

CHILDREN AND THE CHILD WELFARE SYSTEM

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I. INTRODUCTION

The hearing before the family court judge was the kind of routine hearing that occurs in family, juvenile, or dependency courts numerous times every day across the county. The "six-month review" examined the case of a young mother and father who had allegedly battered and injured their three-month-old baby. Neither parent had admitted the attack, yet neither could offer an explanation for the injury. The child had been removed from the parents and placed with a foster family. Eighteen months had passed, and this was the third "six-month review." Attending the hearing were the parents, an attorney representing each parent, a representative from the county child welfare agency, an attorney from the county child welfare agency, an attorney representing the child, and various witnesses, including the child welfare worker assigned to the case and the worker's supervisor.

The issue at the hearing was whether the child should be returned to his parents. While neither parent offered the most modest or credible explanation for the injury, both had complied with the department's case plan. They had attended parenting classes and had consistently attended therapy sessions. On the basis of the parents' compliance, the county child welfare agency was recommending the child be returned home. The child's attorney argued that the parents had merely complied with the case plan. There was no evidence, the child's attorney argued, that the parents had changed or that the risk of future injury had been, in any way, diminished.

In theory, this kind of typical case review hearing took place on a level playing field. Each party had legal representation and the judge could weigh the evidence and rights of

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the parties as she balanced the parents' rights of liberty and undue governmental interference against the child's right to protection.

This paper argues that the ideal of a level playing field that provides both parties with legal advocacy and allows for an unbiased assessment of the weight of evidence is an illusion. The child welfare "playing field" is in reality decidedly unbalanced, almost always tilted in favor of the parents' rights at the expense of a child's protection. The prevailing ideology of the family court, child welfare system, and society has created and nurtured a series of illusions and myths that favor parents' rights. The actual procedures in most family or juvenile courts also weigh more in favor of the parents' rights than of a child's right to protection.

Recent legislative responses have not corrected this imbalance. The Adoption and Safe Families Act of 1997 ("ASFA"),¹ for example, was designed to be a step towards creating a more level playing field. This legislation, however, does not go far enough to create true balance and, even in its present form, the legislation has been attacked as an unfair and discriminatory intrusion into the rights of parents, especially minority parents.²

II. BRIEF OVERVIEW OF AMERICAN CHILD WELFARE LAW

A. *Historical Background and Basic Procedures*

American law and tradition grant to parents broad discretion in how they may rear their children.³ In *Smith v. Organization of Foster Families for Equality & Reform*,⁴ the Supreme Court held that the Fourteenth Amendment gave biological parents a "constitutionally recognized liberty interest" in maintaining the custody of their children "that derives from blood relationship, state law sanction, and basic human right."⁵ This interest is not absolute, however, because *par-*

¹ Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified in scattered sections of 42 U.S.C.).

² See Martin Guggenheim, Commentary, *The Foster Care Dilemma and What to Do About It: Is the Problem that Too Many Children are Not Being Adopted Out of Foster Care or that Too Many Children are Entering Foster Care?*, 2 U. PA. J. CONST. L. 106, 108-10 (1999); Dorothy Roberts, *Is There Justice in Children's Rights?*, 2 U. PA. J. CONST. L. 84, 85-86, 94 (1999).

³ See generally JAMES KENT, COMMENTARIES ON AMERICAN LAW (O.W. Holmes, Jr. ed., 1873).

⁴ 431 U.S. 816 (1977).

⁵ *Id.* at 846.

ens patriae duties give the state power and authority to protect citizens who cannot fend for themselves.⁶

The state may attempt to limit or end parent-child contact and make children eligible for temporary or permanent placement or adoption when the parents: (1) abuse, neglect, or abandon their children, (2) become incapacitated in their ability to be a parent, (3) refuse or are unable to remedy serious, identified problems in caring for their children, or (4) experience an extraordinarily severe breakdown in their relationship with their children (for example, breakdowns caused by a long prison sentence).⁷ Cognizant that severing the parent-child relationship is an extremely drastic measure, the Court held in *Santosky v. Kramer*⁸ that parental rights may only be terminated if the state can demonstrate by clear and convincing evidence that a parent has failed in one of these four ways.⁹ Most state statutes also contain provisions for parents to voluntarily relinquish their rights.¹⁰ The state also has the authority to return a child to his or her parents.¹¹ Ideally, a reunification occurs once a determination is made that it would be safe to return the child home and the child's parents would be able to provide appropriate care.

The family or juvenile court is involved in each step in this process. Child welfare agencies are responsible for investigating and managing cases of child maltreatment. However, the court is responsible for making the final decisions about *whether* children are removed from or returned to their parents, *where* children are to be placed,¹² or *whether* to terminate parental rights and adoptions.

The ideal role of the juvenile, family, or dependency court in child welfare matters is to balance parents' constitutional rights to be free from undue and unwarranted interference in raising their children with the dependent child's right to protection from harm. Child protection is bolstered by the state's ability to seek *ex parte* orders or stipulations that allow a child to be removed from what is deemed an unsafe

⁶ See *Santosky v. Kramer*, 455 U.S. 745, 766 (1982) (explaining that "a *parens patriae* interest in preserving and promoting the welfare of the child" is at stake in parental rights termination proceedings).

⁷ See *id.* at 766.

⁸ *Id.* at 745.

⁹ *Id.* at 768-70.

¹⁰ See, e.g., H. A. Davidson, *The Courts and Child Maltreatment*, in *THE BATTERED CHILD* 482-99 (M.E. Helfer et al. eds., 1997).

¹¹ *Id.*

¹² Placement with relatives, foster care and residential treatment are often among the options available.

caretaking environment. State laws also allow hospitals to place "holds" of various lengths on children in order to protect the children and allow for an investigation into the children's care situations.¹³

Ex parte orders and "holds" are short-term efforts designed to protect children. Generally, if upon conducting a medical evaluation or child protective evaluation the state concludes that a child is at risk and should be removed from the care giving environment, the matter is placed before a juvenile or family court judge or master for a hearing. The hearing proceeds in a typical adversary style.

Before examining a child's rights and representation in a child welfare legal action, it is important to look at the institutional and cultural context of the child welfare system. For at least the last 100 years, private and public social welfare institutions and agencies—not the criminal justice system—have responded to the abuse and neglect of children. The case of Mary Ellen Wilson, a neglected child discovered in New York City in 1874, is perhaps the most well-known example.¹⁴ Mary Ellen had been beaten with a leather thong and allowed to go ill-clothed in cold weather.¹⁵ Mary Ellen's case was initially investigated by Etta Wheeler, a "friendly visitor" who worked for St. Luke's Methodist Mission. The New York police declined to become involved, as there was no evidence that a crime had been committed.¹⁶

In the years after the Mary Ellen case, child abuse and neglect have emerged as social problems in need of a social welfare response.¹⁷ Unless a homicide took place, and even when a child was killed, the institution responsible for investigating cases, responding, and protecting was a social welfare institution.¹⁸ Despite the fact that some acts of child abuse are clearly acts of felony assault and violate criminal codes, the criminal justice system, from the police, to prose-

¹³ See Davidson, *supra* note 10.

¹⁴ See, e.g., B. NELSON, MAKING AN ISSUE OF CHILD ABUSE: POLITICAL AGENDA SETTING FOR SOCIAL PROBLEMS (1984).

¹⁵ See generally RICHARD GELLES, INTIMATE VIOLENCE IN FAMILIES 28-29 (3d ed. 1997); RICHARD GELLES, THE BOOK OF DAVID: HOW PRESERVING FAMILIES CAN COST CHILDREN'S LIVES 10-13 (1996) [hereinafter GELLES (1996)].

¹⁶ Legend has it that Mary Ellen's case was argued in court by the Society for the Prevention of Cruelty to Animals because Mary Ellen was a member of the "animal kingdom." In fact, the case was accepted by the court because the child needed protection. The ASPCA did not represent Mary Ellen, but private societies for the prevention of cruelty to children were established after the case received broad coverage in the New York City newspapers. See NELSON, *supra* note 14, at 7-8.

¹⁷ See generally D. LINDSEY, THE WELFARE OF CHILDREN (1994).

¹⁸ *Id.*

cutors, to criminal courts, are rarely directly involved in such cases (with cases of child homicide and child sexual abuse as exceptions to this pattern).¹⁹

Because social welfare institutions have authority over child welfare cases, the legal cases *do not* result in a true *adversary* proceeding pitting the state against the offenders, as would result, for example, in a case of domestic violence. Rather, the legal proceedings involve a state's, county's, or municipality's *department of child welfare* versus the parents or caretakers of the alleged victim.²⁰

The cultural context that led to the creation of this system and its continued support revolves around the constitutional imperative that parents should be free from undue interference in raising their children.²¹ In addition, deep cultural convictions, values, and ideologies support child maltreatment as a child welfare, and not a criminal justice, issue.²²

B. *The Illusion of the "Level Playing Field"*

While the judicial system has been structured as a level playing field, the cultural and ideological structure and context of the child welfare system results in an uneven playing field. There are seven key beliefs, values, and assumptions that constitute the culture of the child welfare system. While each belief has some basis in experience, on the whole, these beliefs and assumptions lack empirical support. The following are the seven key beliefs of the child welfare system, which, we believe are actually illusions:

1. *Parents want to and can change their abusive and neglectful behavior.* — At the core of child welfare work is the belief that most, if not all, parents want to be good and caring parents and caretakers.²³ Whether maltreating behavior is thought to arise from psychological causes, alcohol or substance abuse, or social or structural stresses, the child welfare system is structured under the assumption that parents want to change their behaviors. As a result, the assumption that parents both want to receive and can make use of the offered resources (such as therapy, parenting classes, home-maker services, and advocacy) underlies the "hard" and "soft"

¹⁹ *Id.*

²⁰ See Davidson, *supra* note 10.

²¹ *Id.* at 487; see also Smith v. Organization of Foster Families for Equal. & Reform, 431 U.S. 816, 816 (1977).

²² See LINDSEY, *supra* note 17.

²³ See *id.*

services²⁴ offered by the child welfare system.

2. *Changes can be achieved if there are sufficient resources.* — The second belief follows directly from the first. If parents and caretakers want to change, then the only constraint or roadblock to change is the lack of resources. If change does not occur, it is attributed to a lack of soft or hard resources, not to the parents' lack of willingness or ability to change. Federal, state, and local policy for child welfare has been to seek increases in staff and funding so as to increase the services that can be provided to maltreating caretakers.

3. *A safe and lasting family reunification can be achieved if there are sufficient resources.* — Although judicial precedent and procedure attempt to balance parents' rights and child safety, in reality the child welfare system places its greatest emphasis on keeping families together.²⁵ As the Adoption Assistance and Child Welfare Act of 1980²⁶ ("Adoption Act") states, in order to be eligible for federal Title IV-E funding,²⁷ state departments of child welfare must make "reasonable efforts" to keep children in their homes or return them safely to their biological caretakers.²⁸ As a result, for the past 17 years, case plans for children in the child welfare system almost always began with the singular goal of reunification. Given the first two beliefs, the child welfare system assumes that if the system has sufficient personnel and service resources, children could be safely kept at home or returned home to their parents.

4. *Children do better when raised by their biological parents.* — The core ideological value of the child welfare system and society at large is that children do best when raised by their biological parents.²⁹ Clearly, for the majority of children, this belief is accurate and the value appropriate. However, when applied to children who have already been maltreated, the belief is more difficult to support with empirical evidence.³⁰ Nevertheless, the child welfare system operates as if this statement applied equally to all children. One application of this belief is the common child welfare ideology that

²⁴ "Hard services" are defined as financial assistance, housing assistance, day care and housekeeping. "Soft services" are defined as counseling, parenting classes, advocacy and case management.

²⁵ See Davidson, *supra* note 10, at 487-88.

²⁶ 42 U.S.C. §§ 620-628, 670-679(a) (1988 & Supp. I).

²⁷ See 42 U.S.C. §§ 672-674, 675(4)(a) (1999).

²⁸ See 42 U.S.C. § 671(a)(15) (1988 & Supp. I).

²⁹ See Davidson, *supra* note 10, at 487.

³⁰ See GELLES (1996), *supra* note 15.

even the best foster or adoptive family is not better for a child than a marginal biological family.³¹ Thus, for more than 100 years the main focus of child welfare has been to rehabilitate or assist biological parents so they can raise their children. At the turn of the last century family preservation was the province of the settlement house movement.³² Today, the most recent attempts to keep maltreated children with their biological caregivers are evidence of support for intensive family preservation and family support programs.³³

5. *Following from the above four core beliefs, adoptions are fragile, often fail and should be a last resort.* — As Elizabeth Bartholet points out, adoption as a permanent child placement option is often dismissed or even demonized by the child welfare system and by society at large.³⁴ Thus, traditionally adoption has not been taken seriously as an option for children whose parents are not capable of parenting. As evidence of the reluctance to use adoption as an option, during the 1990s, when child abuse reports increased and out-of-home placements increased to nearly 600,000 children on any given day,³⁵ adoptions actually decreased.³⁶ Child welfare workers often point to anecdotal case evidence that adoptions are difficult and often fail.³⁷

6. *Children and children's best interests are adequately represented in child welfare judicial proceedings.* — Certainly, as the opening paragraph of this paper suggests,³⁸ children are represented in these proceedings. However, as will be discussed below,³⁹ the representation is variable. Moreover, given the first five beliefs, it is easy to see how a child's "best interests" are most often viewed through the prism of the importance and value of keeping or reunifying the child with his or her biological caretakers.

7. *There are insufficient temporary and permanent placements for at-risk maltreated children.* — Even without the first six beliefs, the child welfare system is skewed toward family reunification because of the seventh illusion. Given

³¹ See *id.*

³² See, e.g., L.B. COSTIN ET AL., *THE POLITICS OF CHILD ABUSE IN AMERICA* (1996).

³³ See GELLES (1996), *supra* note 15.

³⁴ See E. BARTHOLET, *FAMILY BONDS* (1993).

³⁵ See T. TATARA, *CHARACTERISTICS OF CHILDREN IN SUBSTITUTE AND ADOPTIVE CARE* (1993).

³⁶ See C.S. BEVAN, *FOSTER CARE: TOO MUCH, TOO LITTLE, TOO EARLY, TOO LATE. FINAL REPORT: CHILD PROTECTION: OLD PROBLEMS, NEW PARADIGM* (1996).

³⁷ See *id.*

³⁸ See *supra* p. 1.

³⁹ See *infra* pp. 111-12.

that there are more than 1,500,000 substantiated reports of child abuse and neglect each year,⁴⁰ and that nearly 600,000 children are in out-of-home care on a given day,⁴¹ child welfare workers and administrators find fewer families willing to serve as foster families and adoptive families than are needed. To a certain extent, this is not an illusion. There are too few families available to either care for or adopt maltreated children. However, the structure and function of the child welfare system—driven by the above illusory beliefs—is responsible for the insufficient number of foster or adoptive families available to care for children.

C. *The Reality: The Actual Playing Field*

There is, at the very least, a theoretical tension between parents' rights and child protection. Because the underlying ideology of the child welfare system is that the best placement for children is with their parents, permanency, while theoretically allowing for a number of alternative placements (such as legal guardianship, adoption, congregate care), is typically conceptualized as keeping a child with his or her biological parents or achieving a reunification with them.⁴² Similarly, although child welfare institutions promote the ideology of making decisions that are in "the best interests of the child," almost always the best interests are assumed to be achieved if the child is raised by his or her biological caregivers.⁴³

An example of this ideological commitment can be seen in the institutional interpretation of the "reasonable efforts" clause of the Adoption Act.⁴⁴ The Act requires that states make "reasonable efforts" prior to the placement of a child in foster care or to make it possible for a child to return to his home.⁴⁵ The statute defined neither "reasonable" nor "efforts." Nevertheless, child welfare workers, supervisors, administrators, attorneys, and judges often interpret this law to mean that the State has an obligation to make every possible effort

⁴⁰ See U.S. DEP'T OF HEALTH & HUMAN SERVS., NAT'L CTR. ON CHILD ABUSE & NEGLECT, CHILD MALTREATMENT 1996: REPORTS FROM THE STATES TO THE NAT'L CTR. ON CHILD ABUSE AND NEGLECT (1998).

⁴¹ See TATARA, *supra* note 35.

⁴² See Davidson, *supra* note 10, at 487.

⁴³ See BEVAN, *supra* note 36.

⁴⁴ See Pub. L. No. 96-272, 94 Stat. 500, 503 (1980) ("[I]n each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of a child from his home, and (B) to make it possible for the child to return to his home . . .").

⁴⁵ *Id.*

to keep a child in the home or to return a child.⁴⁶ Some state child welfare statutes do in fact require every possible effort.⁴⁷ As noted above, the Supreme Court ruled in *Santosky v. Kramer* that states could terminate parents' rights only if there is clear and convincing evidence that parents have (1) abused, neglected, and/or abandoned their children; (2) are incapacitated themselves; (3) refused or are unable to remedy problems in caring for their children; or (4) experienced a severe breakdown in their relationship with their children.⁴⁸ Parents who make a "reasonable effort" to care for their children would not have their parental rights terminated.

The mandate for child welfare agencies and family, juvenile, or dependency courts is to find a balance between parents' constitutional rights and children's rights. There appears to be a level playing field in achieving this balance; however, appearances are not only deceiving, they are false.

What evidence is there that the above seven beliefs are, in fact, illusions? The following empirical evidence undermines the above ideological beliefs:

1. *The notion that all parents want to and can change is countered by a substantial body of research that demonstrates that people in general, including abusive and neglectful parents, are difficult to change.* — A major failing of child abuse and neglect assessments is the crude way behavior change is conceptualized and measured. Behavior change is thought to be a *one-step* process; one simply changes from one form of behavior to another. For example, if one is an alcohol or substance abuser, then change involves stopping the use of alcohol or drugs. If one stops, but then begins again, then the change has not successfully occurred.

Change, however, is not a one-step process. All individuals are not equally ready to change. Psychologists James Prochaska and Carlo DiClemente have developed "The Transtheoretical Model of Behavior Change,"⁴⁹ which integrates a number

⁴⁶ See GELLES (1996), *supra* note 15.

⁴⁷ See, e.g., N.Y. FAM. CT. ACT § 614(c) (Consol. 1998) (requiring that the authorized agency petitioning for custody "has made diligent efforts to encourage and strengthen the parental relationship and specifying the efforts made or that such efforts would be detrimental to the best interests of the child and specifying the reasons therefor"); see also *In re Klug*, 302 N.Y.S.2d 418, 419 (N.Y. App. Div. 1969) (finding that "petitioner had not demonstrated 'by a fair preponderance of the evidence' that it had 'made diligent efforts to encourage and strengthen the parental relationship' as required by" the Act).

⁴⁸ See *Santosky*, 455 U.S. at 768-70.

⁴⁹ See J.O. PROCHASKA ET AL., CHANGING FOR GOOD (1994); J.O. PROCHASKA & C.C. DICLEMENTE, THE TRANSTHEORETICAL APPROACH: CROSSING TRADITIONAL BOUNDARIES OF CHANGE (1984) [hereinafter PROCHASKA & DICLEMENTE (1984)]; J.O. Prochaska & C.C.

of theoretical constructs central to change, such as Janis and Mann's theory of decisional balance⁵⁰ and Bandura's theory of self-efficacy.⁵¹ The Transtheoretical Model assumes that changing behavior is a dynamic process and that one progresses through a number of stages in trying to modify behavior.⁵² It also assumes that there are cognitive aspects to behavior change that can be measured.⁵³ Further, the Transtheoretical Model is a general model of change and is not linked to any particular type of intervention; the Model is capable of measuring change in individuals over time, over many different kinds of interventions.⁵⁴ The Transtheoretical Model was developed from a study of 18 kinds of psychotherapy from diverse theoretical backgrounds.⁵⁵ Prochaska and DiClemente surmised that what the different therapies had in common was a number of "processes of change," such as consciousness raising, stimulus control, and corrective emotional experience, which transcended the particular theoretical perspective.⁵⁶ They also articulated different stages of the change process and developed an instrument to measure them.⁵⁷ While much of the development of the model took place in research on smoking cessation, the compelling nature of the model and its adaptability with other behavior change environments have led to research in areas as diverse as diet, cocaine, weight control, protected intercourse, sun and radon exposure, alcohol abuse, mammography, adolescent smoking behavior, and delinquent youth.⁵⁸ Briefly, empirical studies of the Transtheoretical Model have found that individuals move through distinct stages of change and that the majority of individuals are at what the researchers call the "precontemplative" or "contemplative" stages of change.⁵⁹ In lay terms, "precontemplators" or "contemplators" tend to deny there is a problem, resist change, see more

DiClemente, *Stages and Processes of Self-change in Smoking: Toward an Integrative Model of Change*, 5 J. OF CONSULTING AND CLINICAL PSYCHOL. 390-95 (1983); J.O. Prochaska & C.C. DiClemente, *Toward a More Integrative Model of Change*, 19 PSYCHOTHERAPY: THEORY, RES. AND PRAC. 276-88 (1982).

⁵⁰ I.L. JANIS & L. MANN, *DECISION MAKING: A PSYCHOLOGICAL ANALYSIS OF CONFLICT, CHOICE, AND COMMITMENT* (1977).

⁵¹ A. Bandura, *Self-efficacy: Toward a Unifying Theory of Behavior Change*, 84 PSYCHOL. REV. 191-215 (1977).

⁵² See PROCHASKA & DICLEMENTE (1984), *supra* note 49.

⁵³ See *id.*

⁵⁴ See *id.*

⁵⁵ See *id.*

⁵⁶ See Prochaska & DiClemente, *Toward a More Integrative Model of Change*, *supra* note 49.

⁵⁷ See PROCHASKA & DICLEMENTE (1984), *supra* note 49.

⁵⁸ See PROCHASKA ET AL., *supra* note 49.

⁵⁹ See PROCHASKA & DICLEMENTE (1984), *supra* note 49.

negative aspects to change than positive ones, and are not amenable to "action" interventions.⁶⁰

2. *Although there is a general belief that change can be achieved if there are sufficient soft and hard resources,⁶¹ as yet, there is no empirical evidence to support the effectiveness of child welfare services in general, or in the newer, more innovative, intensive family preservation services.* — In 1994, the National Academy of Sciences established the Committee on the Assessment of Family Violence Interventions. One of the five tasks charged to the Committee was to "[c]haracterize what is known about both prevention efforts and specific interventions dealing with family violence, including an assessment of what has been learned about the strengths and limitations of each approach."⁶² From 1980 to 1996, the Committee's staff was able to identify a total of 114 evaluation studies that met the Committee's four criteria for an adequate evaluation study.⁶³ Of the 114 studies, 78 evaluated some aspect of the prevention and treatment of child maltreatment. The programs evaluated mainly fell into one of three categories: (1) "social service", (2) "legal interventions," and (3) "health care interventions."⁶⁴ In the "social service" category the programs evaluated included child-parent enrichment programs, parent training, network support services, home helpers, school-based sexual abuse prevention, intensive family preservation services, child placement services, and home health visitors.⁶⁵ "Legal interventions" evaluated included court-mandated treatment for child abuse offenders, court mandated treatment emphasizing child management skills, and in-patient treatment for sex offenders.⁶⁶ Evaluations of "health care interventions" included an identification protocol for high risk mothers, mental health services for child victims, and home health visitor/family

⁶⁰ *Id.*

⁶¹ For a definition of "hard" and "soft" resources, see *supra* note 24.

⁶² NATIONAL RESEARCH COUNCIL, VIOLENCE IN FAMILIES: ASSESSING PREVENTION AND TREATMENT PROGRAMS 17 (1998).

⁶³ The search included published and unpublished studies, although the majority of the 114 studies had been published. The four criteria were: (1) The evaluation involved a program intervention that was designed to treat or prevent some aspect of child maltreatment, domestic violence, or elder abuse; (2) the evaluation was conducted between 1980 and 1996; (3) the evaluation used an experimental design or quasi-experimental design and included measurement tools and outcomes related to family violence; and (4) the evaluation included a comparison group as part of the study design. See *id.* at 21.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

support programs.⁶⁷ The largest number of evaluations was of school-based sexual abuse prevention programs and intensive family preservation programs. The one commonality of the 78 evaluations of child abuse and neglect prevention and treatment programs was, in scientific terms, a failure to reject the null hypothesis.⁶⁸ In other words, the experimental treatment had no measurable effect. While it may be too harsh a judgment to say these programs have not and do not work as intended, the Committee's report did come to the following conclusion regarding social service interventions: "Social service interventions designed to improve parenting practices and provide family support have not yet demonstrated that they have the capacity to reduce or prevent abusive or neglectful behaviors significantly over time for the majority of families who have been reported for child maltreatment."⁶⁹ With regard to intensive family preservation services, there was also little evidence that such services resolve the underlying dysfunction that precipitated the crisis. There was also no evidence that such services improve child well-being or family functioning.

3. *Although preserving families is certainly a worthy goal, it is a difficult one to accomplish.* — For all the reasons noted above (the individual and social problems confronting maltreating families, the limited quantity and quality of services available, and the reluctance and difficulty individuals have changing their behavior) reunifications are fragile and often fail. Research indicates that approximately 50% of children reunified with their families after a stay in foster care are put back into out-of-home placement within 18 months.⁷⁰

4. *Although adoption is considered a last resort by many in the child welfare and child advocacy community,⁷¹ of all the placement possibilities for children, adoption is the least likely to fail.* — In other words, the adoption alternative is least likely to result in the child being moved after placement or adoption.⁷² Certainly, one reason why adoptions are more

⁶⁷ *Id.*

⁶⁸ Failure to reject the null hypothesis means that there was no statistically significant difference between the experimental group and the control group in terms of the outcome variable or variables.

⁶⁹ See NATIONAL RESEARCH COUNCIL, *supra* note 62, at 118.

⁷⁰ See R.P. BARTH ET AL., FROM CHILD ABUSE TO PERMANENCY PLANNING: CHILD WELFARE SERVICES AND PLACEMENTS (1994).

⁷¹ See BARTHOLET, *supra* note 34.

⁷² See BARTH ET AL., *supra* note 70; *Improving the Well-Being of Abused and Neglected Children: Hearings Before the Senate Comm. on Labor and Human Resources* (Federal Document Clearing House Political Transcripts, Nov. 20, 1996) (testimony of Peter Digre, Director, Los Angeles County Department of Children and Family Serv-

permanent and less likely to fail is the fact that adoptive families tend to have more social and economic resources than the average family or household.⁷³ Whatever the cause, if one wanted to predict which placement would be most likely to be permanent for a child, it would be adoption.

5. *Resources have been added to the child welfare system for the past two decades without a measurable improvement.*⁷⁴

— A counter-argument to the above two realities (that reunifications fail and that adoptions are least likely to fail) would be that adding resources to family preservation and support programs would increase the odds of having reunifications succeed. However, beginning in 1993, the federal government allocated \$250 million per year for family preservation and support programs.⁷⁵ This amount was increased in 1997.⁷⁶ Adding resources, staff, more training, and other resources to child welfare reform has not yet resulted in measurable improvements, a reduction in child fatalities, or increased child well-being.⁷⁷ This lack of measurable change lies in sharp contrast to other social problems, such as domestic violence and violent crime, where there is concrete evidence from multiple sources that the rates and numbers of such behaviors have decreased in the last five years.⁷⁸

6. *What little research exists on out-of-home-placement has found that children who reside in foster care fare neither better nor worse than children who remain in homes in which maltreatment occurred.*⁷⁹ — This undermines the belief that foster care placements are more dangerous and detrimental to children than remaining with their biological parents who have abused or neglected them.⁸⁰

7. *The current child welfare system is quite variable in how it provides counsel and legal representation for children involved in child welfare cases.* — While parents in child wel-

ices, Los Angeles, CA).

⁷³ See BARTHOLET *supra* note 34.

⁷⁴ See R.J. Gelles, How Evaluation Research Can Help Reform and Improve the Child Welfare System (July 26, 1998) (unpublished paper presented at the Program Evaluation and Family Violence Research: An International Conference, Durham, NH).

⁷⁵ See Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66, 107 Stat. 312 (1993).

⁷⁶ See Adoption and Safe Families Act of 1997, Pub. L. 105-89, 111 Stat. 2115 (1997).

⁷⁷ See Gelles, *supra* note 74.

⁷⁸ See *id.*

⁷⁹ See NATIONAL RESEARCH COUNCIL, *supra* note 62.

⁸⁰ See *supra* notes 29, 30, 34, 40 and accompanying text; see also R. WEXLER, WOUNDED INNOCENTS: THE REAL VICTIMS IN THE WAR AGAINST CHILDREN (1991).

fare cases have legal representation (often, in fact, each parent has legal representation) and while the child welfare agency has counsel present, the children involved are often not represented by legally trained and qualified attorneys. According to Howard Davidson of the American Bar Association's Children's Rights Project, in only half of the states in the United States do children in dependency actions have attorneys.⁸¹ In the other half of the states, children are represented either by Court Appointed Special Advocates ("CASA") or Guardians Ad Litem.⁸² In only 30% to 40% of the states does a child welfare statute define the role of the child's lawyer; in the majority of the states the role is not defined.⁸³

Some might argue that a CASA or Guardian Ad Litem is an appropriate representative for a child's interests.⁸⁴ However, if that were the case, why are parents afforded the right to counsel in all dependency court actions? If a trained CASA or guardian is sufficient for a child, why not for the parents as well? The answer to this question is clear; parents are provided or obtain counsel to assure that their due process rights are upheld.

Furthermore, even the trained and qualified counsel appointed to represent children may have only a limited grasp and understanding of federal and state law and policy with regard to child welfare. Many attorneys representing state or county child welfare agencies believe that the federal mandate of the Adoption Act is to make "every possible effort" to reunify families and that terminations of parental rights cannot be sought or granted until all efforts at reunification have been exhausted. The new Adoption and Safe Families Act is even less well understood or applied. An attorney attending the American Bar Association's Children's Rights Project "Ninth Annual Conference on Children and the Law," in Washington, D.C., stated during a question and answer session that she had received training in Baltimore, Maryland, from a regional administrator of the U.S. Department of Health and Human Services. She explained that her trainer had stated that the new law required states to terminate parental rights in one-third of active child welfare cases. The trainer went on to explain that the Federal government would

⁸¹ Interview with Howard Davidson, Director of the American Bar Association Center on Children and the Law (Feb. 1999).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ See G. COURTER, *I SPEAK FOR THIS CHILD: TRUE STORIES OF A CHILD ADVOCATE* (1995).

withhold funds if this quota was not achieved. A second attorney stated that she had received training from a regional administrator of the U.S. Department of Health and Human Services, who stated that the Federal Government would pay states for meeting their termination quotas. Carol Williams, then Associate Commissioner of the Administration on Children, Youth and Families, stated that such statements about quotas and financial incentives or penalties were incorrect.

D. The Legal Process

Taking a wider look at child welfare legal proceedings, we also see the minimal legal protections and safeguards that are provided children. It was not until 1974 that the federal government even recommended (as part of a requirement for federal child abuse and neglect funding) that states have a Guardian Ad Litem represent the child's legal interests.⁸⁵ Two Supreme Court decisions also demonstrate the minimal protections provided children. In *Suter v. Artist*,⁸⁶ the Supreme Court ruled that the "reasonable efforts" clause of the Adoption Act⁸⁷ neither created rights for children enforceable in an action nor created an implied private right of action.⁸⁸ In *DeShaney v. Winnebago County Department of Social Services*,⁸⁹ the Court ruled that if a state child welfare agency fails to protect an individual against a caretaker's violence, that state agency is not liable for the harm done to the child.⁹⁰ The failure of a state agency to protect an individual against private violence, in other words, does not constitute a violation of due process. This decision implies that state agencies cannot be held liable for failing to protect a child from harm, even if they are aware the child may be at risk.

In light of the absence of Supreme Court precedent that federal law provide legal guarantees for children and that children involved with the child welfare system have a right to be protected, the legal rights of children have been advanced by a series of class action suits against state and local child

⁸⁵ See Child Abuse Prevention and Treatment Act of 1974, Pub. L. 93-247, 88 Stat. 4 (1974); 45 C.F.R. § 1340.14.(g).

⁸⁶ 503 U.S. 347 (1992).

⁸⁷ 42 U.S.C. §§ 620-628, 670-679(a) (1988 & Supp. I).

⁸⁸ See *Suter*, 503 U.S. at 363 ("We conclude that 42 U.S.C. § 671(a)(15) neither confers an enforceable private right on its beneficiaries nor creates an implied cause of action on their behalf.").

⁸⁹ 489 U.S. 189 (1989).

⁹⁰ See *id.* at 196-97.

welfare agencies.⁹¹ At present, at least 27 states and many more localities are under court order to improve child welfare services.⁹² However, there is little consistency to be found among the suits or court stipulations. In Alabama, for example, the state is obliged to provide more family preservation services;⁹³ in Connecticut the state has been ordered to give more weight to child safety.⁹⁴ Unfortunately, however, even class action suits have failed to provide a clear basis for the rights and best interests of children (or even reflect differing conceptions of children's "best interests").

For at least 100 years the main thrust of the child welfare system has been to provide social and psychological resources so that children can be raised without interference from the government.⁹⁵ While the child welfare system is criticized from all directions, one consistent concern is that children are often removed from families without cause or that families that can be helped are not afforded that opportunity.⁹⁶ Those who demonstrate concern for children harmed even after they have been identified by the child welfare system are labeled "child savers," a pejorative term in this context.

The child welfare system has been in crisis for nearly three decades. The response to the crisis is a "round up the usual suspects" call for more resources, more workers, and reorganization of child welfare bureaucracies.⁹⁷ New federal legislation, The Adoption and Safe Families Act of 1997,⁹⁸ attempts to create more balance in the system in three specific ways: (1) by identifying instances where reunification efforts do not have to be made for families,⁹⁹ (2) by requiring states to seek termination of parental rights when children have been in out of home care for 15 of the previous 22 months,¹⁰⁰ and (3) mandating that states do concurrent planning, rather than planning only for reunification and then seek alternatives when such plans fail or are deemed inappropriate.¹⁰¹ In Florida, Arkansas, and Michigan, plans are in place or are

⁹¹ See I. SCHWARTZ & G. FISHMAN, *KIDS RAISED BY THE GOVERNMENT* (1999).

⁹² See *id.*

⁹³ See *id.*

⁹⁴ See *id.*

⁹⁵ See COSTIN ET AL., *supra* note 32.

⁹⁶ See WEXLER, *supra* note 80; Guggenheim, *supra* note 2, at 109-10.

⁹⁷ See SCHWARTZ & FISHMAN, *supra* note 91.

⁹⁸ Pub. L. 105-89, 111 Stat. 2115 (1997).

⁹⁹ See *id.* at § 101(a), 111 Stat. at 2116.

¹⁰⁰ See *id.* at § 103(a), 111 Stat. at 2118.

¹⁰¹ See *id.* at § 101(a), 111 Stat. at 2116.

being developed to transfer child protection investigations from child welfare agencies to the sheriffs or police departments. There appears to be a subtle movement to treat child maltreatment as a criminal justice problem, rather than as a social welfare issue.

What impact ASFA and current changes regarding investigations will have is still to be determined. What is clear, however, is that currently children and their "best interests" have only a minimal voice in child welfare proceedings. The child welfare system remains a system where the client is the parent, where the parent's legal rights are primary, and where a child's developmental best interests are rarely represented or given careful and appropriate weight.

III. CONCLUSION

There is no controversy that there is a crisis with the child welfare system today. Rather, the controversy arises when proposals are advanced for the resolution of the crisis (and, to a certain extent, during discussions of the actual nature of the crisis). Most child welfare system observers agree that the system both has not and is not protecting vulnerable and abused children.¹⁰² Most observers would also agree that the current system merely substitutes government neglect and mistreatment for parental neglect and abuse. How this crisis should be resolved is the dilemma.

It is difficult to defend providing more resources to a system that has yet to demonstrate that it is working, or even can work. Far too many children remain in harm's way and far too many children lack permanence. There is, however, no credible evidence that providing more resources for the preservation of families will resolve this crisis. And there is no evidence that the legal status quo can secure to children their rights to safety and protection.

¹⁰² See, e.g., U.S. ADVISORY BOARD ON CHILD ABUSE AND NEGLECT, CHILD ABUSE AND NEGLECT: CRITICAL FIRST STEPS IN RESPONSE TO A NATIONAL EMERGENCY (1990).