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Timely Permanency for Children in Foster Care:

Revisiting Core Assumptions about Children's Options and Outcomes

Sarah A. Font & Lindsey Palmer

The Adoption and Safe Families Act (ASFA, 1997) represented an emerging consensus that foster care should not be a long-term solution for children. Foster care is intended to provide a temporary living arrangement until permanency can be achieved, but, at the time ASFA was passed, some children were spending large proportions of their childhoods in temporary homes. In many cases, these children had a permanency plan of reunification that had little chance of being realized. Thus, the overarching goals of ASFA were to reduce the amount of time children spent “in limbo” and to promote permanency, while maintaining explicit preferences for family preservation and reunification.

ASFA's permanency provisions (described elsewhere in this issue) reflect a central premise that remaining in foster care compromises children's social development and threatens their life chances. Although ASFA and its predecessor, the Adoption Assistance and Child Welfare Act of 1980, assume that reunification, wherever possible, is in children's best interests, ASFA also explicitly acknowledged that reunification may pose unacceptable risks to children in especially egregious cases and that indefinite efforts toward reunification deny children the opportunity for normative family life with an adoptive family or with relatives. Before ASFA, the foster care system was viewed as prioritizing the rights of parents to indefinite efforts to achieve reunification over children's interests in having safe, stable, and normative family life.¹

Recently, advocates have asserted that ASFA (as well as other policies from that era, such as the Multiethnic Placement Act) is a failed policy and should be repealed.² Even in the absence of repeal, ASFA is functionally irrelevant in many areas of the country, as agencies rarely request or receive exemptions to reasonable efforts requirements³ and broadly phrased exceptions to the termination of parental rights (TPR) timelines allow those timelines

to be frequently waived.⁴ Indeed, in several states, the average time to TPR exceeds 3 years.⁵ Put in context, these children spend *at least* one-sixth of their childhoods in foster care. And, despite concerns to the contrary, there is little to no evidence that enforcing ASFA's permanency provisions meaningfully reduces reunification rates.⁶

This article focuses on two questions that should inform debates about the harms and benefits of ASFA's permanency provisions:

Are children harmed by delays to permanency (remaining in foster care indefinitely)?

Do the forms of permanency (reunification, adoption, or guardianship) confer different risks and benefits?

ARE CHILDREN HARMED BY DELAYS TO PERMANENCY?

Foster care is a suboptimal long-term environment, even when children have safe, stable, and loving non-relative or kinship foster parents. Two general principles about human development illustrate why timely permanency is a worthwhile objective.

First, knowing where and to whom one belongs is a fundamental need of humans.⁷ The process of removing children from their homes complicates children's understanding of belonging: they may feel affection for or identify with both biological and foster parents, and consequently experience guilt about such feelings (the “loyalty conflict”). Indeed, children's behavioral and emotional outbursts before and after parental visitation is believed to derive, in part, from this ambivalence.⁸ Such conflicts are not unique to foster care, however, and can also occur in cases of divorce or domestic violence.⁹

Second, the ability to cope and adjust to various life circum-

Footnotes

1. U.S. GOV'T PUB. OFF., IMPROVING THE WELL-BEING OF ABUSED AND NEGLECTED CHILDREN (1996).
2. UPEND MOVEMENT, HOW WE ENDUP: A FUTURE WITHOUT FAMILY POLICING (Jun. 18, 2021), <http://upendmovement.org/wp-content/uploads/2021/06/How-We-endUP-6.18.21.pdf>.
3. Jill Duerr Berrick et al., *Reasonable Efforts? Implementation of the Reunification Exception Provisions of ASFA*, 87 CHILD WELFARE 163, 163–182 (2008).
4. U.S. GOV'T ACCOUNTABILITY OFF., GAO-02-585, FOSTER CARE: RECENT LEGISLATION HELPS STATES FOCUS ON FINDING PERMANENT HOMES FOR CHILDREN BUT LONG-STANDING BARRIERS REMAIN (2002) [hereinafter GAO-02-585].
5. Based on author analysis of Adoption and Foster Care Reporting and

Analysis System microdata.

6. Richard P. Barth et al., *From Anticipation to Evidence: Research on the Adoption and Safe Families Act*, 12 VA. J. SOC. POL'Y & L. 371 (2004); Anna Rockhill et al., *Is the Adoption and Safe Families Act Influencing Child Welfare Outcomes for Families with Substance Abuse Issues?*, 12 CHILD MALTREATMENT 7–19 (2007); See GAO-02-585, *supra* note 4.
7. A. H. Maslow, *A Theory of Human Motivation*, 50 PSYCHOL. REV. 370, 370–396 (1943).
8. Sonya J. Leathers, *Parental Visiting, Conflicting Allegiances, and Emotional and Behavioral Problems among Foster Children*, 52 FAM. REL. 53, 53–63 (2003).
9. Paul R. Amato & Tamara D. Afifi, *Feeling Caught Between Parents: Adult Children's Relations with Parents and Subjective Well-Being*, 68 J. MARRIAGE & FAM. 222, 222–235 (2006).

stances requires some capacity, within reason, to anticipate what is coming.¹⁰ Lack of predictability inhibits the ability to plan—and therefore exercise real or perceived control over—one’s environment.¹¹ In the longer term, this undermines children’s sense of agency, or the perception that they are able to actualize goals or impact their circumstances.¹² Research consistently demonstrates that unpredictable environments impact children’s development above and beyond the effects of low-quality environments.¹³ Consider again the example of parental visitation. If parents never show up, a child learns to anticipate their absence, as painful as that is likely to be. But, when parents intermittently show up, or are sometimes kind and sometimes cold, children cannot predict, and thus cannot prepare.

When unpredictability is long-term and implicates children’s primary relationships and environments, it is likely to overwhelm their capacity to cope, leading to disruptive manifestations of anxiety. For example, children may attempt to release stress in destructive ways that threaten their safety (e.g., aggression or self-harm) or exercise control over their environments by running away, shutting down emotionally, or intentionally disrupting their foster care placements. Furthermore, prolonged uncertainty is likely to compromise long-term developmental milestones, as it induces impulsive and present- (rather than future-) oriented thinking¹⁴ a cognitive framework that poorly situates youth for successful education, relationship, or career trajectories.

The dual anxieties of “to whom do I belong?” and “what should I expect to happen?” are intrinsic to the experience of foster care, even when agencies and courts follow best practices. This does not mean that foster care is never necessary or never preferable to the alternative. Rather, it underscores, consistent with the goals of ASFA,¹⁵ the need to minimize the length of time children are deprived of a permanent family environment and to minimize the number of times a child is asked to adapt to a new environment. Children are not frozen in time while the adults in their lives sort things out. Notwithstanding the importance of making the best permanency decision for each child, it is very likely that delaying decisions also imposes a degree of harm on children.

THE COMPLICATED COUNTERFACTUALS TO REMAINING IN CARE

Minimizing time in foster care is a reasonable goal based on children’s developmental needs for belonging and predictability. However, it is possible to reduce time in foster care while having no impact on—or undermining—children’s life chances. Foster care is a non-ideal environment but undoubtedly the alternatives are sometimes far worse. It is often said that *children need families*, but one would not expect for the mere presence of a unit called “family” to be beneficial. Rather, it is what families provide—safety, unconditional love and support, and a stable foundation for development—that confers lifelong advantages to children. Absent those provisions, a “family”—biological, adoptive, or other—is unlikely to enhance children’s quality of life. Thus, we must consider the comparative safety, stability, and supportiveness of children’s permanency environments.

“Minimizing time in foster care is a reasonable goal based on children’s developmental needs for belonging and predictability.”

DO THE FORMS OF PERMANENCY (REUNIFICATION, ADOPTION, OR GUARDIANSHIP) CONFER DIFFERENT RISKS AND BENEFITS?

Reunification. As both a matter of law and of social preference, biological parents are the default custodians of a child and necessitate efforts toward family reunification for children in foster care. However, an abundance of research shows that reunifying families are, too often, ill-equipped to provide the safe, stable, and supportive care that all children need, and perhaps especially unprepared to provide the level of care needed to repair insecure attachments and help children cope with the effects of prior abuse and neglect. As agencies and courts are pressured to reunify more children more quickly,¹⁶ it is essential to understand how reunified children fare.

The rates of foster care reentry average 20-40% within 1-5 years,¹⁷ and rates of ongoing maltreatment risk are substantial.¹⁸

10. See Maslow, *supra* note 7; Jos F Brosschot et al., *The Default Response to Uncertainty and the Importance of Perceived Safety in Anxiety and Stress: An Evolution-Theoretical Perspective*, 41 *FEARING THE UNKNOWN* 22, 22–34 (2016).

11. Matthias J. Müller, *Will It Hurt Less if I Believe I Can Control It? Influence of Actual and Perceived Control on Perceived Pain Intensity in Healthy Male Individuals: A Randomized Controlled Study*, 35 *J. BEHAV. MED.* 529, 529–537 (2012).

12. Bev Killian et al., *Children’s Loss of Agency Under Extreme Adversity*, 18 *J. PSYCHOL. IN AFR.* 403, 403–412 (2008); Bruce F. Chorpita & David H. Barlow, *The Development of Anxiety: The Role of Control in the Early Environment*, 124 *PSYCHOL. BULL.* 3, 3 (1998).

13. Melissa A. Lippold et al., *Lability in the Parent’s Hostility and Warmth Toward Their Adolescent: Linkages to Youth Delinquency and Substance Use*, 54 *DEV. PSYCHOL.* 348, 348–361 (2018); Melissa A. Lippold et al., *Day-to-Day Consistency in Positive Parent–Child Interactions and Youth Well-Being*, 25 *J. CHILD & FAM. STUD.* 3584, 3584–3592 (2016); Jay Belsky et al., *Beyond Cumulative Risk: Distinguishing Harshness and Unpredictability as Determinants of Parenting and Early Life History Strategy*, 48 *DEV. PSYCHOL.* 662, 662–673 (2012); Jeffrey

A. Simpson et al., *Evolution, Stress, and Sensitive Periods: The Influence of Unpredictability in Early Versus Late Childhood on Sex and Risky Behavior*, 48 *DEV. PSYCHOL.* 674, 674 (2012).

14. Willem E Frankenhuis et al., *Cognition in Harsh and Unpredictable Environments*, 7 *CURRENT OPINION IN PSYCHOL.* 76, 76–80 (2016); Chiraag Mittal & Vidas Griskevicius, *Sense of Control Under Uncertainty Depends on People’s Childhood Environment: A Life History Theory Approach*, 107 *J. PERSONALITY & SOC. PSYCHOL.* 621, 621 (2014).

15. NAT’L COUNCIL JUV. & FAM. CT. JUDGES, *ENHANCED RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES* (2016), <https://www.ncjfcj.org/wp-content/uploads/2016/05/NCJFCJ-Enhanced-Resource-Guidelines-05-2016.pdf>.

16. UPEND MOVEMENT, *supra* note 2.

17. Sara E. Kimberlin et al., *Re-Entering Foster Care: Trends, Evidence, and Implications*, 31 *CHILD. & YOUTH SERV. REV.* 471, 471–481 (2009).

18. Christian M. Connell et al., *Maltreatment Following Reunification: Predictors of Subsequent Child Protective Services Contact After Children Return Home*, 33 *CHILD ABUSE & NEGLECT* 218, 218–228 (2009); Melissa Jonson-Reid, *Foster Care and Future Risk of Maltreatment*, 25 *CHILD. & YOUTH SERVICES REV.* 271, 271–294 (2003).

“Research has not established that reunification improves child wellbeing, even when compared with remaining in foster care.”

Research has not established that reunification improves child wellbeing, even when compared with remaining in foster care.¹⁹ Rather, studies largely find that reunified children and youth fare worse than those who remain in care or exit to alternative forms of permanency on a variety of metrics, including incarceration, teen motherhood, educational

attainment, behavior problems, and exposure to violence.²⁰

None of this evidence is intended to renounce reunification as a goal; rather, it highlights the urgent need to understand *why* outcomes of reunification are suboptimal, and *what* can be done to improve children’s post-reunification experiences and outcomes. There are myriad possible considerations for these questions, but at least five implicate a role for court oversight²¹:

1. Low quality of services. The services families typically receive before, and after, reunification have little impact on child safety.²² They may be particularly inadequate given the depth and complexity of challenges facing parents who lose custody of their children.
2. Lack of post-reunification oversight and support. Even “evidence-based” services demonstrate very modest impacts on child maltreatment recurrence or other aspects of family functioning.²³ Thus, even with high-quality services, many parents will need long-term support after reunification (e.g., to maintain mental health

and avoid substance abuse) but may not continue services once court oversight ends.²⁴ Courts can continue oversight post-reunification to ensure continuity in supports and continued child safety.

3. Compliance with the case plan is a very low bar. Parents may participate in services, and thus meet criteria for reunification, without adopting the skills and the behaviors needed to provide a safe and healthy environment for a child. Although the desire to provide objective and clear criteria to parents about how to regain custody is understandable, it ultimately encourages both parents and caseworkers to engage in “box-checking” that is more so a test of parental endurance than parental capacity.
4. Lack of assessment and intervention around parent-child attachment. Insecure parent-child attachment both increases the risk of future abuse and neglect and adversely impacts children’s social and behavioral functioning.²⁵ To form secure attachments, children need caregivers to be safe, consistent, and responsive²⁶ — the very conditions that are absent for abused and neglected children. Removing children from such conditions is unlikely to sever a *secure* attachment to the (abusive or neglectful) biological parent, because such an attachment is unlikely to exist.²⁷ Interventions with the potential to strengthen parent-child attachment and prevent child maltreatment, such as parent-child interaction therapy,²⁸ may be appropriate pre- and post-reunification.
5. The law, social norms, and structural incentives favor

19. Nina Biehal, *Reuniting Children with Their Families: Reconsidering the Evidence on Timing, Contact and Outcomes*, 37 BRIT. J. SOC. WORK 807, 807–823 (2007); SARAH A. FONT & ELIZABETH GERSHOFF, *FOSTER CARE AND BEST INTERESTS OF THE CHILD: INTEGRATING RESEARCH, POLICY, AND PRACTICE* 89 (2020).

20. Sarah A. Font et al., *Foster Care, Permanency, and Risk of Prison Entry*, 58 J. RES. CRIME & DELINQ. 710, 710–754 (2021); Sarah A. Font et al., *Permanency and the Educational and Economic Attainment of Former Foster Children in Early Adulthood*, 83 AMER. SOC. REV. 716, 716–743 (2018); Jennifer L. Bellamy, *Behavioral Problems Following Reunification of Children in Long-Term Foster Care*, 30 CHILD. & YOUTH SERV. REV. 216, 216–228 (2008); Heather N. Taussig et al., *Children Who Return Home from Foster Care: A 6-Year Prospective Study of Behavioral Health Outcomes in Adolescence*, 108 PEDIATRICS E10, E10 (2001); Anna S. Lau et al., *Going Home: The Complex Effects of Reunification on Internalizing Problems Among Children in Foster Care*, 31 J. ABNORMAL CHILD PSYCHOL. 345, 345–358 (2003); Alan J. Litrownik et al., *Long-Term Follow-up of Young Children Placed in Foster Care: Subsequent Placements and Exposure to Family Violence*, 18 J. FAM. VIOLENCE 19, 19–28 (2003); Nina Biehal et al., *Reunifying Abused or Neglected Children: Decision-making and Outcomes*, 49 CHILD ABUSE & NEGLECT 107, 107–118 (2015); Richard P. Barth & Marianne Berry, *Outcomes of Child Welfare Services Under Permanency Planning*, 61 SOC. SERV. REV. 71, 71–90 (1987).

21. Sarah Font & Elizabeth T. Gershoff, *Foster Care: How We Can, and Should, Do More for Maltreated Children*, 33 SOC. POL’Y REP. 1, 1–40 (2020).

22. Fred Wulczyn, *Family Reunification in Law, Policy, and Practice*, 14 FUTURE CHILD. 95, 95–113 (2004); Becci A. Akin et al., *Effect of a*

Parenting Intervention on Foster Care Reentry After Reunification Among Substance-Affected Families: A Quasi-Experimental Study, 22 CHILD MALTREATMENT 194, 194–204 (2017); Catherine A. LaBrenz et al., *Service Utilization and Association with Recurrences of Child Maltreatment Post-Reunification*, 15 J. PUB. CHILD WELFARE 52, 52–77 (2021); Catherine A. LaBrenz et al., *Reunifying Successfully: A Systematic Review of Interventions to Reduce Child Welfare Recidivism*, 30 RES. SOC. WORK PRAC. 832, 832–845 (2020).

23. TITLE IV-E PREVENTION SERVICES CLEARINGHOUSE, <https://prevention-services.abtsites.com/program?page=1> (last visited Oct. 10, 2019).

24. Berenice Rushovich et al., *A Post-Reunification Service Model: Implementation and Population Served*, 122 CHILD. & YOUTH SERV. REV. 105928, 105928 (2021).

25. Jay Belsky, *Three Theoretical Models of Child Abuse: A Critical Review*, 2 CHILD ABUSE & NEGLECT 37, 37–49 (1978); Heather Bacon & Sue Richardson, *Attachment Theory and Child Abuse: An Overview of the Literature for Practitioners*, 10 CHILD ABUSE REV. 377, 377–397 (2001).

26. Mary S Ainsworth, *Infant–Mother Attachment*, 34 AMER. PSYCHOL. 932, 932 (1979).

27. Judith C Baer & Colleen Daly Martinez, *Child Maltreatment and Insecure Attachment: A Meta Analysis*, 24 J. REPROD. & INFANT PSYCHOL. 187, 187–197 (2006); Vicki Carlson et al., *Disorganized/Disoriented Attachment Relationships in Maltreated Infants*, 25 DEVELOPMENTAL PSYCHOL. 525, 525 (1989).

28. Jane Kohlhoff et al., *Parent–Child Interaction Therapy with Toddlers in a Community-Based Setting: Improvements in Parenting Behavior, Emotional Availability, Child Behavior, and Attachment*, 41 INFANT MENTAL HEALTH J. 543, 543–562 (2020); Brian Allen et al., *Parent–Child*

reunification, even when it presents serious risks. The burden of proof falls on agencies to demonstrate that reunification is not in a child's best interests. Building such a case requires extensive time, training, and effort (resources in limited supply for caseworkers). In addition, there is no real or perceived liability for failing to make the case. If the court returns a child home against agency recommendations—even if the agency made a poor case for continued placement—and the child experiences new harm, the agency correctly asserts that it was not their decision. If the reunification goes well, the agency can take credit for fulfilling federal and state policy priorities and achieving the outcome that is assumed to reflect children's best interests. Structural incentives are especially distorted for “hard to place” children, who have no identified adoptive or guardianship alternative.

Adoption. Long considered the best option for children born to parents unable or unwilling to safely care for them, a growing chorus of adoption critics—including some adoptees—have sought to change the narrative of adoption, arguing that adoption is unnatural²⁹ and intrinsically traumatic to children. These criticisms are especially pronounced in the case of “transracial” adoption.³⁰ What does the evidence say? Though limited, research generally suggests preferable outcomes for adopted children relative to remaining in care;³¹ this appears to be no less true for transracial adoptees,³² especially when parents are adequately prepared to support the child's cultural identity.³³ Although surprisingly little modern research compares adoptee outcomes to alternative types of foster care exits, research links adoption with higher levels of wellbeing compared with reunifi-

cation and, in some cases, guardianship or permanent placement with a relative.³⁴ Of course, not all adoptions are successful and studies have highlighted a relatively high frequency of adjustment concerns, particularly for children adopted at older ages.³⁵ Children fare better after adoption when the adoptive parents are fully committed to the child³⁶ and have the social and economic resources to address the long-run effects of children's earlier trauma.³⁷ The courts play a critical role in evaluating these factors during the adoption finalization process.

Again, for a variety of legal, social, and practical reasons, reunification is and remains the preferred option for permanency. This article is not asserting a need to change this preference. Rather, the evidence described can be interpreted thusly: where reunification does not appear to be viable within a reasonable period of time, there is little reason for agencies and courts to believe that they are harming children by changing their permanency goal to adoption.

Guardianship and other forms of legal permanency. In this section, we will use the term *guardianship* to encompass the range of legal custody options other than adoption (e.g., permanent conservatorship). Guardianships are pitched as providing the legal permanency children need without the aspects of adoption to which kin (and sometimes youth)³⁸ may object—namely, the requirement for termination of parental rights and the formal changing of roles (e.g., from grandmother to mother). In some states, non-relative foster parents can also opt for guardianship

“Again, for a variety of legal, social, and practical reasons, reunification is and remains the preferred option for permanency.”

Interaction Therapy as an Attachment-Based Intervention: Theoretical Rationale and Pilot Data with Adopted Children, 47 CHILD. & YOUTH SERV. REV. 334, 334–341 (2014); Stephanie Batzer et al., *Efficacy or Chaos? Parent–Child Interaction Therapy in Maltreating Populations: A Review of Research*, 19 TRAUMA, VIOLENCE, & ABUSE 3, 3–19 (2018).

29. NAOMI SCHAEFER RILEY, NO WAY TO TREAT A CHILD 63–64 (2021) (quoting Frank-Meyer).
30. For example, best-selling author Ibram X. Kendi said of transracial adoption, “Some White colonizers ‘adopted’ Black children. They ‘civilized’ these ‘savage’ children in the ‘superior’ ways of White people, while using them as props in their lifelong pictures of denial, while cutting the biological parents of these children out of the picture of humanity.” See Ibram X. Kendi (@Dribram), TWITTER (Sept. 26, 2020, 1:01 PM), <https://twitter.com/dribram/status/1309916696296198146>. Alan Dettlaff, Dean of the University of Houston School of Social Work and invited speaker at the U.S. Children's Bureau, similarly asserts, “The ‘intent’ [of the Adoption and Safe Families Act] has always been to make Black children available to White parents looking to rescue them.” See Alan Dettlaff (@AlanDettlaff), TWITTER (Aug. 17, 2021, 7:28 AM), <https://twitter.com/AlanDettlaff/status/1427608350372646923>.
31. Bo Vinnerljung & Anders Hjern, *Cognitive, Educational and Self-Support Outcomes of Long-Term Foster Care Versus Adoption: A Swedish National Cohort Study*, 33 CHILD. & YOUTH SERV. REV. 1902, 1902–1910 (2011); E. Christopher Lloyd & Richard P. Barth, *Developmental Outcomes After Five Years for Foster Children Returned Home, Remaining in Care, or Adopted*, 33 CHILD. & YOUTH SERV. REV. 1383,

1383–1391 (2011); Nicholas Zill, *Adoption from Foster Care: Aiding Children While Saving Public Money* (May 19, 2011), https://www.firststar.org/wp-content/uploads/2015/02/05_adoption_foster_care_zill.pdf.

32. Femmie Juffer & Marinus H. Van Ijzendoorn, *Adoptees Do Not Lack Self-Esteem: A Meta-Analysis of Studies on Self-Esteem of Transracial, International, and Domestic Adoptees*, 133 PSYCHOL. BULL. 1067, 1067 (2007).
33. EVAN B. DONALDSON ADOPTION INSTITUTE, FINDING FAMILIES FOR AFRICAN AMERICAN CHILDREN: THE ROLE OF RACE & LAW IN ADOPTION FROM FOSTER CARE (Evan B. Donaldson Adoption Institute 2008), <https://www.nationalcenteronadoptionandpermanency.net/post/finding-families-for-african-american-children-the-role-of-race-law-in-adoption-from-foster-care>.
34. Font et al., *Foster Care*, and Font et al., *Permanency*, *supra* note 20.
35. Rebecca Orsi, *Predicting Re-involvement for Children Adopted Out of a Public Child Welfare System*, 39 CHILD ABUSE & NEGLECT 175, 175–184 (2015); Kevin R. White et al., *Understanding Wellbeing and Care-giver Commitment After Adoption or Guardianship from Foster Care*, 15 J. PUB. CHILD WELFARE 105, 105–130 (2021).
36. See White et al., *supra* note 35.
37. Erum Nadeem et al., *Long-Term Effects of Pre-Placement Risk Factors on Children's Psychological Symptoms and Parenting Stress Among Families Adopting Children from Foster Care*, 25 J. EMOTIONAL & BEHAV. DISORDERS 67, 67–81 (2017).
38. Anonymous Akeema, *Saying No to Adoption*, INTENTIONS AND RESULTS: A LOOK BACK AT THE ADOPTION AND SAFE FAMILIES ACT (2004).

“The motivations for pursuing guardianship rather than adoption are an important line of inquiry that should be assessed and reported...”

over adoption, most often with older children. In most states, guardianships are eligible for federal subsidies similar to those provided for foster care or adoption.³⁹

The various legal distinctions between guardianship and adoption suggest guardianships may be less preferable for children. Because guardianship does not require TPR, guardianship

welfare agencies to collect and present evidence and the courts to make a finding as to whether the parents are unfit or whether permanent separation is in the child’s best interests. In some states, the initial order of guardianship eliminates the presumption that parental custody is the child’s best interests and return of custody to the parents requires a finding that guardianship dissolution is in the best interests of the child. Yet, other states retain the presumption that parental custody is in the child’s best interests—even after a child was involuntarily removed from that parent’s care—and thus require only a finding that the parent is (currently) fit.⁴⁰ A few states even place the burden on the guardian to prove parental unfitness, rather than on the parent (petitioner) to prove fitness⁴¹; guardians—often relatives of the parent—may be reluctant to contest the petition at all.

Of some concern, there is little research on the outcomes of guardianship following foster care, beyond reported rates of dissolution. Guardianships are two to three times more likely to end with reentry to foster care than adoptions.⁴² However, it is not clear from research why or under what circumstances guardianships may have less favorable outcomes than adoptions. Notably, adoptions by relatives and nonrelatives are at equal risk of dissolution,⁴³ indicating that guardianships are not more likely to dissolve simply because they are more likely to involve relative caregivers. It is possible that differences emerge because supports—both financial subsidies and post-permanency services—are more available and widely accessed by adoptive parents than by guardians, or because the standards for approving an adoption

are more stringent or comprehensive than for guardianship. Alternatively, when caregivers prefer guardianship to adoption, it may signal a lower level of commitment to the child. The motivations for pursuing guardianship rather than adoption are an important line of inquiry that should be assessed and reported on by attorney guardians ad litem, court-appointed special advocates, and child welfare agency caseworkers.

DO CHILDREN HAVE REAL OPTIONS FOR PERMANENCY?

A small proportion of children emancipate (“age out”) from foster care, but the probability of aging out increases exponentially for children removed later in childhood.⁴⁴ Decades of data document the difficulties experienced by emancipated youth.⁴⁵ The emancipated population of youth includes both those who desired an adoptive or other permanency arrangement but did not receive that opportunity, and youth who chose aging out (which confers a range of federal and state benefits). The latter group—those who choose emancipation over possible alternatives—include youth who perceive adoption as inauthentic or disloyal to their families of origin⁴⁶ as well as those whose prior trauma or rejection leave them unwilling to risk opening up to a new family.

Approximately 50,000 children exit foster care to adoption each year (a dramatic increase since the passage of ASFA), but over 100,000 are “waiting”—meaning they have a goal of or are eligible for adoption.⁴⁷ (In some cases, these “waiting” cases reflect children residing in a pre-adoptive home and it’s a matter of getting the court to finalize the adoption. In other cases, these are children who are not able to reunify, but no permanent family has been identified; existing federal data cannot discern the size of each group.)

Both the “aging out” and “waiting for adoption” populations underlie a common narrative that, regardless of the harms inflicted or risks posed by the families from which children were removed, the foster care system has nothing better to offer them. Put simply, there is a perception that *no one else wants these children*.

For decades, agencies have cited the undersupply of foster and adoptive families (especially for older children and children with significant behavioral challenges)⁴⁸ to explain why children

39. CHILD WELFARE INFORMATION GATEWAY, KINSHIP GUARDIANSHIP AS A PERMANENCY OPTION (2019).

40. Wisconsin Legislative Council Study Committee Memorandum, Information in Response to Members’ Requests at Meeting on July 24, 2018 (2018), https://docs.legis.wisconsin.gov/misc/lc/study/2018/1784/020_august_28_2018_meeting_10_00_a_m_room_411_south_state_capitol/001a_aug21memo_minr.

41. A.B.A., Guardians Must Prove Parental Unfitness in Guardianship Termination Proceedings (Feb. 1, 2012), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol_31/Feb12/guardians_requiredtoproveparentalunfitnessinguardianshipterminat/.

42. Kierra M. P. Sattler & Sarah A. Font, *Predictors of Adoption and Guardianship Dissolution: The Role of Race, Age, and Gender Among Children in Foster Care*, 26 CHILD MALTREATMENT 216, 216-217 (2020); Nancy Rolock, *Post-Permanency Continuity: What Happens After Adoption and Guardianship from Foster Care?*, 9 J. PUB. CHILD

WELFARE 153, 153-173 (2015).

43. See Sattler & Font, *supra* note 42.

44. Annie E. Casey Foundation, *Fostering Youth Transitions: Using Data to Drive Policy and Practice Decisions* (Nov. 13, 2018), <https://assets.aecf.org/m/resourcedoc/aecf-fosteringyouthtransitions-2018.pdf>.

45. Amy Dworsky et al., *Midwest Evaluation of Adult Functioning of Former Foster Youth*, Research Collection, Chapin Hall University of Chicago (2011), <https://www.chapinhall.org/research/midwest-evaluation-of-the-adult-functioning-of-former-foster-youth/>.

46. See Akeema, *supra* note 38.

47. U.S. DEP’T OF HEALTH AND HUM. SERV., THE AFCARS REPORT: PRELIMINARY FY 2019 ESTIMATES AS OF JUNE 23, 2020 (2020).

48. See GAO-02-585, *supra* note 4; U.S. GOV’T ACCOUNTABILITY OFF., GAO/HEHS-98-182, *FOSTER CARE: AGENCIES FACE CHALLENGES SECURING STABLE HOMES FOR CHILDREN OF SUBSTANCE ABUSERS* (1998); U.S. GOV’T ACCOUNTABILITY OFF., GAO-16-85, *FOSTER CARE: HHS*

are delayed or denied permanency. The consequent perception—that there are simply few if any families interested in adopting children with challenging life histories—may seem intuitive but is supported by little evidence. There are far more families interested in adoption—including older child and special needs adoption—than are ever “matched” for adoption.⁴⁹ Moreover, up to a third of approved foster families (some of whom are likely interested in adoption) have no children placed with them at any given time,⁵⁰ suggesting agencies are failing to draw upon their existing resources. Agencies continue to rely on “advertising” to solicit inquiries about a child in need of a permanent home, by posting blurbs about the child on an adoption exchange, public television, or social media. Advertising necessitates family-driven searches, where prospective adoptive families are advised to search for and inquire about children (rather than encouraging direct outreach to approved families by caseworkers), which are inefficient.⁵¹ The number of children available for adoption is large and the information about them is very shallow: families are not well-positioned to evaluate whether they are a good option for a particular child. Further, and perhaps due to a high volume of inquiries where a match is very unlikely, there is little or often no response from caseworkers to family inquiries.⁵² In sum, efforts to identify permanent homes for children are unlikely to be successful if relying heavily on advertising-based strategies; such strategies cannot constitute reasonable efforts or a diligent search.⁵³

Some have argued that—due to contracting agencies’ reliance on government contracts for their existence and the incentive structure of those contracts (which tends to be based on the number of children being served)—there are strong disincentives to find permanent families for children or to finalize permanent arrangements once identified.⁵⁴ Even less-cynical observers would acknowledge that agencies’ high turnover and limited resources leave them focused on dealing with emergencies, rather than planning for the future.

In sum, too many child welfare agencies and courts fail to see

permanency as *urgent, necessary, and achievable* for all children. Some may believe that older children and traumatized children are incapable of developing secure attachments or that no suitable caregiver is willing to make the effort. Yet, children with maltreatment histories, even older children, can and do form secure attachments when provided safe and stable environments.⁵⁵

“Judges hold incredible power over the lives of children who experience abuse and neglect...”

WHAT FAMILY AND JUVENILE COURT JUDGES NEED TO KNOW

Judges hold incredible power over the lives of children who experience abuse and neglect—perhaps more so than any other individual in their lives. Their discretion in the area of permanency—about whether to extend reunification timelines, how evidence is weighed or disregarded when evaluating TPR cases, how stringently caseworkers are held to their responsibilities to provide services to parents and pursue concurrent planning for children—is vast. The key takeaways for use of that discretion are:

Children need permanency to be timely, but permanency must also provide safe, stable, and supportive care.

It is reasonable to conclude that long-term foster care harms children by leaving them uncertain of where they belong and what comes next for them. Timely permanency can improve opportunities (and, one could even argue, is necessary) for children to reach their full potential. Yet, it is clearly possible for children to exit foster care quickly to an unsafe or ill-suited environment: by focusing on timely permanency as the primary outcome, timely permanency ceases to be a reliable metric for children’s needs being met.⁵⁶ By way of analogy, children typically need to attend school to learn, but it would be misguided to evaluate

COULD DO MORE TO SUPPORT STATES’ EFFORTS TO KEEP CHILDREN IN FAMILY-BASED CARE (2015); U.S. GOV’T ACCOUNTABILITY OFF., GAO-18-376, FOSTER CARE: ADDITIONAL ACTIONS COULD HELP HHS BETTER SUPPORT STATES’ USE OF PRIVATE PROVIDERS TO RECRUIT AND RETAIN FOSTER FAMILIES (2018).

49. See Elaine C. Karmack et al., *Eliminating Barriers to the Adoption of Children from Foster Care*, Faculty Research Working Paper Series, Harvard University, John F. Kennedy School of Government (2012), https://dash.harvard.edu/bitstream/handle/1/9804493/RWP12-040_Kamarck_Wilson.pdf?sequence=1&isAllowed=y.

50. Fred Wulczyn et al., *The Dynamics of Foster Home Recruitment and Retention*, Center for State Child Welfare Data, Chapin Hall, University of Chicago (2018), https://www.chapinhall.org/wp-content/uploads/Foster-Home-Report-Final_FCDA_October2018.pdf.

51. Nils Olberg et al., *Search and Matching for Adoption from Foster Care*, Cornell University (Mar. 18, 2021), <http://arxiv.org/abs/2103.10145>.

52. See Karmack et al., *supra* note 49.

53. Previously, the federal government had issued definitions of diligent search requirements that seemed to suggest adoption exchanges were a mandated strategy, rather than one of many options agencies

could pursue to match children with families—policy guidance has since been clarified, such that states clearly have the flexibility to use more effective strategies. See *Adoption-Share, Onward Annual Report 2020*, 5-6, <https://adoption-share.com/wp-content/uploads/2021/01/Final-Annual-Report-2020-Electronic.pdf>.

54. Isabella M. Pesavento, *How Misaligned Incentives Hinder Foster Care Adoption*, 41 *CATO J.* 139, 139-158 (2021), <https://www.cato.org/cato-journal/winter-2021/how-misaligned-incentives-hinder-foster-care-adoption>.

55. Michelle A. Joseph et al., *The Formation of Secure New Attachments by Children Who Were Maltreated: An Observational Study of Adolescents in Foster Care*, 26 *DEV. & PSYCHOPATHOLOGY* 67, 67-80 (2014); Mary Dozier et al., *Attachment for Infants in Foster Care: The Role of Caregiver State of Mind*, 72 *CHILD DEV.* 1467, 1467-1477 (2001); Shannon Altenhofen et al., *Attachment Security in Three-Year-Olds who Entered Substitute Care in Infancy*, 34 *INFANT MENTAL HEALTH J.* 435, 435-445 (2013); Katrin Lang et al., *Foster Children’s Attachment Security in the First Year After Placement: A Longitudinal Study of Pre-dictors*, 36 *EARLY CHILDHOOD RES. Q.* 269, 269-280 (2016).

56. Donald T. Campbell, *Assessing the Impact of Planned Social Change*, 2 *EVALUATION & PROGRAM PLAN.* 67, 67-90 (1979).

schools based solely on attendance or to assume that all children who attend are therefore learning. And, if schools were asked to improve attendance, without concordant expectations for learning, it takes little imagination to see how a school could improve attendance in ways that disregard, or even diminish learning.

Agencies can do more to find permanent relative or adoptive placements. Agencies default to the language of scarcity—“not enough families”—to justify children continuing to wait for adoption. However, it is often agencies’ behaviors rather than the children’s needs that deter prospective families. Agencies are often unresponsive to inquiries, and rely on passive strategies (e.g., posting information about a child and seeing who inquires) rather than active strategies (e.g., outreach to families who are waiting to adopt). The courts, through extracting testimony from caseworkers, guardians ad litem, and advocates, can identify and require better strategies to identify a permanent family for every child who does not have one.

A substantial proportion of children exiting to reunification will need ongoing support and oversight. Given the high rates of reentry and revictimization following reunification, closing the case at or shortly after reunification places children at risk. Trial reunifications and post-reunification court oversight are tools that states have used to reduce those risks.



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