lack of transparency and wide variations among states

Types of Data Needed

- Number of children subject to hidden foster care arrangements
- Racial/National Origin Demographics of children and families in hidden foster care
- Types of hidden foster care placements (i.e. relative, friend, etc.)
- Number of children who enter formal system out of hidden foster care
- Number of children reunified with parents from hidden foster care
- Length of stay: 5 days, 10 days, 30 days, more than 60 days, more than 180 days, more than a year
- What services, benefit or supports are provided to/received by kinship caregivers and parents, including legal services
- How many cases of hidden foster care are ultimately unfounded after an investigation and why, or were substantiated and why
- Maintaining a centralized repository of the agreements that parents are asked to sign

LEGISLATION

Several states are taking action to reform Hidden Foster Care. Four notable examples:

- Texas House Bill 2680 (2021; Hull R); requires appointment of counsel for indigent parents, limits placements to 30 days, requires agency to track and report number of hidden foster care placements. Passed House; will be refiled in 2023.
- California Assembly Bill 260 (2021; Stoner D); ensures that probate and dependency courts work together to protect due process interests; requires juvenile court judges to review child welfare cases referred to probate courts to prevent the child welfare agency from bypassing dependency court and ensuring that families have access to due process, services, and financial supports. Enacted.
- California Assembly Bill 2309 (2022; Friedman D); requires data collection and reporting concerning children subject to a voluntary placement agreement. Pending.
- New York: Assembly Bill 08090 (2022; Hevesi D); defines “alternative living arrangement,” requires data collection and reporting, limits placements to 5 days with option for one 5 day extension, does NOT include right to counsel. Controversial because NY already has a statute allowing for temporary removal of a child with consent of parents (Family Court Act 1021), which includes right to counsel, a 3 day time limit, and more robust protections for parents. Pending.

POLICY CHANGE

Ensure Due Process Protections for Families:

- Right to counsel for families in connection with proposed agreement
- Right to a court hearing on the proposed agreement
- Strict time limits that are enforced

Require Data Collection and Reporting (see data slide)

Remove Systemic Barriers for Relative Caregivers to Access Supports and Services:

- Reform documentation requirements to obtain TANF
- Reform childcare subsidy requirements
- Ensure local housing authority is following federal and local fair housing requirements and its own regulations

Support Relative Caregivers So They Can Support and Stabilize Children:

- Have a fully functioning kinship navigator program that is separate from the child welfare agency
- Subsidies for relative caregivers similar to the DC Grandparent and Close Relative Caregiver Programs (and ensure amounts are par with foster care subsidy amounts)
- Provide legal support for relative caregivers so they know all of their rights before agreeing to anything
- Help relatives obtain the legal rights they need to care for the children

HFC REFORM STATEMENT OF PRINCIPLES

The following reflects the consensus views of members of the Hidden Foster Care Working Group, a diverse coalition of advocates for parents, children, and kinship caregivers.

- Family integrity is a fundamental right protected by the U.S. Constitution. Any proposed separation or agency-imposed restriction, including those portrayed as voluntary or that occur without court oversight, are restraints on liberty and must conform to Constitutionally required due process protections.
- Circumstances related to poverty, race, or culture are never a valid reason for the state to separate families or impose other restrictions on families.
- Agencies should never separate families or impose other restrictions when a child is not in imminent danger of harm due to abuse or neglect.
- Parents have an absolute right to counsel whenever an agency seeks the separation of a child from their parents or other restrictions on the parent-child relationship.
- Agencies have an affirmative duty to actively negotiate with the family and their counsel regarding the terms of a proposed arrangement and to identify community-based resources to address areas of concern or alleged grounds for separation.
- Families and their counsel have the right to identify their own resource providers and are under no obligation to utilize providers under contract with the agency.
- Alleged grounds for separation or areas of concern must be shared with parents and their counsel specifically and in writing at first contact.

HFC REFORM STATEMENT OF PRINCIPLES (contd.)

- Resources must be culturally responsive and narrowly tailored to address the specific areas of concern or alleged grounds for separation identified by the agency and parent. Agencies must not require unnecessary services or interventions unrelated to areas of concern or alleged grounds for separation.
- Parents should have a right to request a hearing related to the proposed arrangement.
- Arrangements shall be temporary, brief, and time limited as negotiated between the agency and parents' counsel. Terms of the arrangement, including conditions for the return of the child must be clear, understandable, and in writing.
- Before a child is placed with a kinship caregiver under an agreement between the agency and parents, the agency shall provide the proposed kinship caregiver with written notice that sets forth: (a) the terms of the agreement, that they are under no obligation to consent to care for the child pursuant to those terms, and that they have the right to decline to care for the child; (b) the rights, responsibilities, options, and resources available to them if they decide to care for the child; and (c) their right to consult with legal counsel and to have counsel represent them in connection with their decision to care for the child.
- The agency has an affirmative duty to assist the kinship caregiver to obtain any documentation or other resources necessary to care for the child and ensure the stability of the placement.
- A kinship caregiver may decide not to care for the child at any time, and that decision alone shall not result in any adverse action against the caregiver, such as the bringing of a neglect case against the caregiver or future disqualification as a formal or informal resource for the child and family.
- Seeking or facilitating parent-child separations outside of the legal removal process does not amount to reasonable efforts to preserve families or prevent removals.

QUESTIONS/DISCUSSION

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