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**THE POTENTIAL OF FLORIDA’S EFFECTIVE ASSISTANCE OF COUNSEL
DOCTRINE TO INCREASE PARENT ENGAGEMENT AND PROMOTE THE
WELL-BEING OF CHILDREN**

Robert Latham and Robin Rosenberg***

I. INTRODUCTION

Florida has experienced three major shifts that significantly affected the representation of parents in its child welfare system. The first was the statutory appointment of counsel to all parents for both dependency and termination cases. The second was the creation of the Office of Regional Conflict Counsel, which represents one parent in each case by assigning a staff attorney in a public defender model, with the court appointing every other parent on the case a private attorney from a registry. The third was the statutory imposition of flat fee billing on those private attorneys.

More recently, a fourth shift potentially occurred in 2015 when the Florida Supreme Court ruled that parents in termination proceedings are entitled to effective assistance of counsel.¹ The standard for establishing ineffective assistance of counsel enunciated by the court is

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¹ J.B. v. Fla. Dep’t of Children & Families, 170 So. 3d 780, 796 (Fla. 2015).

very strict and the procedure is very difficult. The standard requires that the parent bring a *pro se* motion proving that the attorney's conduct was not only deficient by professional standards under a "totality of the circumstances" analysis, but also that the attorney's conduct was the "but-for" cause of the termination of parental rights—and all within twenty days.²

Florida's child welfare advocates have long debated what the standard and procedure for effective assistance for parents should be. That debate focused heavily on whether the claim must be brought on the face of the record, through a special writ, or on direct appeal. Some energy was spent on the wording of the standard itself, mostly with an eye toward avoiding the morass of litigation that ineffective assistance claims cause in criminal cases. But the questions of what effective assistance in dependency cases substantively is, how it differs from criminal and civil cases, and how it would or would not improve the child welfare system were largely and perhaps strategically left for another day. Decades of writings by criminal law scholars show that effective assistance doctrines do not raise the bar on quality representation—they only mark the floor, and poorly.³ The Florida Supreme Court, explicitly not adopting the *Strickland v. Washington* standard for termination cases,⁴ did so primarily to avoid the difficulties that standard brings.⁵ Instead, a new jurisprudence of effective assistance would be created in Florida, specifically for dependency

² *Id.* at 793-94.

³ See, e.g., Martin C. Calhoun, *How to Thread the Needle: Toward A Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L.J. 413, 421 (1988); Keith Cunningham-Parmeter, *Dreaming of Effective Assistance: The Awakening of Cronin's Call to Presume Prejudice from Representational Absence*, 76 TEMP. L. REV. 827, 839 (2003).

⁴ See *Strickland v. Washington*, 466 U.S. 668, 694 (1984), *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, *as recognized in* *United States v. Williams*, No. 2:12-CR-162-TFM, 2015 WL 4255574, at *2 (W.D. Pa. July 14, 2015) (“[U]nder *Strickland*, a defendant ‘must establish that (1) the performance of counsel fell below an objective standard of reasonableness; and, (2) counsel's deficient performance prejudiced the defense.’”).

⁵ *J.B.*, 170 So. 3d at 792 (stating that the Florida Supreme Court does not find it “appropriate simply to transplant *Strickland* and the body of case law that it has spawned into the TPR context.”).

cases.⁶

That goal may be in vain, however, without sufficient attention to what the professional standards for parent representation are and should be. This Article presents what may be the first review of Florida's particular representation system with its mixed appointment models and billing systems. Its findings lead to questions concerning not only the current system of parents' representation, but also certain procedural and substantive child welfare doctrines that appear to undermine the best interests of children by penalizing their parents for active participation in their cases.

This Article presents examples of active and engaged parents represented by equally active attorneys, significantly contributing to positive outcomes for children. These examples suggest that a key measure of quality of representation is how effectively the attorney contributes to the meaningful participation of the client—parent, State, child, or Guardian ad Litem alike—in furthering the well-being of the child. Unlike criminal cases, where a quality defense may reasonably involve shielding a client from the case completely, the hallmark of quality representation in child welfare cases is often *engagement*.⁷

The cases reviewed in this Article show that attorney engagement, and therefore quality of representation for parents in

⁶ *Id.* at 793 (finding that the *Strickland* standard “requires a showing of prejudice that goes beyond” an assertion that “confidence in the outcome is undermined.”).

⁷ See Kathleen A. Bailie, *The Other “Neglected” Parties in Child Protective Proceedings: Parents in Poverty and the Role of the Lawyers Who Represent Them*, 66 *FORDHAM L. REV.* 2285, 2285 (1998). The goal of engagement is not new. See, e.g., Clare Huntington, *Missing Parents*, 42 *FAM. L.Q.* 131, 135 (2008) [hereinafter Huntington, *Missing Parents*]; Clare Huntington, *Mutual Dependency in Child Welfare*, 82 *NOTRE DAME L. REV.* 1485, 1485-87 (2007) [hereinafter Huntington, *Mutual Dependency*] (discussing another view of a child welfare system that maximizes engagement); Elizabeth Thornton, *Tools for Evaluating Parent Attorney Performance*, 29 *CHILD L. PRAC.* 81, 87-89 (2010) (providing a summary of attorney quality surveys); Steve M. Wood & Jesse R. Russell, *Effects of Parental and Attorney Involvement on Reunification in Juvenile Dependency Cases*, 33 *CHILD. & YOUTH SERVS. REV.* 1730, 1730-41 (2011) (discussing the effects of parental and attorney involvement on reunification in juvenile dependency cases and finding that parental participation in court has significant impact on reunification rates and permanency outcomes).

Florida, varies greatly.⁸ The cases also show that quality is not solely a product of funding.⁹ Certainly, funding in the criminal and child welfare context has never been sufficient, but Florida's court-appointed attorneys in fact have no fee cap, are free to decline appointments, and can liberally retain experts to assist in their cases.¹⁰ Florida's court-appointed attorneys, moreover, can bill at either a flat rate or an hourly rate if the flat rate is confiscatory.¹¹ The idea that quality is solely a product of absolute funding is, therefore, compelling but incomplete.

The vast majority of attorneys for parents in Florida do not bill at the hourly rate and do not retain support experts, even though doing so would potentially result in higher pay, lower caseloads, and the opportunity to perform higher quality work.¹² It is improbable that hundreds of unrelated attorneys across a large, populous state are graciously volunteering their time in child welfare courts because they would prefer not to fill out invoices. Therefore, one must assume that these attorneys feel as though they are being paid fairly for their work and feel as though they are performing their duties ethically; therefore, they see no reason to bill beyond the flat rate. Yet, it appears almost impossible to fully handle a child welfare case in the number of hours the flat rate is modeled on.

This Article concerns this curious, nearly universal complacency of parents' attorneys with a system almost guaranteed to underpay them.¹³ Instead of being the result of professional failings, this Article suggests that this apparent low-quality representation may actually be a rational strategic response to the tension between attorney funding policies that center on litigation and the legal doctrines that penalize a parent who resists the State's intervention.¹⁴ Parents' attorneys may actually be performing work at the maximum level of engagement they

⁸ See *infra* Part III.

⁹ See, e.g., Susan Calkins, *Ineffective Assistance of Counsel in Parental-Rights Termination Cases: The Challenge for Appellate Courts*, 6 J. APP. PRAC. & PROCESS 179, 184 (2004).

¹⁰ See *infra* Part II.

¹¹ See *infra* Section IV.C.

¹² See *infra* Part II.

¹³ See *infra* Part II.

¹⁴ See Calkins, *supra* note 9, at 207-12.

believe is tolerated by child welfare law and procedures.¹⁵ This Article suggests that low-quality representation—defined as a low level of lawyer engagement and parent participation—is a predictable outcome of the policy decisions that courts and the legislature have made in the development of child welfare doctrines.

While Florida's effective assistance standard applies only to termination cases, the majority of termination cases begin as dependency proceedings. The most common ground for termination of parental rights is the parents' compliance or noncompliance with a performance agreement during the dependency phase. And most cases never proceed to termination at all. Far from the stories of egregious abuse and murder that scream across headlines, most families in the child welfare system have complex, but cognizable, problems and a severe lack of material and social resources to help them through the system.¹⁶ Effective assistance of counsel should extend to assisting a parent to avoid a termination proceeding, not just litigating once one is commenced, and it should apply to dependency proceedings even when termination is not threatened. Our focus, therefore, is on this vast majority of families in the system for whom a termination of parental rights petition is not initially filed and on the acts of their attorneys that make them more or less likely to be subject to a termination proceeding.

First, this Article will analyze billing data held by the state agency responsible for paying parents' attorneys. This data will show a dwindling and somewhat aging population of parents' attorneys, a surprising lack of hourly billing, and a counterintuitive relationship between fee caps and representation cost. Next, this Article will look at case studies drawn from twenty invoices to show the wide range of strategies and behaviors attorneys have actually implemented in child welfare cases. Far from finding passive participants or active confounders, the case studies show that many parents and their attorneys attempt to promote children's well-being with the limited tools the law provides. However, not all attorney behaviors were positive. Third, this Article will outline certain child welfare doctrines

¹⁵ See *infra* Section V.B.

¹⁶ See Cynthia Godsoe, *Parsing Parenthood*, 17 LEWIS & CLARK L. REV. 113, 136 (2013) (discussing the "blame frame" under which parents are viewed in the child welfare system).

that explain the problematic behaviors and find policies that were intended to promote children's best interests may actually be counterproductive in practice. Finally, this Article will bring the data and the doctrines together to outline the considerations that go into effective representation of parents in the child welfare system, critique this model, and offer suggestions to move the legal components of Florida's child welfare system forward.

II. BILLING RECORDS OF PARENTS' ATTORNEYS: 2007-2014

This Part explores the idea that funding is the primary predictor of attorney engagement by examining the billing records of Florida attorneys for parents between 2007 and 2014. The Justice Administrative Commission, the agency responsible for payment to court-appointed attorneys, produced the records under Florida's broad public records law.¹⁷ After removing irrelevant items, the records consisted of 130,553 paid invoices to 839 parents' attorneys between January 1, 2007 and December 31, 2014.¹⁸

Florida's flat-rate system compensates parents' attorneys as follows: an attorney may bill for \$800 payable after an adjudication of dependency, then \$200 for each additional year the case is open; or \$1000 for appointment to a termination of parental rights case, and then \$200 for each additional year of that proceeding.¹⁹ Payment is made per client, irrespective of the number of children or number of cases the client has open.²⁰ The Florida Supreme Court, beginning in 1986, has issued a series of opinions explaining the ability of courts to award fees above the statutory caps when the caps would be confiscatory of the

¹⁷ FLA. STAT. § 27.40(7)(b)(1) (2014). Due to variations in the billing practices of the attorneys, caution when interpreting the data is warranted. Robert Latham & Robin Rosenberg, Justice Administrative Commission: Invoice Billing Data (June 17, 2015) [hereinafter Justice Administrative Commission] (unpublished manuscript) (on file with authors). This study considered only those invoices that were actually paid by the Justice Administrative Commission, on the assumption that the Justice Administrative Commission's internal quality review mechanisms would provide some level of data verification. *Id.*

¹⁸ Justice Administrative Commission, *supra* note 17.

¹⁹ The current rates have been in effect since 2008, and they are current as of 2015. See General Appropriations Act 2015-2016, ch. 2015-232, § 4, 2015 Fla. Laws 1, 142; General Appropriations Act 2008-2009, ch. 2008-152, § 4, 2008 Fla. Laws 1, 133.

²⁰ § 4, 2008 Fla. Laws at 132.

attorney's time.²¹ In determining whether a case is extraordinary, courts are to focus on the amount of time required for the case and not on whether the case is factually or procedurally complex.²² In extraordinary cases, attorneys contractually agree to seek no more than an hourly rate of \$75 per hour.²³

This low rate of compensation may contribute to the first notable feature in our dataset: the high attrition rate for attorneys who represent parents. In our dataset, 170 attorneys, or 20.3%, billed during only one calendar year, while 51 attorneys submitted only one invoice in total. Only 181 attorneys, or 21.6%, participated in the registry for the full 8 years under review. By comparing attorneys' first recorded appointment order with their last appointment order, the longest practicing parents' attorney appears to have over 20 years of experience representing parents, but the median span of appointments among all attorneys was only 3.33 years. For the 20 attorneys who submitted the most invoices in our eight-year period, the median year of admission to the bar was 1996. For the 20 attorneys who submitted the most invoices in 2014, the median year of admission was even lower in 1990. The pool of attorneys has also shrunk, with the number of attorneys who filed an invoice in each year steadily decreasing from a high of 505 attorneys in 2008 to 397 in 2014.

Compensation for individual attorneys was much lower than expected. The median yearly amount invoiced per attorney ranged from a high of \$24,700 in 2008 to \$14,348 in 2010. The amount had risen to \$19,392 as of 2014. Of the 181 attorneys who appeared throughout the entire 8 years under review, their average yearly invoices ranged from \$5,490 to \$112,185. Notably, only 31 attorneys in that group averaged over \$65,000 per year.

Total state expenditures on attorneys' fees varied from \$11.8 million in 2007 to a low of \$10.3 million in 2010 and a rise again to \$12.3 million in 2014. It appears the variation in yearly expenditures is largely explained by the ever-changing size of the foster care population

²¹ *Makemson v. Martin Cty.*, 491 So. 2d 1109, 1115 (Fla. 1986).

²² *Id.* at 1114.

²³ *Agreement for Attorney Services for the Judicial Circuit(s) (Fiscal Year 2015-2016)*, JUST. ADMIN. 17 (July 1, 2005), https://www.justiceadmin.org/court_app_counsel/contracts/2015-2016/Draft.pdf.

in Florida. After eliminating seasonal factors, monthly variations in the invoice amounts that are found year-to-year, expenditures on attorneys' fees and the total number of children in out-of-home care were very strongly correlated—with a correlation coefficient of 0.918.

The Justice Administrative Commission began coding invoices as either flat fee or hourly in 2011. Since that time, only 12.42% of attorney fee expenditures have been for hourly rate cases. The amount has increased from 6.84% in 2011 to 14.99% in 2014. It is possible to estimate the percentage of hourly invoices over the full 2007-2014 period by looking at the number of invoices billed for one of the flat-rate billing amounts. During that time period, 49% of invoices were billed for \$800, 20% for \$200, and 16% for \$1,000—a total of 84% of invoices were submitted at a flat rate amount. Another 7% of invoices were billed for amounts that could be explained by the penalties assessed for late submission of paperwork and other less frequently used payment categories. This leaves only 9% of invoices with amounts suggestive of hourly billing.

There was wide variation in the percentage of hourly fees by judicial district, ranging from 0.57% of expenditures in the First District (Northwest Region) to 55.85% in the Third District (Southern Region). Notably, the Third District was the lowest compensated district for much of 2009-2012 and more-or-less equal with three of the other districts in 2014. To account for differences in the size of the child welfare system in each district, calculating attorneys' fees expenditures per child in out-of-home care shows an even greater disparity. In 2014, the district that utilized hourly billing the least compensated its attorneys 56% more per child than the district that utilized hourly billing the most and 129% more per child than the district with the second-most number of hourly invoices.

Only 99 attorneys have filed an hourly invoice over the 4 years since the State began tracking them. Among these attorneys, the median annual amount billed hourly has steadily increased from \$6,985 in 2010 to \$29,412 in 2014. Only 30 attorneys billed hourly across all four years under review. Among that subset, the average hourly amounts invoiced ranged from \$4,002 to \$77,362 per year. Adding in those attorneys' flat-fee invoices results in average billings ranging from \$24,602 to \$105,426 per year. Again, only 11 of the attorneys

who regularly billed hourly were able to average above \$65,000 per year from 2011 to 2014.

From this data, the typical parent's attorney, therefore, appears to be older and more experienced, not in the exclusive business of representing parents in dependency cases or not doing it "for the money," and not particularly interested in or aware of their right to bill hourly. A core group of attorneys, perhaps as few as thirty in the whole state, appear to be full-time parents' attorneys. Eleven of those are in the same district. Counterintuitively, districts that have a higher rate of billing hourly and above the statutory caps expended significantly less per child on parent representation.

The aggregate data, however, provides little insight on the quality or even behaviors of parents' attorneys in typical cases—a necessary guidepost for developing professional standards. The flat-fee system trades useful information away in exchange for easy billing. Therefore, in Part II we investigate billing invoices from twenty randomly selected cases that were billed as "extraordinary." By understanding what is extraordinary, we gain some insight into what strategies and behaviors parents' attorneys might ordinarily undertake.

III. CASE STUDIES

Of the approximately 1,400 hourly invoices filed in Florida during the review period, twenty cases handled by fourteen attorneys were randomly selected.²⁴ Two of the attorneys handled three cases in the set; two handled two cases; and the remaining ten handled just one. The time billed ranged from 21.93 to 209.6 hours. The span of days billed for ranged from 17 to 3,750 days. None of these cases involved egregious facts. All of them had a dependency phase, while some closed out in reunification, others closed out in permanent guardianship, and others went to termination. Two went on appeal, with one reversal and one affirmance. What makes these cases available for review is the fact that the attorneys who handled them chose to bill hourly instead of accepting the flat rate. There is a selection bias inherent in that fact, but

²⁴ Robert Latham & Robin Rosenberg, Overview of Case Studies (June 17, 2015) [hereinafter Overview of Case Studies] (unpublished manuscript) (on file with authors).

that bias does not invalidate the project of documenting actual lawyering styles and strategies under the current legal regimes described above.²⁵ The fact that some of these attorneys took no documented actions outside of court and their cases were still determined to be “extraordinary” is telling.

To document attorney behavior, each billing invoice was coded using six categories, which were chosen through a review of the common billing categories found across all invoices.²⁶ The categories were Researching, Reading, Court Hearings, Drafting, Communicating, and Administrative. Object codes²⁷ were assigned to describe the attorney’s action in more detail—for example, the type of hearing the attorney attended or the type of document the attorney drafted. Supporting documentation for each billing invoice was reviewed to learn the background and narrative of the case.²⁸

Patterns easily emerged based on the billing categories above. An attorney’s actions on a given case could be described first as either *proactive* or *reactive*. Proactive attorneys took affirmative steps both in and out of court on behalf of their clients. Reactive attorneys, on the other hand, tended to respond to the actions of other parties or the court, if at all. Attorneys further adopted a multitude of strategies, including litigation, negotiation, counseling, and monitoring (ensuring the parent and State were complying with the performance agreement). Notably, in this limited dataset, litigation appeared to have the least success. Two case studies are detailed in Sections II.A and II.B as an example.

²⁵ See *infra* Part V.

²⁶ See, e.g., Overview of Case Studies, *supra* note 24.

²⁷ See, e.g., *id.* Attorneys are not permitted to bill for administrative functions, so this last category consisted mostly of the Justice Administrative Commission’s annotations indicating that an entry was not billable.

²⁸ See *generally id.* (showing the relative frequency of each case throughout its disposition, as well as the circumstances surrounding each case). The supporting documentation included with the billing invoices varied greatly by attorney. Some attorneys attached detailed docket notes while others only attached printouts of hearing dates. A few attorneys attached adjudicatory orders with detailed findings. While the documents were all redacted, it was possible without any significant deduction to decipher the general narrative of most of the cases. Due to the sensitive nature of the documents we have chosen to publish only the general case studies focusing on the attorney, not the families.

A. Case 15889

1. Narrative

The mother in this case was under a probate guardianship and had a “serious mental health condition” that interfered with her ability to care for her new infant. The father of the child was the mother’s full-time caregiver, which made it difficult for him to care for the infant as well. The infant was sheltered at five days old and placed in a medical foster home with foster parents who were also the adoptive parents of the mother’s older child.

Over the next months, the billing attorney engaged in a great deal of communication with the attorneys for the other parties and especially with an attorney retained by the foster parents. The billing attorney promoted the client’s right to participate in the child’s life by filing multiple motions, including motions for parental visitation, participation in medical appointments, and sibling visitation. The billing attorney then engaged in negotiations with the foster parents regarding an open adoption. The attorney researched the adoption statute to effectuate contact and visitation for her client with the child after adoption.

The case concluded with the parents entering surrenders so that the foster parents could adopt. Concurrently, the parties entered into an agreement for post-adoption communication that would allow the birth parents to continue to have a relationship with their child after the adoption.

2. Comments

By the numbers, this attorney adopted a proactive negotiation strategy.²⁹ The attorney spent a significant percentage of time discussing the case with the parties and service providers and then consistently communicated what she learned with her client.³⁰ The billing attorney brought issues before the court through both motions and objections.³¹ The case reached a notably speedy resolution in under

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

eight months.³²

3. Breakdown of Effort

The attorney spent 34.5% of her time communicating with the client and other parties, 30.7% of her time reading documents, and only 15.3% of her time in hearings. Additionally, the attorney only spent 11.6% of her time drafting motions and 10.8% of her time researching. She spent a total of 56.7 hours working on this case over a span of 224 days. Therefore, her work rate totaled only 0.253 hours per day.

B. Case 15200

1. Narrative

The State brought a dependency petition against two parents after one of their children was a victim of sexual assault by a minor family member. There was no indication that the parents knew about the assault at the time it happened; but, when the family member was arrested, the parents declined to press charges. During the police interview, one parent was said to have made excuses for the abuse and had not sought professional help for the victim child's subsequent self-injurious behavior.

The parents' two children were sheltered in March of that year. In month two, the court accepted a case plan. The parents were assigned tasks of individual therapy and therapy for families of sexually abused children. By month four, the mother still had not received services from the State. According to a notation this was "because she speaks Spanish." In month seven, seven months after the children were sheltered, a case note indicated that the case plan still needed to be translated into Spanish. In month eight, the parents were still not enrolled in individual therapy. For reasons that are not documented, the father's counsel then asked to be discharged. It is the replacement counsel's time records that are available for review.

Every court finding concerning compliance with the case plan found the parents in partial compliance, meaning the parents were active but not yet ready to safely regain custody. The court consistently

³² *Id.*

found the Department of Children and Families in full compliance, despite the fact that appropriate referrals had not been made. The replacement counsel's billing records did not document any activity directed at helping the father obtain the services that he needed. No motions were filed and no communications were attempted with service providers, case managers, or anyone other than the client. Counsel, who had been appointed in month eight, recorded no activities on the case in months nine through eleven until just prior to a hearing for judicial review and case planning. The attorney then had no recorded activities until month eighteen, again right before the next hearing.

It was not until month eighteen—seventeen months after the case plan required therapy and eleven months after the replacement counsel was appointed—that the case notes finally indicated that the parents were in therapy related to their child's sexual abuse. The next month's notes said the parents were in a parenting class, but not individual and family therapy. The notes also added that the "parents completed all the services but have to restart because they didn't gain any knowledge." There is no notation of either parent ever being in full compliance or when the children went home, but the case seems to have closed in reunification during month twenty-three without further description in the records.

2. Comments

This attorney adopted a reactive monitoring strategy to the apparent detriment of the client.³³ Almost all of the attorney's efforts were spent reviewing documents and appearing in statutorily required court hearings.³⁴ Notably, this is the lowest effort rate in our set, despite a client with clearly documented advocacy needs.³⁵ The parents appear to have participated in everything asked of them, even when it would not help, and went as far as attending a parenting class in a language they did not speak.³⁶ The limited records obtained revealed no proactive efforts by the parents' attorney to secure appropriate services

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

for the clients for two years.³⁷

3. Breakdown of Effort

The attorney spent 23% of the time communicating with the client and other parties, 29.8% of the time reading documents, and 43.3% of the time in hearings. However, the attorney only spent 1.1% of the time drafting motions, 2.6% of the time preparing for hearings, and no time researching. The attorney spent a total of 33.7 hours working on this case over a span of 488 days. Therefore, the attorney's work rate totaled only 0.069 hours per day.

C. Summary of Case Studies

Most attorneys in the case studies predominantly adopted a strategy of monitoring their client's compliance with the performance agreement. For all the attorneys, a large amount of time was spent reviewing reports and documents (33.35% of total hours billed) and then attending judicial review, permanency, or status hearings (41.53% of total hours billed). In all of the cases in the dataset, nearly the only time every party was in the same room was in court. Billing for participation in an out-of-court case conference (or "staffing," as they are referred to in Florida) amounted to only 0.7% of the time billed in this limited dataset.

Attorneys who adopted a monitoring strategy could further be divided into two types: reactive and proactive. Reactive attorneys reviewed reports and attended hearings, but appeared to take few affirmative actions on the case outside of court, unless in response to another party or the court. In contrast, proactive attorneys affirmatively reached out to service providers, custodians, and other participants to further their client's positions. Proactive attorneys also filed motions to keep cases moving forward, even in cases where their client's chances of full reunification appeared slim. The differences and effects in litigation styles could be seen both when a parent was and was not seeking reunification.

It is also sometimes possible to see from the billing records the

³⁷ *Id.*

strategies that parents adopted vis-à-vis their attorneys. In cases where parents with reactive attorneys were seeking reunification, the parents' main strategy was strict adherence to their case plan and limited reliance on legal advocacy or negotiation. Strict case plan adherence, however, sometimes resulted in the problems predicted above. For example, in the case of the parents who attended parenting classes taught in a language they did not speak, the docket notes show that the parents attended dutifully but were unsuccessfully discharged due to "lack of progress." The reactive attorney in that case actually spent a large portion of time—16.18% of total hours on the case—communicating with the client, but took no apparent actions outside of regularly scheduled court hearings to secure appropriate services. It is not clear from the records when the client disclosed the language issue or whether the attorney chose not to raise the issue earlier as a strategic decision or just as part of the attorney's reactive style. Whatever the reason, the case eventually ended with apparent reunification after being open for two years.

In contrast, one proactive attorney's client enrolled in a substance abuse program in the middle of a termination of parental rights trial. The client's good progress created a basis for the attorney to file motions with supporting witnesses for expanded visitation, dismissal of the termination petition, and eventual reunification. On a different case, a proactive attorney of an uncharged parent maintained close contact with the child's therapist and drafted motions to limit contact with the charged parent for the child's protection. The attorney later negotiated a visitation agreement, researched how to close a case over the other parent's objection, and moved the court to terminate supervision with the child in his client's custody.

Not all proactive attorneys were successful for their client, and not all clients accepted their attorney's advice. In one case, a mother with severe mental health issues appears to have insisted on a strategy of both aggressive litigation and strict adherence to her performance agreement. The attorney was proactive, diligently researching the legal issues surrounding a parent with severe disabilities. The mother attended every service required of her and took both the dependency and the termination petitions to trial, all without success. After the termination trial, the attorney also handled the appeal, which resulted in an affirmance after a motion for extension of time filed by the State.

The case ultimately took just over two and a half years to resolve, with the child safely in a pre-adoptive foster home. The attorney was able to negotiate and obtain an order allowing continued contact between the mother and the child pending the adoption.³⁸

In several cases the attorney's client was not seeking reunification at all. Those cases are instructive of what a "minimal effort" case might look like. When the attorney was reactive, the percentage of time spent in court and reading documents was almost the entirety of the attorney's efforts: 93.64% in the case of a client who was in agreement with a permanent guardianship and 91.98% in the case of a client who took no steps towards reunification when the other parent successfully reunified. In another case, once the client agreed with the permanent guardianship, the attorney took no further actions, though the case would not close for another eight months. The reactive attorneys appear to have contributed nothing to the proceedings.

On the contrary, even in cases where the parent was not seeking reunification, proactive attorneys still had a productive role. In a case with the proactive attorney of a legal father who sought to disestablish paternity, the attorney expeditiously researched the issue, drafted the paperwork, and had the legal father dismissed within seventeen days so that the biological father of the child could be recognized. A reactive attorney in the same position may have instead waited for the State to file a termination petition against their client. In the case described above involving parents with disabilities and a foster parent who had adopted the parents' previous child, the proactive attorney sought expanded visitation rights for her clients while simultaneously negotiating post-adoption contact in return for the client surrendering his rights. That case closed in eight months.

A minority of attorneys in our selection adopted a purely litigation-based strategy aimed at intensive legal advocacy during the adjudicatory trials and little else. None of the trial-based litigation resolved in favor of the parents. One attorney obtained a reversal on

³⁸ *Id.* It is hard not to compare this case with the other case study in which the parents had a positive relationship with the pre-adoptive parent and the case closed in eight months. Is the recruitment of strangers to adopt a child a source of delayed permanency?

appeal based on improper reliance on hearsay, but lost again on retrial. That attorney, who had spent much effort litigating, subsequently took no affirmative steps outside of court, and the case eventually closed in a permanent guardianship. Despite being favored under the flat-fee structure, trial-based litigation was the least effective advocacy strategy present in these case studies.

Notably, even in cases that centered on litigation, none of the attorneys in our selection appear to have utilized experts that had not been provided by the State. This is true across the reviewed billing data: only \$366,120 or 0.38% of all expenditures were for medical or mental health evaluations. Compared to 101,298 invoices for attorneys' fees, independent evaluations were invoiced just 624 times—and 373 of those invoices came out of just two circuits. It seems that parents' attorneys rely almost completely on the State's experts.

Some cases did not focus on the parents at all. These cases invested a great amount of resources from all parties and the courts in monitoring the children or the custodians. In one such case, the parent agreed to a permanent guardianship in month eight, but the case remained open for another eight months while the court determined whether the custodian could care for the child's medical needs. In another case, there was significant litigation surrounding the child's placement, psychotropic medication, and participation in a summer program. In yet another case, the main litigation issue appears to have been a high-conflict custody battle between the maternal and paternal side of the family, with custodians being ordered out of their own houses and into services.³⁹

Finally, one contentious domestic violence case arising out of a divorce is telling of how the temperament of a judge can affect the shape of a child welfare case. In that case, both parents appeared to have proactive attorneys who maintained contact with the custodians and service providers and filed affirmative motions for both expanded

³⁹ *Id.* Florida courts have issued conflicting rulings on whether nonparties even have the right to appeal, leaving the trial courts' ruling even further insulated from review. See, e.g., *In re K.M.*, 978 So. 2d 211, 213 (Fla. Dist. Ct. App. 2008); *C.M. v. Dep't of Children & Families*, 981 So. 2d 1272, 1272 (Fla. Dist. Ct. App. 2008); *In re C.G.*, 612 So. 2d 602, 603 (Fla. Dist. Ct. App. 1992).

rights of their clients and the protection of the children. The judge, it seems, also took an aggressive position on the case, at one point ordering State attorneys from another county to be present. At another point the judge ordered the Department of Children and Families and all attorneys and parties involved to produce all e-mails and correspondence on the case. The court issued detailed orders—down to how the children were to be dressed for visits with a parent in jail—and denied multiple motions for termination of supervision. The case was in the system for six years and ended anticlimactically with sole custody for one parent and visitation for the other.

It was apparent in this randomly selected set of cases that many parents and their attorneys were far from passive recipients of services or impediments to the well-being of children. Instead, many parents were actively engaged in advocacy using the limited tools the legal system had provided. The fact that attorneys appeared more active when their clients were not seeking reunification or when termination was seemingly inevitable is suggestive of a participation penalty, similar to the trial penalty found in criminal cases, that discourages active engagement by parents. What is also apparent is that it is hard to imagine many cases—and certainly not 91% of cases—being handled in fewer hours than many of these. This raises serious questions about the level of involvement attorneys have in flat fee cases. To help explain why such unexpected behavior occurs, the next Part explores the one thing all of these cases have in common: the law of the child welfare system.

IV. THE PROBLEMATIC STRUCTURES OF CHILD WELFARE LAW

Noticeable in the case studies are two problematic structures of child welfare law that rarely find voice in appellate opinions: punitive proceduralization, where parents are held to procedural compliance standards with grossly disproportionate substantive consequences and the lack of accountability mechanisms available to non-State parties to ensure the State is upholding its obligations to the family. The next Section shows how the convergence of these two features, along with the flat-rate payment model's emphasis on trial-based litigation, possibly explains the low-engagement behavior seen in the case studies and aggregate data.

A. *Punitive Proceduralization*

The history of Florida's modern procedural framework can be traced to the 1980s and the introduction of performance agreements as the organizing principle of child welfare policy.⁴⁰ Early courts struggled with the application of performance agreements. One district court in 1983 wrote that the question of when a performance agreement was in the child's best interest required "more wisdom than Solomon[]" and held that performance agreements would therefore be required in all cases.⁴¹ Other district courts found performance agreements actually violative of justice for children, with one court in 1984 commenting that the mandatory use of performance agreements in cases where permanent commitment was "inevitable" would produce "absurd results."⁴² The Florida Supreme Court issued a compromise opinion, holding that performance agreements were statutorily required but that the goal of the agreement need not be reunification.⁴³

This policy debate is traditionally framed as one of protection of children versus preservation of families, or the "pendulum" of child welfare.⁴⁴ The debate normally invokes discussions of the threshold of

⁴⁰ See, e.g., *In re A.B.*, 444 So. 2d 981, 995 (Fla. Dist. Ct. App. 1983).

⁴¹ *Id.* at 993-94. That same year, scholars were debating whether termination of parental rights for mere case plan noncompliance was even in children's best interests. See Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 423-25 (1983).

⁴² *In re C.B.*, 453 So. 2d 220, 222 (Fla. Dist. Ct. App. 1984), *quashed sub nom.* *Burk v. Dep't of Health & Rehab. Servs.*, 476 So. 2d 1275 (Fla. 1985).

⁴³ See generally *Gerry v. Dep't of Health & Rehab. Servs.*, 476 So. 2d 1279, 1280 (Fla. 1985) (holding that a performance agreement should be prepared regardless of the permanency commitment and termination of parental rights hearing even if the child will not be placed with the biological parents); *Burk*, 476 So. 2d at 1278 (holding that the Department of Health and Rehabilitative Services must "offer a performance agreement to a natural parent before terminating parental rights").

⁴⁴ See, e.g., John T. Halloran, *Families First: Reframing Parental Rights As Familial Rights in Termination of Parental Rights Proceedings*, 18 U.C. DAVIS J. JUV. L. & POL'Y 51, 80-81 (2014); Virginia S. Radding, *Intention v. Implementation: Are Many Children, Removed from Their Biological Families, Being Protected or Deprived?*, 6 U.C. DAVIS J. JUV. L. & POL'Y 29, 37 (2001); Catherine J. Ross, *The Tyranny of Time: Vulnerable Children, "Bad" Mothers, and Statutory Deadlines in Parental Termination Proceedings*, 11 VA. J. SOC. POL'Y & L. 176, 194 (2004). More modern views of child welfare and social work assert that the protection of children and the preservation of their families are not competing goals at all. Patricia A. Schene, *Past*,

harm required to remove a child and the length of time that is reasonable for a parent to “rehabilitate.”⁴⁵

By the mid-1980s, the two policy positions were clearly articulated in Florida law.⁴⁶ In 1986, a district court of appeal found that performance agreements were subject to the “whims and caprices of the individual social worker who drafts them.”⁴⁷ The court consequently ruled performance agreements facially unconstitutional delegations of legislative power.⁴⁸ Permanent commitment, the court held, was constitutional only if based on abuse, abandonment, or neglect; the constitution requires harm to the child, not the failure of parents to comply with arbitrary requirements.⁴⁹ The Florida Supreme Court unanimously affirmed the decision in the late summer of that year.⁵⁰

In an apparent attempt to sidestep the Florida Supreme Court’s ruling, the Florida Legislature statutorily defined failure of a parent to comply with the performance agreement itself to constitute evidence of abuse, abandonment, or neglect.⁵¹ It was, and still is, a pure legal fiction: a parent alleged to have physically abused his child is treated as continuing to abuse his child until he completes a required anger management course—even if he never harms his child again.⁵²

Present, and Future Roles of Child Protective Services, 8 FUTURE CHILD., Spring 1998, at 23, 29-30, https://www.princeton.edu/futureofchildren/publications/docs/08_01_01.pdf. Unfortunately, much of child welfare legal doctrine has not incorporated these newer views. *Id.*

⁴⁵ Radding, *supra* note 44, at 32.

⁴⁶ Compare FLA. STAT. § 39.521(f)(1) (2012) (finding that the Department of Children and Families must utilize “reasonable efforts by way of “reasonable diligence and care” when attempting to reunify families), with FLA. STAT. § 39.806 (2014) (finding that the best interest of the child takes precedence over familiar reunification under certain delimited circumstances).

⁴⁷ *In re R.W.*, 481 So. 2d 548, 549 (Fla. Dist. Ct. App. 1986), *aff’d*, 495 So. 2d 133 (Fla. 1986).

⁴⁸ *Id.* There was no comment that child welfare policy had for decades been implemented at the pure discretion of individual judges. *See id.*

⁴⁹ *Id.*

⁵⁰ *In re R.W.*, 495 So. 2d at 135.

⁵¹ *Id.*

⁵² FLA. STAT. § 39.806(1) (2014).

Almost all of Florida's child welfare jurisprudence can be traced back to these dual doctrinal cores: the Florida Supreme Court requires actual or imminent harm to a child before it will permit intervention into a family's life, but the Florida Legislature insistently defines the procedural status of a parent as equivalent to substantive harm to a child.⁵³

Overwhelmingly, most cases do not proceed to termination of parental rights; those that do, do so only after the provision of a performance agreement to the parent.⁵⁴ Termination in those cases is then based on the parent's procedural noncompliance with the terms of the agreement, not the egregiousness of the underlying harm.⁵⁵ The performance agreement has thereby been elevated to the primary engine of due process in child welfare cases, and with some exceptions,⁵⁶ courts have concurrently dismantled the traditional litigation protections.⁵⁷

The Florida Supreme Court has not yet revisited the question of whether procedural noncompliance with potentially arbitrary terms of a performance agreement is a constitutional basis for termination of

⁵³ *Id.*

⁵⁴ *Gerry v. Dep't of Health & Rehab. Servs.*, 476 So. 2d 1279, 1280 (Fla. 1985).

⁵⁵ *Id.*

⁵⁶ For example, the Florida Supreme Court has ruled strongly against the punitive use of defaults against parents. *J.B. v. Fla. Dep't of Children & Family Servs.*, 768 So. 2d 1060, 1066-69 (Fla. 2000).

⁵⁷ *See, e.g.*, *Fla. Dep't of Children & Family Servs. v. P.E.*, 14 So. 3d 228, 236 (Fla. 2009) (eliminating the need for any substantive offer of proof of the underlying grounds when a parent defaults in a termination of parental rights case); *S.B. v. Dep't of Children & Families*, 851 So. 2d 689, 694 (Fla. 2003) (declining to recognize ineffective assistance of counsel claims in dependency matters); *N.S.H. v. Fla. Dep't of Children & Family Servs.*, 843 So. 2d 898, 904 (Fla. 2003) (declining to extend *Anders* procedures to child welfare cases); *Nat. Parents of J.B. v. Fla. Dep't of Children & Family Servs.*, 780 So. 2d 6, 11 (Fla. 2001) (finding that there was no constitutional requirement that termination of parental rights proceedings be open to the public even at the parent's request); *Dep't of Health & Rehab. Servs. v. M.B.*, 701 So. 2d 1155, 1162 (Fla. 1997) (allowing child hearsay statements to be admitted even when inconsistent with the child's testimony at trial, if otherwise found reliable by the trial judge); *Dep't of Health & Rehab. Servs. v. Honeycutt*, 609 So. 2d 596, 597 (Fla. 1992) (ruling that decisions of the trial court, during the period between adjudication and permanency, were not reviewable by direct appeal).

parental rights. The result is that in many places in Florida a consent plea to marijuana usage can legally escalate to a termination of parental rights proceeding when a parent fails—for whatever reason—to attend group sessions, even if the parent’s original behavior was never proven to be harmful to the child.⁵⁸

B. *Lack of State Accountability*

The second problematic doctrine of child welfare jurisprudence is what Josh Gupta-Kagan has termed the “due process donut hole.”⁵⁹ This donut hole exists in the time between an adjudication of dependency—where a child is initially found to be abused, abandoned, or neglected—and a permanency hearing, where a child’s ultimate fate is decided.⁶⁰ There are court hearings during that year, and for easy cases, this is of little concern—the progress towards reunification and closure of the case will likely be agreed upon by the parties.⁶¹ In more difficult cases, however, disputed positions can be hotly contested and important to the ultimate outcome of the case.⁶²

What Professor Gupta-Kagan points out as unusual about this portion of a case is its general lack of procedural rules typically inherent in judicial proceedings.⁶³ In Florida, the evidentiary requirements after the adjudicatory phase are relaxed to allow the court to consider “any other relevant and material evidence,” allowing rumors, suppositions, and multilayered hearsay to be considered in the form of written reports, not subject to cross-examination or needing corroboration.⁶⁴ Participation in a quarterly or biannual judicial review hearing is procedurally indistinguishable from an informal status conference in

⁵⁸ See *J.E. v. Dep’t of Children & Families*, 126 So. 3d 424, 427 (Fla. Dist. Ct. App. 2013).

⁵⁹ Josh Gupta-Kagan, *Filling the Due Process Donut Hole: Abuse and Neglect Cases Between Disposition and Permanency*, 10 CONN. PUB. INT. L.J. 13, 14 (2010).

⁶⁰ See *id.*

⁶¹ See *id.*; see also DONALD T. KRAMER, LEGAL RIGHTS OF CHILDREN § 2:18 (rev. 2d ed. 2005).

⁶² See Gupta-Kagan, *supra* note 59, at 14-15.

⁶³ See *generally id.* (demonstrating that the state lacks clarity when adopting rules that provide procedural safeguards during the waiting period).

⁶⁴ *Id.* at 17, 26; FLA. STAT. § 39.521(7)(t) (2015).

criminal or civil cases.⁶⁵ Attorneys proffer evidence with no expectation that anyone will verify it, and judges make decisions on those proffers, up to and including the extreme decision of finding the parent in noncompliance with the case plan and ordering the State to seek to terminate their parental rights.⁶⁶ Although Florida has detailed rules of juvenile procedure, it is not immune to Professor Gupta-Kagan's critique. Both its statutes and court rules offer significantly weaker protections in the middle of reunification cases than are found in adjudicatory hearings.⁶⁷ That hole has been widened even further by being insulated from appellate review; the Florida Supreme Court ruled early on that dependency cases do not fall within the rules authorizing review of nonfinal orders.⁶⁸

Consequently, Florida courts have thus far issued only a handful of opinions on performance agreements outside of the context of termination of parental rights.⁶⁹ The holdings of those opinions can be summarized as follows: performance agreements must be narrowly tailored to address the "facts and circumstances" of the dependency,⁷⁰ and even uncharged parents can be ordered to complete tasks as a

⁶⁵ Compare FRANK L. MCGUANE, JR. & KATHLEEN A. HOGAN, COLORADO FAMILY LAW AND PRACTICE § 12:9 (2d ed. 2009) (demonstrating the low requirements within informal status conferences), with Gupta-Kagan, *supra* note 59, at 15-21 (discussing the procedures and customs of permanency hearings).

⁶⁶ See Gupta-Kagan, *supra* note 59, at 42-46, 48 (explaining that without proper evidentiary hearings there is a high probability of erroneous deprivation of parental rights and that courts should verify evidence offered by the parties before making such "critically important" decisions).

⁶⁷ For example, Florida Rules of Juvenile Procedure 8.420(a)(3) states that case plan tasks and goals may be amended at any time over the objection of a parent if there is a "preponderance of the evidence demonstrating the need for the amendment," but the rules make no reference to the quality of the evidence, the right to a hearing, or how "the need for the amendment" should relate to the underlying adjudication of dependency or harm to the child.

⁶⁸ See *Dep't of Health & Rehab. Servs. v. Honeycutt*, 609 So. 2d 596, 597 (Fla. 1992). After a recent amendment to the Florida Rules of Appellate Procedure, one district court ruled that orders on motions that fully resolve the issues of the motion are directly appealable. *W.W. v. Guardian ad Litem Program*, 159 So. 3d 999, 1000-01 (Fla. Dist. Ct. App. 2015).

⁶⁹ See *supra* Section IV.A.

⁷⁰ *In re S.M.*, 136 So. 3d 1271, 1271 (Fla. Dist. Ct. App. 2014); *In re G.S.*, 84 So. 3d 1231, 1233 (Fla. Dist. Ct. App. 2012).

condition of custody;⁷¹ a party objecting to the amendment of a performance agreement has the right to be heard,⁷² and the amendments cannot be based solely on hearsay;⁷³ but neither the court nor the parties are bound by the case plan goal,⁷⁴ and amendments can be made at any hearing without prior notice.⁷⁵ Under this regime, if a case does not proceed to termination there is very little review of the performance agreement's reasonableness.⁷⁶ If a case goes to a termination trial, the court conducts a post hoc review of the agreement as part of the determination that the State made reasonable efforts to rehabilitate the parent.⁷⁷ Such review occurs far too late to go back and correct any but the most egregious errors that were made.⁷⁸

C. *Flat-Rate Billing Policies*

Uncomfortably adjoining these substantive and procedural doctrines, the policies on attorneys' fees also threaten to undermine parent participation in child welfare cases. By accepting appointments for parents, attorneys agree via contract to accept a "flat rate" for their

⁷¹ F.O. v. Dep't of Children & Families, 94 So. 3d 709, 710 (Fla. Dist. Ct. App. 2012); D.M. v. Dep't of Children & Families, 807 So. 2d 90, 90-91 (Fla. Dist. Ct. App. 2002).

⁷² R.H. v. Dep't of Children & Families, 948 So. 2d 898, 899-900 (Fla. Dist. Ct. App. 2007); K.E. v. Dep't of Children & Families, 958 So. 2d 968, 973 (Fla. Dist. Ct. App. 2007).

⁷³ R.C. v. Dep't of Children & Families, 917 So. 2d 241, 242 (Fla. Dist. Ct. App. 2005).

⁷⁴ M.I. v. Dep't of Children & Families, 45 So. 3d 878, 882 (Fla. Dist. Ct. App. 2010).

⁷⁵ R.N. v. Dep't of Children & Families, 25 So. 3d 697, 700 (Fla. Dist. Ct. App. 2010).

⁷⁶ See David J. Herring, *Inclusion of the Reasonable Efforts Requirement in Termination of Parental Rights Statutes: Punishing the Child for the Failures of the State Child Welfare System*, 54 U. PITT. L. REV. 139, 163 (1992) [hereinafter Herring, *Inclusion*] (detailing reasonable efforts review).

⁷⁷ CHILD WELFARE PRE-SERVICE TRAINING REMOVAL AND PLACEMENT PARTICIPANT GUIDE 2 (2012), <http://centerforchildwelfare.fmhi.usf.edu/preservice/participantguides/Removal%20and%20Placement%20Participant%20Guide.pdf>.

⁷⁸ See Herring, *Inclusion*, *supra* note 76. This has long been the critique of incorporating reasonable efforts review into the termination of parental rights process. *Id.*

work performed on the case.⁷⁹ The flat-rate system permits billing at certain intervals as follows: \$800 at the conclusion of a dependency trial or a parent's consent, \$200 for each subsequent year of the case, and \$1,000 at the filing of a petition for termination of parental rights.⁸⁰ Attorneys may bill for fees in excess of the flat rate if billing the flat rate would be "confiscatory" of their time.⁸¹ The flat rate is generally considered confiscatory in a child welfare case when an attorney has worked 21.3 hours in a dependency case or 26.6 hours in a termination of parental rights case.⁸² The attorney may bill at \$75 per hour after that point, meaning that an attorney who works just under the threshold amount is compensated at the effective rate of \$38 an hour.⁸³

There are two perceived benefits of the flat-rate system for attorneys. The first is that they are not required to keep time records in order to receive the flat rate.⁸⁴ Many attorneys find timekeeping onerous, so relief from that burden has intrinsic and extrinsic value. The second benefit lies in the ability to collect the full fee even if the number of hours expended is minimal. The flat fee of \$800 compensates an attorney at \$75 an hour for 10.67 hours of work, so a resolution achieved in less time increases the effective compensation rate. During the second and subsequent years of a dependency case, the same point occurs at 2.67 hours.

It seems highly unlikely that the circumstances of most cases would allow counsel to meet the minimal requirements of effective

⁷⁹ See FLA. STAT. § 27.5304(6)(a) (2014). The flat-rate compensation system developed in the criminal defense realm when the Florida Legislature's repeated attempts to cap attorney's fees were rebuffed by the Florida Supreme Court. Fla. Dep't of Fin. Servs. v. Freeman, 921 So. 2d 598, 600 (Fla. 2006). The court held that the State may not confiscate an attorney's time by refusing to provide adequate compensation. *Id.* at 601.

⁸⁰ § 27.5304(6)(a). Although it did not change the statute, the Legislature reduced the flat rate for dependency cases from \$1,000 to \$800 effective 2008. General Appropriations Act 2008-2009, ch. 2008-152, § 4, 2008 Fla. Laws 1, 133.

⁸¹ Makemson v. Martin Cty., 491 So. 2d 1109, 1114 (Fla. 1986).

⁸² See FLA. STAT. § 27.5304(6)(a). Multiply the flat rate times two and dividing that number by \$75 to calculate the threshold number of hours.

⁸³ See *id.*

⁸⁴ See *id.* § 27.40(7)(b)(1). Failure to keep contemporaneous time records constitutes a waiver of the right to seek fees in excess of the flat rate. *Id.*

representation in under three hours per year, especially during the dependency phase.⁸⁵ Under this system, attorneys who choose not to record their time are not financially incentivized to do more than the bare minimum for their clients, which is to appear at court hearings and lodge oral procedural objections to the terms of the performance agreement.⁸⁶ Worse still, the flat-rate system incentivizes attorneys to allow a difficult case to proceed to the filing of a termination petition prior to engaging in affirmative advocacy to resolve pending issues and send the case back to the dependency phase.⁸⁷ At \$1,000, the litigation of a termination petition is the dollar equivalent of five years of “donut hole” work on a case.⁸⁸ It is clear this system was created on the assumption that an attorney’s role is (or should be) primarily to litigate in the two main adjudicatory trials.⁸⁹

V. STRATEGIC BEHAVIORS OF THE PARTIES

The convergence of the legal doctrines listed above and the flat rate billing system leads to litigation strategies that appear to risk undermining the goal of promoting the best interests of children. This Part sketches out the rational behavior of attorneys for the State and the parents under these doctrines. It also discusses how the introduction of third-party advocates, such as Guardians ad Litem, does not address the issues raised here, which are inherent in the relationship between the

⁸⁵ See AM. BAR ASS’N HOUSE OF DELEGATES, AMERICAN BAR ASSOCIATION STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT IN ABUSE NEGLECT CASES 1-7 (1996), <http://www.afccnet.org/Portals/0/PublicDocuments/Guidelines/AbuseNeglectStandards.pdf> (identifying that at a minimum an attorney must review pleadings, interview and counsel his or her her client, investigate the facts, interview witnesses, and attend court hearings). Pennsylvania recently undertook a comprehensive study of the time required to represent a parent in a dependency proceeding and allocated thirty hours to the work covered by Florida’s \$800 fee. General Appropriations Act 2008-2009, ch. 2008-152, § 4, 2008 Fla. Laws 1, 133.

⁸⁶ See generally AM. BAR ASS’N HOUSE OF DELEGATES, *supra* note 85 (identifying key components of an attorney’s role in representation).

⁸⁷ *Id.*

⁸⁸ See FLA. STAT. § 27.5304(6)(a).

⁸⁹ See generally AM. BAR ASS’N HOUSE OF DELEGATES, *supra* note 85, at 13 (finding that a competent lawyer is one who is trained in representing children and “skilled in litigation”).

parent and the State.⁹⁰

First, though, one additional feature of child welfare proceedings must be considered: they move far faster than any criminal or civil trial.⁹¹ Even for clients or causes with nearly endless financial resources, there is a very real limit to judicial patience and time.⁹² Time moves even more swiftly in child welfare cases where the work of early advocates succeeded in grafting into the bones of the system the idea that speedy “permanency,” or an end to State oversight of a child, is one correct measure of successful outcomes in the child welfare system.⁹³ This hurriedness, along with the features of child welfare law discussed above, produce litigation strategies quite different from traditional criminal and civil cases.⁹⁴

The following Section explores how rational attorneys might conceive of their duties under the doctrinal system described above. The result is a system in which both litigation and cooperation are not only discouraged, but penalized.⁹⁵ Before discussing representation of parents, however, it is useful to begin with the role of attorneys for the State.

A. Representing the State

Child welfare cases begin with an intake process similar to a criminal investigation.⁹⁶ Florida, like many states, has a very strict

⁹⁰ See Martin Guggenheim, *The Importance of Family Defense*, 48 FAM. L.Q. 597, 606 (2015) (discussing the role of family defense work in furthering the goals of the child welfare system).

⁹¹ See *supra* Section IV.B.

⁹² See generally FOSTERING RESULTS, VIEW FROM THE BENCH: OBSTACLES TO SAFETY & PERMANENCY FOR CHILDREN IN FOSTER CARE (2004), http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/foster_care_reform/fosteringresults070104pdf.pdf (reporting that seventeen percent of judges named overcrowded dockets as their number one frustration in child welfare cases).

⁹³ See, e.g., Herring, *Inclusion*, *supra* note 76, at 144; Radding, *supra* note 44, at 45.

⁹⁴ See Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C.).

⁹⁵ See *id.*

⁹⁶ See *infra* Part VI.

mandatory reporting law that applies to all persons—not just designated professionals—and mandates a report if a person either knows of or has “reasonable cause to suspect” child maltreatment.⁹⁷ The knowing and willing failure to report child maltreatment is a third-degree felony punishable by up to five years in state prison.⁹⁸ Unlike police complaints, all calls to the child abuse hotline must be investigated and acted upon.⁹⁹ Complicating the relationship between the law and practice, the Department of Children and Families has determined that the incident-based analysis (defining a dependent child as one who has suffered any of a list of enumerated harms) found in the current statutes does not lead to an efficient use of resources for some children and leaves other children at home with a high risk of future harm.¹⁰⁰

⁹⁷ FLA. STAT. § 39.201(1)(a) (2014). The wisdom of such laws and their exceptions are under constant question. *See, e.g.,* Mary H. Mitchell, *Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion*, 71 MINN. L. REV. 723, 729 (1987); Robert P. Mosteller, *Child Abuse Reporting Laws and Attorney-Client Confidences: The Reality and the Specter of Lawyer As Informant*, 42 DUKE L.J. 203, 250 n.144 (1992); Dale Margolin Cecka, *How child abuse hotlines hurt the very children they're trying to protect*, WASH. POST (May 6, 2015), <http://www.washingtonpost.com/posteverything/wp/2015/05/06/how-child-abuse-hotlines-hurt-the-very-children-theyre-trying-to-protect/>.

⁹⁸ FLA. STAT. § 39.205.

⁹⁹ *Id.* § 39.301.

¹⁰⁰ FLA. STAT. § 39.01 (2015). Not every broken bone or bruise requires the full arsenal of State and judicial oversight; but even without broken bones and bruises, chronic environmental neglect may signal the need for intervention. *See id.* The Department of Children and Families (like many other agencies around the nation) has therefore adopted an actuarial decision-making methodology that assesses a child's situational risks and the family's protective capacity in conjunction with the type of maltreatment. Dep't of Children & Families, Office of Child Welfare, *Florida Safety Methodology*, FLA. CTR. FOR CHILD WELFARE 1, 1 (Dec. 6, 2013), <http://centerforchildwelfare.fmhi.usf.edu/kb/safetymethod/SafetyMethodOverview12-6-13.pdf> [hereinafter *Florida Safety Methodology*]. Scientific does not mean free of bias. *See generally* Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 804-05 (2014) (discussing different variables courts are using now to determine sentencing, including but not limited to, socioeconomics impacts, gender, family, and age). Florida has been rolling the system out incrementally since 2013. *Florida Safety Methodology, supra*, at 2. The full effects of the methodology have yet to be seen, but one of the methodology's goals is to increase the engagement and empowerment of parents in the system, a goal that is in conflict with the more proceduralized doctrines found in current child welfare law. *Id.*

Once a case is selected for prosecution, the role of an attorney for the State¹⁰¹ is, initially, not so different from a criminal prosecutor.¹⁰² Like a criminal prosecutor, the State's child welfare attorney must assess the legal merits of a case independent of the investigation process, but the legal definition of child maltreatment extends so broadly as to make almost any case that involves some harm or perceived risk legally sufficient.¹⁰³ Additionally, the lack of any prophylactic rules on the nature and scope of the child protective investigation removes any consideration of how the evidence came to be known.¹⁰⁴ A case is weighed by its alleged facts alone, and the preponderance standard makes a dismissal on the quality of the evidence unlikely.¹⁰⁵

The child welfare attorney's next step is to determine whether the case merits termination of the parents' rights.¹⁰⁶ The Legislature has provided Florida petitioners with approximately fourteen grounds that a petitioner can allege in an expedited manner without first offering a performance agreement.¹⁰⁷ Choosing to file for termination of parental rights comes with a higher evidentiary burden and a significantly more complicated legal framework; therefore, only the most egregious or compelling cases would likely be filed without first offering the parents

¹⁰¹ See Michael J. Dale & Louis M. Reidenberg, *Providing Attorneys for Children in Dependency and Termination of Parental Rights Proceedings in Florida: The Issue Updated*, 35 NOVA L. REV. 301, 335 (2011).

¹⁰² See *id.*; see also Kate Smith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1420 (2008) [hereinafter Smith, *The Arc of the Pendulum*].

¹⁰³ See Dale & Reidenberg, *supra* note 101. Therefore, it is subject to many of the same critiques and calls for reform.

¹⁰⁴ *Id.* at 310 (“[S]ince 2000 there has been almost no change in the system of independent legal representation of children in child welfare proceedings in Florida.”).

¹⁰⁵ See Douglas E. Cressler, *Requiring Proof Beyond a Reasonable Doubt in Parental Rights Termination Cases*, 32 U. LOUISVILLE J. FAM. L. 785, 791 (1994) (stating that reasonable doubt is not required but a lower threshold of proof). The preponderance burden itself is not strictly applied in practice, however, because a judge is likely to grant the State's petition in borderline cases in order to provide an opportunity for the State to monitor the family for at least six months.

¹⁰⁶ See FLA. STAT. § 39.802(8) (2015).

¹⁰⁷ See *id.* § 39.802(5). See generally *id.* § 39.806 (listing grounds for termination of parental rights).

a case plan, especially in light of the fact that a parent's failure to comply with the case plan could later be an independent ground for termination.¹⁰⁸ Noncompliance, the bureaucratic measure of lack of progress, is much easier to prove than egregiousness of harm or futility of services. Also, dependency cases are not backwards looking; a parent's actions throughout the case can become evidence against them.¹⁰⁹

For cases in which a performance agreement is offered, a child welfare petitioner's next step is to attempt to negotiate a plea.¹¹⁰ All of the criticisms of plea negotiations in the criminal context equally apply.¹¹¹ The difference is that the child welfare petitioner's plea negotiation tools are far more limited than those available to a criminal prosecutor.¹¹² There are no degrees of dependency as there are degrees of crime.¹¹³ At the end of a dependency trial, a child either is or is not adjudicated dependent.¹¹⁴ A petitioner could overcharge by filing a petition for termination in hopes of negotiating a dependency, but in most cases the facts would not support it.¹¹⁵

A child welfare petitioner is also more limited in negotiating the

¹⁰⁸ See *id.* § 39.802(8). See generally *id.* § 39.806(f)-(n) (providing reasons for immediate termination, including egregious behavior, murder, and conviction of sexual assault as a type of termination without a case plan).

¹⁰⁹ See generally *id.* § 39.806 (identifying reasons to terminate parental rights).

¹¹⁰ See generally David J. Herring, *Legal Representation for the State Child Welfare Agency in Civil Child Protection Proceedings: A Comparative Study*, 24 U. TOL. L. REV. 603, 609-10 (1993) [hereinafter Herring, *Legal Representation*] (stating that the attorney negotiates with opposing counsel to eliminate the need for trial).

¹¹¹ See generally Smith, *The Arc of the Pendulum*, *supra* note 102 (stating that a prosecutor has discretion to investigate, charge, and punish, and the system needs to be revamped).

¹¹² See generally Herring, *Legal Representation*, *supra* note 110, at 624 (describing how prosecuting attorneys work in narrow legalistic bounds and make decisions based upon the evidence and confines of the law).

¹¹³ See generally § 39.806 (listing grounds for termination of parental rights). *But see* FLA. R. CRIM. P. 3.071 (detailing the degrees of criminal charges for purposes of preparing score sheets used as sentencing guidelines).

¹¹⁴ See § 39.802(6).

¹¹⁵ See generally Herring, *Legal Representation*, *supra* note 110 (stating the petitioner may refuse to file or "pursue petitions that were too difficult to prove in court" or file amendments to the petition over the objection of the social worker).

conditions of the case.¹¹⁶ A criminal prosecutor could recommend a lesser sentence or credit time served, but a child welfare petitioner's negotiations are complicated because their cases are multiparty, with usually at least five parties: the State, two parents, the child, and a guardian ad litem—not to mention an open list of potential “participants” that the court can hear from about the well-being of the child.¹¹⁷ Unlike criminal cases where there is a clear division of responsibility between the prosecutor and the defense, every party in a child welfare case has standing to prosecute the petition against a parent or to move the court to amend the performance agreement or change the conditions of the child's placement.¹¹⁸ Furthermore, with some limitations, judges are free to act unilaterally even if all parties agree to a different course of action.¹¹⁹

If a maltreatment case actually goes to trial (the reasons for why this is unlikely will be discussed in further detail in Section IV.B), the child welfare petitioner has several advantages over a criminal prosecutor.¹²⁰ First, most of the State's witnesses are professional witnesses: child abuse investigators, medical examiners, forensic interviewers, therapists, and case managers.¹²¹ Their testimony coupled with statements by the parent during the investigation are usually

¹¹⁶ *Id.*

¹¹⁷ § 39.01(50), (51). Multiparty litigation presents its own difficulties. *See, e.g.,* Barbara Busharis, *The Barnes Dilemma Resolved? The Florida Supreme Court Requires Apportionment of All Offers to Multiple Defendants*, 24 TRIAL ADVOC. Q., July 2005, at 6, 6, 19 <http://www.fdla.org/Scripts/Members/TAQ/TAQ%20-%20SUMMER%202005.pdf> (describing the dilemma facing multiple defendants in one litigation); Thomas J. Stipanowich, *Arbitration and the Multiparty Dispute: The Search for Workable Solutions*, 72 IOWA L. REV. 473, 480 (1987) (detailing how courts are limited given the issue of multiple parties and complexity of third-party litigation).

¹¹⁸ § 39.6013(2)(3)(a).

¹¹⁹ *See, e.g.,* Dep't of Children & Family Servs. v. *In re J.C.*, 847 So. 2d 487, 490 (Fla. Dist. Ct. App. 2002) (“Especially in the context of children, our trial courts have a continuing responsibility to vigilantly protect the welfare and best interests of the child.”).

¹²⁰ *See generally* *Toro v. State*, 642 So. 2d 78, 80, 83 (Fla. Dist. Ct. App. 1994) (finding that the child welfare petitioner had the advantage of producing expert testimony in the form of a psychologist).

¹²¹ *Id.* at 79-80, 82.

sufficient to make a case.¹²² The credibility gap is stacked so clearly against a parent that it is considered a sound strategy by many attorneys for the State to call the parent as the first witness.¹²³

There is one notable way in which child welfare prosecutions stand distinct from the criminal model the system was built on: the role of the State's attorney changes significantly once the parent enters into a performance agreement, and the State is obligated to provide services and care to the family.¹²⁴ This shift in posture morphs the attorney's role into that of a governmental in-house counsel in charge of compliance oversight.¹²⁵ Breaches of duty by the State, both large and small, happen at alarmingly frequent rates in child welfare cases.¹²⁶ Criminal prosecutors are not in charge of litigating jail conditions claims or parole hearings, but child welfare prosecutors have to live with the case they bring, sometimes for years.¹²⁷ By having to constantly respond to challenges from the parties and the judge, the State's attorney is put squarely on the defense.¹²⁸

The State's attorney's rational *defensive* strategies during this

¹²² D. Children v. Dep't of Children & Family Serv., 820 So. 2d 980, 984 (Fla. Dist. Ct. App. 2002).

¹²³ See *id.* at 981, 983, 985.

¹²⁴ Meghan Scahill, *Prosecuting Attorneys in Dependency Proceedings in Juvenile Court: Defining and Assessing a Critical Role in Child Abuse and Neglect Cases*, 1 J. CTR. CHILD. & CTS. 73, 76-78 (1999).

¹²⁵ See *id.* at 83-84.

¹²⁶ See JENNIFER L. RENNE, LEGAL ETHICS IN CHILD WELFARE CASES 13 (Claire Sandt ed., 2004), http://www.americanbar.org/content/dam/aba/administrative/child_law/2004_LegalEthics.authcheckdam.pdf. For example, service providers close down and will not release reports, case managers fail to conduct visits or studies on time, a foster parent is arrested for neglect, or no appropriate therapeutic placements for a child can be found.

¹²⁷ See *id.* at 53.

¹²⁸ See *id.* 29 (stating that prosecutors must balance the interests of the parties and the people). The role of the prosecutor in child welfare proceedings was the focus of some study in the 1990s. See Herring, *Legal Representation*, *supra* note 110, at 605. See generally Lisa A. Stranger, *Conflicts Between Attorneys and Social Workers Representing Children in Delinquency Proceedings*, 65 FORDHAM L. REV. 1123 (1996) (explaining the conflicts arising "when attorneys and social workers act together in the representation of children in delinquency proceedings").

period depend on several factors.¹²⁹ The first consideration is the level of seriousness of the alleged misconduct by the state agency.¹³⁰ If the misconduct is significant to the case—say failing to refer a parent to a therapeutic service in a language they speak—it could negatively affect a termination trial later or could result in a failed reunification.¹³¹ The second factor is how compliant the parent is with the rest of the performance agreement.¹³² A parent who is noncompliant with most other tasks will probably not be able to successfully raise a defense based on the State's reasonable efforts at a termination trial.¹³³ Put another way, when termination looks inevitable, the State has less incentive to volunteer any more assistance than is minimally required.¹³⁴ The third consideration is avoidance of liability.¹³⁵ Some children will be reinjured, sometimes seriously, after reunification, just as some children will be injured, sometimes seriously, while in foster care.¹³⁶ By refraining from initiating any action that promotes reunification, a State attorney avoids sharing blame for any negative outcome with the parent.¹³⁷

¹²⁹ See generally AM. BAR ASS'N, STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING CHILD WELFARE AGENCIES 19-25 (2004) (considering attorney strategies in regard to child welfare cases).

¹³⁰ See *id.* at 16.

¹³¹ See generally Esme N. DeVault, *Reasonable Efforts Not So Reasonable: The Termination of Parental Rights of a Developmentally Disabled Mother*, 10 ROGER WM. U.L. REV. 763, 769-70 (2005) (arguing that when a parent is not given access to rehabilitative services, reasonable efforts have not been made).

¹³² See generally *id.* (finding that the parent complied with what little efforts were made by the State).

¹³³ See generally CHILD WELFARE INFO. GATEWAY, GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS 1 (2013) (discussing the criteria for terminating parental rights).

¹³⁴ See generally *id.* (discussing instances where parental termination is inevitable). Under the but-for standard for ineffective assistance claims, the same parent will equally be able to expect *less* from their attorney by virtue of having additional problems that arguably contributed to the outcome of the case. Timothy P. O'Neill, *Taking a Closer Look at 'Effective Assistance,'* 154 CHI. DAILY L. BULL., Feb. 22, 2008.

¹³⁵ FLA. STAT. § 409.993 (2015).

¹³⁶ Elizabeth Bartholet, *Creating A Child-Friendly Child Welfare System: Effective Early Intervention to Prevent Maltreatment and Protect Victimized Children*, 60 BUFF. L. REV. 1323, 1357 (2012).

¹³⁷ James C. Backstrom & Garry L. Walker, *The Role of the Prosecutor in Juvenile*

Finally, probably the most important factor influencing a petitioner's litigation strategy is how aggressive the judge is at holding the State accountable to the performance agreement.¹³⁸ Judicial enforcement of compliance in Florida is accomplished through judicial review findings and can be supplemented with rules to show cause against the State.¹³⁹ A parent can also seek a rule to show cause why the child cannot be immediately reunified—a procedural mechanism that, to our knowledge, has never been ruled upon by a Florida appellate court.¹⁴⁰ Not all judges are comfortable issuing contempt orders, and not all judges are interested in micromanaging child welfare cases at the sometimes inscrutable level of bureaucratic detail with which they actually play out. A persistent judge can get results, either with a scalpel or a sledgehammer, but the results are skewed towards the priorities of the judge, not the parties, and the battles come at the cost of

Justice: Advocacy in the Courtroom and Leadership in the Community, WM. MITCHELL L. REV. 963, 968 (2005). This is of course a trolley problem. See PHILIPPA FOOT, VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY 19 (Oxford Univ. Press 2003). The prosecutor's failure to seek reunification in cases where it is warranted is the substitution of a certain harm of delayed permanency for uncertain fear of reunification. *Id.*

¹³⁸ See Michele B. Neitz, *A Unique Bench, A Common Code: Evaluating Judicial Ethics in Juvenile Court*, 62 JUV. & FAM. CT. J. 32, 33-34 (2011). Aggressiveness can range from righteously angry and engaged to unproductively hostile or avoidant. Terry A. Maroney, *Angry Judges*, 65 VAND. L. REV. 1207, 1207, 1271 (2012) [hereinafter Maroney, *Angry Judges*]; Terry A. Maroney, *Emotional Regulation and Judicial Behavior*, 99 CAL. L. REV. 1485, 1486 (2011) [hereinafter Maroney, *Emotional Regulation*] (discussing that the problem of unproductive hostility from the bench may actually be compounded by the lack of oversight, support, and review provided to most judges).

¹³⁹ See generally HONORABLE WILLIAM G. JONES, WORKING WITH THE COURTS IN CHILD PROTECTION 1 (3d ed. 2006) (discussing judicial review). The critiques of contempt as an enforcement mechanism are well taken. See, e.g., Earl C. Dudley, Jr., *Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempts*, 79 VA. L. REV. 1025, 1031-32 (1993); Richard B. Kuhns, *The Summary Contempt Power: A Critique and A New Perspective*, 88 YALE L.J. 39, 41 (1978); Margit Livingston, *Disobedience and Contempt*, 75 WASH. L. REV. 345, 427-28 (2000). Much has been written about Congress's powers of contempt over the executive branch, but far less is understood about the judicial branch's contempt powers over the executive in child welfare cases. See Dudley, *supra*, at 1025-29; Kuhns, *supra*, at 39; Livingston, *supra*, at 345. But see Gerard Glynn, *Contempt: The Untapped Power of Juvenile Court*, 15 FLA. COASTAL L. REV. 197, 200 (2014).

¹⁴⁰ *In re Z.J.S.*, 787 So. 2d 875, 876, 880 (Fla. Dist. Ct. App. 2001).

alienating the State actors that have to implement the judge's orders in other cases. Rational strategies for the State's attorney in these situations depend on the personality of the judge and the goal of negotiating power and responsibilities across all of the cases that come before that judge.

This point is important for our critique. The judge's heightened power of review was a historical inheritance, but its continuation in the modern system was a decision aimed at providing strict oversight of the Department of Children and Families' actions.¹⁴¹ This judicial oversight role is frequently cited when justifying the weakening of traditional due process protections in child welfare cases.¹⁴² Because of these expanded judicial review requirements, the prosecutor's main "adversary" during a dependency proceeding in many cases is not the parent but the judge.¹⁴³ The path of the case is shaped largely by the style and priorities of that judge.¹⁴⁴ The other parties—parents, guardian ad litem, and child—can only be successful in bringing challenges against the State to the extent they can enlist the judge in their campaign, and State actions that anger the judge in other cases can spill over into their case in unknown and unexpected ways.¹⁴⁵ The appellate court's traditional hands-off approach to dependency proceedings has further cemented this dynamic, preventing anything but basic procedural review by certiorari in a portion of the case with very few procedural requirements to review.¹⁴⁶ The result is that child

¹⁴¹ *9e. The Power of the Federal Courts*, U.S. HIST., <http://www.ushistory.org/gov/9e.asp> (last visited Nov. 7, 2015). A Florida court wrote in 2006: "The judge in a termination proceeding is the fact finder, the sentinel of the child's best interest, and an involved participant in the process." *E.T. v. State*, 930 So. 2d 721, 726 (Fla. Dist. Ct. App. 2006).

¹⁴² See Kevin B. Frankel, *The Fourteenth Amendment Due Process Right to Family Integrity Applied to Custody Cases Involving Extended Family Members*, 40 COLUM. J.L. & SOC. PROBS. 301, 337 (2006). This was also the amicus position of the Statewide Guardian ad Litem Program, arguing that effective assistance procedures were not necessary in Florida due to judicial oversight. *J.B. v. Fla. Dep't of Children & Families*, 170 So. 3d 780, 798 (Fla. 2015).

¹⁴³ *E.T.*, 930 So. 2d at 727.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Jeff Atkinson, *Criteria for Deciding Child Custody in the Trial and Appellate Courts*, 18 FAM. L.Q. 1, 16, 39-40 (1984).

welfare litigation, more so than probably any other area of law, is shaped based on the personality of the person sitting on the bench.¹⁴⁷ Far from ensuring due process, this arrangement almost guarantees arbitrary outcomes, even for the State.

B. Representing Parents

For a parents' attorney, the unintended consequences of the convergence described above occur on the first day a case is filed. When a parents' attorney receives a copy of the petition and goes over it with the parents, one of three things can happen.¹⁴⁸ The parents can confirm the allegations, deny the allegations, or volunteer facts that would constitute more allegations if the State knew of them.¹⁴⁹ Allegations tend to result in predictable menus of services, so a parents' attorney can roughly estimate the minimum amount of time for parents to reach reunification and closure of the case.¹⁵⁰ The time required to take a case to trial and appeal is also roughly calculable and is often equal to or longer than the amount of time expected for the parents to participate in services.¹⁵¹

Aggressive trial practice in child welfare cases is often unsuccessful and frequently backfires. The lack of exclusionary rules makes pretrial winnowing of facts almost nonexistent: the evidence will likely be what is written in the petition and most conflicting evidence

¹⁴⁷ *Id.* at 16.

¹⁴⁸ *See* FLA. STAT. § 39.506(1) (2015) (indicating that a parent will also have to appear for an arraignment hearing after the State files a dependency petition, and the parent will also have to “admit, deny, or consent to findings of dependency alleged in the petition”).

¹⁴⁹ *See id.*

¹⁵⁰ *See generally id.* (stating that once a parent admits or consents to the petition a disposition hearing will be held within fifteen days, but if a parent denies allegations there will need to be another hearing in order to adjudicate the parent within thirty days unless there is a continuance); *id.* § 39.521 (stating the process of a disposition hearing where a judge makes decisions regarding the appropriate placement for the child, determines the necessary protections and services, and reviews or approves the suggested case plan with specific goals and steps for the parent).

¹⁵¹ *See* Herring, *Legal Representation*, *supra* note 110, at 607 (discussing that children spend a long period in foster home awaiting permanency).

will be resolved against the parents.¹⁵² A defense predicated on aggressive denial of the allegations, moreover, can draw the State's attention to the case in negative ways, especially when the system does not have sufficient resources for thorough investigation of every case beyond the initial intake.¹⁵³ Aggressive defense also raises red flags in a system in which the main fitness measure is called "compliance."¹⁵⁴ For most parents' attorneys and most cases, the recommendation to take a plea and begin engaging in services quickly is easy advice.¹⁵⁵ Whether the parents accept the advice, of course, is beyond the attorney's control.¹⁵⁶

The attorney's conundrum arises in how to advise a parent who volunteers additional needs that could be addressed in the case plan. On one hand, leaving the problem unaddressed could result in a failed reunification.¹⁵⁷ On the other hand, volunteering issues to the State

¹⁵² See generally § 39.502(3) (indicating that the petition will contain the allegations of facts which, if true, establish that the child is a dependent child).

¹⁵³ Soledad A. McGrath, *Differential Response in Child Protection Services: Perpetuating the Illusion of Voluntariness*, 42 U. MEM. L. REV. 629, 630 (2012). This dynamic cannot be understated. As written by Amy Sinden:

A key word in the prevailing social work discourse [of child welfare] is thus "cooperation." This word often forms the focal point of the meetings and conversations that take place in the hallways of the courthouse: "If mom would just cooperate" Running as an undercurrent to this refrain are powerful cultural stereotypes and expectations attached to motherhood. Mothers are supposed to be nurturing, loving, and above all protective of their children. Conflict is viewed as harmful to the child, and therefore the mother accused of child abuse who creates conflict by failing to "cooperate" harms her child a second time. This language of "cooperation" cloaks the substantial power differential that exists between the child welfare agency and the accused mother.

Amy Sinden, *"Why Won't Mom Cooperate": Critique of Informality in Child Welfare Proceedings*, 11 YALE J.L. & FEMINISM 339, 354 (1999).

¹⁵⁴ Sinden, *supra* note 153, at 354, 389.

¹⁵⁵ See McGrath, *supra* note 153, at 659. A plea should not be mistaken for voluntary participation, however. *Id.* at 666-67.

¹⁵⁶ See FLA. R. JUV. P. 8.325(c) (stating that consent must be given voluntarily and with full understanding).

¹⁵⁷ See § 39.806(1)(e); M.S. v. Dep't of Children & Families, 765 So. 2d 152, 153 (Fla. Dist. Ct. App. 2000) (holding that a final judgment terminating a mother's parental rights was appropriate where the mother failed to substantially comply with a

could result in performance agreement terms that could later be used against the parent at a termination trial.¹⁵⁸ But in child welfare cases the goal is successful reunification, and parents who are seeking reunification in good faith are left with a dangerous disclosure dilemma.¹⁵⁹ Help comes with a catch.

The dilemma is made worse by the fact that the parents are incentivized to withhold information even from their own therapeutic treatment providers.¹⁶⁰ The performance agreement phase of the case involves intense monitoring and participation in services and therapies with no right to confidentiality.¹⁶¹ The purpose of abrogating the psychotherapist-patient privilege is to ensure that judges have supposedly comprehensive information about parents when making decisions regarding the best interests of the children.¹⁶² The result is that the parents' disclosure dilemma extends even to the people seeking to help them most.

Because the rational assumption under this system is that parents are withholding information, the detection of small problems are assumed to be evidence of much bigger undisclosed issues.¹⁶³ It is therefore a rational strategy, even for parents operating in good faith, to wait and see whether an undisclosed issue will become serious enough

case plan). *See generally* Bailie, *supra* note 7 (illustrating the importance of having a service plan that is tailored to the specific needs of a family and recognizes each family's unique circumstance in order to provide the best opportunity of success and reunification).

¹⁵⁸ *See, e.g.*, *R.N. v. Dep't of Children & Families*, 25 So. 3d 697, 698-99 (Fla. Dist. Ct. App. 2010) (illustrating the possibility of an unaddressed issue being used against a parent where a court amended a case plan following an incident that indicated the need for additional services).

¹⁵⁹ *See* § 39.522(2), (3) (establishing the standards for granting reunification). *But see supra* note 46 and accompanying text.

¹⁶⁰ *See, e.g., R.N.*, 25 So. 3d at 698-99.

¹⁶¹ § 39.204.

¹⁶² *See id.* § 39.001.

¹⁶³ In the Children & Youth Law Clinic students read *The Case of Marie and Her Sons* on the first day of class. The article highlights how easily the child welfare system can ignore overwhelming evidence of progress in a parent's life in favor of isolated examples of set-backs. Daniel Bergner, *The Case of Marie and Her Sons*, N.Y. TIMES (July 23, 2006), http://www.nytimes.com/2006/07/23/magazine/23welfare.html?pagewanted=all&_r=0.

to be detected by the State. The detection of new issues sometimes occurs through disclosure by the parents, but often is the result of vague “concerns” of the other parties or judge.¹⁶⁴ These concerns are often documented in the case plan as though they were adjudicated facts.¹⁶⁵ The result is a ratcheting upward of tasks based on information that has not undergone adversarial testing. A reasonable defense attorney takes this into account when determining whether it is better for parents to disclose early and appear cooperative or to withhold information and appear more fit. If the parents’ attorney miscalculates, a late-raised issue could delay permanency by requiring reassessment of the case, but a prematurely raised issue could result in needless tasks that overwhelm the parents and increase the chances of failure and eventual termination of parental rights.¹⁶⁶

The disclosure dilemma extends beyond just the need for services and also limits the parents’ incentive to raise objections to the quality of services. Parents who attend therapy for three months and do nothing in the sessions but endure stories about the therapist’s vacation can either report the therapist’s conduct and redo the sessions with someone else (thus delaying the case), or accept the certification that they finished the service and hope that whatever benefit they would have received from the therapist does not prove to be the difference between a successful and failed reunification.

¹⁶⁴ See *C.D. v. Dep’t of Children & Families*, 974 So. 2d 495, 502 (Fla. Dist. Ct. App. 2008) (“While the trial court is permitted, and indeed required, to consider the opinions of the caseworker and guardian ad litem, it cannot base its decision on unsupported assertions.”). “Concerns” are rampant in child welfare cases, especially in the middle of the case where the rules do not apply. See *id.* At trials, at least, the concerns must be substantiated, but that is often too late. See *id.*

¹⁶⁵ *Makos v. Prince*, 64 So. 2d 670, 673 (Fla. 1953) (finding that “the taking of evidence, subject to established safeguards, is the best way to resolve disputes concerning adjudicative facts.”).

¹⁶⁶ Compare *R.N. v. Dep’t of Children & Families*, 25 So. 3d 697, 698-99 (Fla. Dist. Ct. App. 2010) (where ostensibly full disclosure resulted in a case plan with seventeen tasks and where incidents of spousal abuse after case plan development resulted in additional tasks being assigned, respectively), with *S.Q. v. Dep’t of Health & Rehab. Servs.*, 687 So. 2d 319, 324-25 (Fla. Dist. Ct. App. 1997) (finding that the fact that the mother failed to get timely psychiatric treatment or counseling to comply with the permanency plan did not establish prospective abuse or neglect by clear and convincing evidence; thus, did not support termination of parental rights).

The disclosure dilemma even applies to the parents' ability to report mistreatment of their own child in the system. Parents' attorneys report that concerned parents are frequently seen as attempting to disrupt the placement for their own advantage, especially when the child disclosed only to them. This is particularly and tragically ironic for the child, who may feel the most comfortable reporting maltreatment to the parents when all of the other adults now in the child's life are part of the same abusive system. A parents' attorney presented with information of maltreatment in the foster home would reasonably weigh the effect of the report coming from the parents and look for strategies to get the information into the open without it reflecting negatively on the parents.

The problems listed above are traceable to a fundamental principle of child welfare law: noncompliance with even an arbitrary performance agreement is tantamount to child maltreatment worthy of termination of parental rights.¹⁶⁷ This policy, developed by the legislature as a response to the court's insistence that terminations could only be predicated on actual harm, was meant to streamline cases and prevent parents from dragging out an inevitable result with lackadaisical efforts.¹⁶⁸ This punitive proceduralization of child welfare law has had the unanticipated consequence of incentivizing the same behaviors that it sought to prevent.¹⁶⁹ A rational parent's strategy under this regime is to perform the tasks requested from the State and not a single thing more, thus allowing substantive risks of harm to the child to remain undisclosed.¹⁷⁰ The goal of promoting the well-being of the children in the system is completely undermined by isolating the party with the most information and strongest incentive to advocate on behalf of that child.

¹⁶⁷ See, e.g., *Dep't of Health & Rehab. Servs. v. S.H.*, 666 So. 2d 1039, 1040 (Fla. Dist. Ct. App. 1996).

¹⁶⁸ NANCY M. PINDUS ET AL., TOPICAL PAPER #6: ENSURING QUALITY IN CONTRACTED CHILD WELFARE SERVICES 8 (2008), <https://aspe.hhs.gov/sites/default/files/pdf/75631/report.pdf>.

¹⁶⁹ 1991-92 SAN DIEGO CTY. GRAND JURY, FAMILIES IN CRISIS: REPORT NO. 2 (1992).

¹⁷⁰ See, e.g., *Reunification Plans: Recipes for Failure*, LIFTING VEIL, <http://www.liftingtheveil.org/reunificationplans.htm> (last updated Oct. 2, 2010).

VI. PROMOTING EFFECTIVE ASSISTANCE

Before making recommendations about what could be, it is important to recognize innovations in parents' representation that already exist and are working well.¹⁷¹ High-quality representation models, such as those described by Elizabeth Thornton and Betsy Gwin, have achieved impressive results.¹⁷² These projects include highly motivated and innovative practitioners and focus on changing the structure of the representation, usually by decreasing caseloads and increasing social support for the parents.¹⁷³ In contrast, this Article suggests changes to the structure of the legal system that fostered the less than high-quality behaviors that these models are measured against.¹⁷⁴ We believe these strategies go hand-in-hand. The fundamental premise that high-quality representation models and our structural critiques share is that parents in the child welfare system are better treated as subjects than objects.¹⁷⁵

A. *Aligning Substance and Process*

The presence of a ground for termination of parental rights based on "noncompliance" is a significant threat to parental

¹⁷¹ See Elizabeth Thornton & Betsy Gwin, *High-Quality Legal Representation for Parents in Child Welfare Cases Results in Improved Outcomes for Families and Potential Cost Savings*, 46 FAM. L.Q. 139, 146-47 (2012).

¹⁷² *Id.* at 148-49, 151-52. Some of the outcomes of those programs included:

- (1) providing parents with quality representation reduces the time that children spend in foster care and leads to quicker permanency for children across all permanency outcomes;
- (2) providing parents with quality representation leads to faster and more successful family reunifications;
- and (3) providing parents with representation during the child protective services investigation reduces the need for foster care placement.

Id.

While the results from these programs provide impressive outcomes for the families and children involved, they can also reduce federal, state, and county costs associated with foster care. *Id.*

¹⁷³ *Id.* at 142, 146, 148.

¹⁷⁴ See *infra* Section VI.B.

¹⁷⁵ See *infra* Section VI.B.

participation.¹⁷⁶ For a person to engage in a process requires the person to be able to voice disagreement and grievances without fear of reprisal.¹⁷⁷ For all the reasons discussed above, threatening parents who are participating in good faith with termination results in counterproductive isolation of the parents.¹⁷⁸ Similarly, terminations based solely on the passage of time should be equally eliminated.¹⁷⁹ As the case studies show, trial courts readily recognize that families resolve their problems (or do not) at different paces.¹⁸⁰ The presence of time-based doctrines that are not being universally enforced only serves to punish families who are deemed less worthy of extensions, while punitively strict adherence to time limits only creates arbitrary outcomes based on events outside of anybody's control.¹⁸¹

Once parents are free to fully participate, courts and the Legislature should move towards incentivizing parents and their attorneys to actively engage in the process.¹⁸² Case plans should no longer be a tool of coercive control over the parents but a mechanism for all parties and participants to identify barriers and opportunities for promoting the well-being of the child and holding responsible parties

¹⁷⁶ See Garrison, *supra* note 41.

¹⁷⁷ FLA. BAR STANDING COMM. ON THE LEGAL NEEDS OF CHILDREN, FLORIDA GUIDELINES OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES 14 (2014 ed. 2006), [https://www.floridabar.org/TFB/TFBResources.nsf/Attachments/5857B88CB9C5417A85257B870075DFAF/\\$FILE/LegalNeedsofChildren_Dependency.pdf?OpenElement](https://www.floridabar.org/TFB/TFBResources.nsf/Attachments/5857B88CB9C5417A85257B870075DFAF/$FILE/LegalNeedsofChildren_Dependency.pdf?OpenElement) (explaining the attorney-client privilege for a guardian ad litem attorney for a child).

¹⁷⁸ See *supra* Section IV.A. In fact, a parent's "good-faith" effort may be sufficient to prevent termination of parental rights in some states. See, e.g., ME. REV. STAT. tit. 22, § 4055(1)(B)(2)(b)(iv) (2015).

¹⁷⁹ See *D.F. v. Fla. Dep't of Children & Family Servs.*, 877 So. 2d 733, 733-35 (Fla. Dist. Ct. App. 2004) (holding that denying a continuance may be sufficient grounds to reverse a judgment for termination of parental rights because it violates the due process rights of the parent).

¹⁸⁰ See Overview of Case Studies, *supra* note 24.

¹⁸¹ *But see J.B. v. Fla. Dep't of Children & Family Servs.*, 768 So. 2d 1060, 1067 (Fla. 2000) (holding that time provisions may be necessary to prevent a parent's neglect from defeating the proceeding).

¹⁸² See Kathleen A. Kearney et al., *Performance-Based Contracting in Residential Care and Treatment: Driving Policy and Practice Change Through Public-Private Partnership in Illinois*, CHILD WELFARE J., Mar. 2010, at 39 (citing the need for the courts and legislature to begin incentivizing active engagement in the process).

accountable. Beginning with the State's obligations, the procedural rules should encourage the litigation of the State's reasonable efforts in a timely manner so that problems are resolved expeditiously.¹⁸³ The current method of promoting reasonable efforts comes too late and with only one penalty: the State cannot terminate a parent's rights, thus returning the parent and child back to the faulty dependency proceedings.¹⁸⁴ As critics have pointed out, this is a poor accountability mechanism.¹⁸⁵

This Article proposes instead a system of mutual accountability between the parents and the State. Parents should have an obligation under this system to raise problems early and often so that they can be resolved by the parties and the court. To that end, all "reasonable efforts" litigation—including the provision of services, visitations, placement, and other terms of the case plan—should be raised during the dependency phase. Otherwise, the court should deem the reasonable efforts waived in the termination phase.¹⁸⁶ No case should proceed to a termination trial with the parents' reasonable efforts objections still pending.¹⁸⁷ So that parents are not punished for their attorney's inaction, failure of an attorney to raise an obvious reasonable efforts objection should be grounds for a finding of ineffective assistance and

¹⁸³ See Calkins, *supra* note 9 (referring to the need for procedural rules which encourage timely efforts).

¹⁸⁴ See generally CHILD WELFARE INFO. GATEWAY, *supra* note 133 (showing that all states require reasonable efforts).

¹⁸⁵ See Herring, *Inclusion*, *supra* note 76, at 140 (discussing the inclusion of the Reasonable Efforts Requirement in Termination of Parental Rights Statutes).

¹⁸⁶ See generally Patricia Rudden, *An Analysis of Collaborative Courts in Child Welfare: Santa Clara County Family Wellness Court and Dependency Drug Treatment Court*, in BASSC EXECUTIVE DEVELOPMENT TRAINING PROGRAM PARTICIPANTS' CASE STUDIES CLASS OF 2011, at 55, 60 (2011), http://mackcenter.berkeley.edu/assets/files/edp_cases/CHI/TOC-CHI-113.pdf (explaining that in a new pilot court for maltreated infants and toddlers, parents engage in completing their case plans immediately because the reunification time period is only six months).

¹⁸⁷ See generally CHILD WELFARE INFO. GATEWAY, *supra* note 133 (showing that all states require some sort of reasonable efforts, and although reasonable efforts are required, "the child's health and safety constitute the paramount concern in determining the extent to which reasonable efforts should be made").

return to the dependency phase.¹⁸⁸

To balance out this strict requirement on parents, reasonable efforts objections should be subject to plenary, but expedited appellate review.¹⁸⁹ Errors in case planning, and other conditions of the case, should be corrected early so that they are not compounded over years until finally reviewed at a termination trial.¹⁹⁰ However, to discourage the need for appellate review, attorneys' fees should be charged directly against the contracted private agency for unreasonably opposing a parent's motion or objection instead of remedying the identified problem. More detail on possible fee structures is found in the next Section.

Conversely, the State has an interest in holding parents accountable to their children as well.¹⁹¹ Good-faith participation by the parents should include meaningful efforts to change conditions that parents actually control.¹⁹² To help parents appropriately identify their own needs and abilities—and the needs of their children—the State should provide funding for parents to retain their own social workers or “reunification specialists” through their attorney as is done in other

¹⁸⁸ *Id.*

¹⁸⁹ After a recent amendment to the Florida Rules of Appellate Procedure, one district court ruled that orders on motions that fully resolve the issues of the motion are directly appealable. *W.W. v. Guardian Ad Litem Program*, 159 So. 3d 999, 1000-01 (Fla. Dist. Ct. App. 2015). This would appear to permit full appeal of any motion heard during the dependency phase, but the practical effect of this shift is yet to be seen. Compare *id.* (relating to the amendment of FLA. R. APP. P. 9.130(a)(4)), with *Dep't of Health & Rehab. Servs. v. Honeycutt*, 609 So. 2d 596, 596 (Fla. 1992) (holding that child dependency proceedings are not “domestic relations matters”).

¹⁹⁰ See Gary Padgett, *The Right to Counsel for Indigent Parents in Termination Proceedings: A Critical Analysis of Lassiter v. Department of Social Services*, 21 J. FAM. L. 83, 96-102 (1992) (discussing the substance and nature of termination proceedings).

¹⁹¹ See generally Matthew I. Fraidin, *Heuristics, Cognitive Biases, and Accountability: Decision-Making in Dependency Court*, 90 CLEV. ST. L. REV. 913, 930 (2013) (explaining that dependency cases involve decisions with high stakes that can mean life and death to the children involved).

¹⁹² See generally Huntington, *Missing Parents*, *supra* note 7, at 140-44 (discussing the goals of the problem-solving model of the child welfare system, its benefits, and how control, autonomy, and power are not easy concepts, especially in the contexts of poverty, mental health, and interpersonal violence). The child welfare system in general could do better with these complexities. *Id.*

states.¹⁹³ The State should create a marketplace where parents can choose social workers with experience with their particular needs, and parents should be free to fire or replace their reunification specialist without interference from the State or court. Furthermore, the specialist should be bound by the attorney-client privilege until such time as that privilege is waived, so that parents are able to discuss all areas of their lives free from fear of reprisal by the State.¹⁹⁴

These innovations, consistent with the high-quality representation models discussed above, would provide parents with control over the quality and type of assistance they receive, would align the child welfare service market with the needs of parents and families and not the needs of the agencies that currently contract with them, and, most importantly, would help transform the process into one focused on solving identified problems.¹⁹⁵

B. Aligning Payment and Process

The Florida Supreme Court has long recognized that compensation is integral to ensuring that counsel provides meaningful and effective representation.¹⁹⁶ Yet, even a cursory analysis of the existing fee structure shows flaws that undermine the goal of maximizing parental participation.¹⁹⁷ Our review of the billing records

¹⁹³ See, e.g., Joseph T. Flies-Away & Carrie E. Garrow, *Healing to Wellness Courts: Therapeutic Jurisprudence*, 2013 MICH. ST. L. REV. 403, 450 (citing Nicolette M. Pach, *An Overview of Operational Family Dependency Treatment Courts*, 6 DRUG CT. REV. 67 (2008)) (explaining how a “family wellness court” utilizes team members to represent and respond to different roles for each family member).

¹⁹⁴ See generally FLA. BAR STANDING COMM. ON THE LEGAL NEEDS OF CHILDREN, *supra* note 177 (explaining the attorney-client privilege for a Guardian ad Litem attorney for a child).

¹⁹⁵ See *supra* Part V.

¹⁹⁶ See *Remeta v. State*, 559 So. 2d 1132, 1134-36 (Fla. 1990) (applying *Makemson* and *White* principles to counsel appointed pursuant to statute); *White v. Bd. of Cty. Comm’rs of Pinellas Cty.*, 537 So. 2d 1376, 1380 (Fla. 1989) (stating that statutory fee caps create “a risk that counsel will spend fewer than the hours required to represent the defendant” and the “relationship between an attorney’s compensation and the quality of his or her representation cannot be ignored”); *Makemson v. Martin Cty.*, 491 So. 2d 1109, 1110 (Fla. 1986) (holding that inflexible fee caps are unconstitutional).

¹⁹⁷ *Makemson*, 491 So. 2d at 1112. (holding that the compensation scheme found in

shows that 98% of dependency invoices were billed at the flat rate.¹⁹⁸ It was not possible to calculate the hourly rate of compensation for attorneys who accepted the flat rate because they were not required to submit a record of their hours, but the compensation structure—\$800 at the conclusion of the dependency trial, \$200 for each year thereafter, and \$1,000 at the filing of a petition to terminate the parent’s rights—causes serious concerns.¹⁹⁹ At the dependency phase, the current structure disincentivizes work to be performed in the “donut hole” which comes between the payment of \$800 at disposition and the \$200 payment a year later.²⁰⁰ It instead encourages attorneys to allow difficult cases to stagnate to the point the State files a petition for termination.²⁰¹ The attorney must then only make minimally effective objections at a trial to collect \$1,000.²⁰²

It is troubling that although parents’ attorneys could take a fewer number of cases and bill hourly for intensive, high-quality work, in general they do not.²⁰³ This Article has suggested that this is in part because legal doctrines discourage parents from actually taking vocal positions on their cases.²⁰⁴ Consideration must also be given to the usual suspect when discussing indigent defense: perhaps the funding structures, despite their apparent generosity, serve to dissuade attorneys

Florida Statute section 925.036 is unconstitutional when it is “applied in such a manner as to curtail the court’s inherent power to ensure the adequate representation of the criminally accused”).

¹⁹⁸ More than half of cases billed hourly were from one particular county. An adjacent county had the only other significant number at 13%. For termination of parental rights cases, 99% of invoices were filed at the flat rate. Again, the same county accounted for half of the termination cases where excess fees were sought. See Overview of Case Studies, *supra* note 24.

¹⁹⁹ See FLA. STAT. § 27.5304(6)(a) (2015).

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² See *id.*

²⁰³ See *supra* Section IV.C.

²⁰⁴ See generally Charisa Smith, *The Conundrum of Family Reunification: A Theoretical, Legal, and Practical Approach to Reunification Services for Parents with Mental Disabilities*, 26 STAN. L. & POL’Y REV. 307 (2015) [hereinafter Smith, *The Conundrum of Family Reunification*] (discussing the discouragement parents face with the legal doctrine in place).

from engaging in high-quality representation.²⁰⁵ The problems of indigent defense funding extend far beyond the child welfare system, and solving it is beyond the scope of this project. There are alternative fee structures that may function better than the current “phase-by-phase” fixed-fee system.²⁰⁶ Each of these alternatives highlights a problem with the current system.

The simplest fee structure would be an annual salary for parents’ attorneys who agree to accept a minimum number of clients, even if those numbers are not steady.²⁰⁷ The current fee structure discourages attorneys from entering and remaining in the field of parent representation because payment is withheld until disposition and a stable wage is contingent on receiving a steady flow of new clients each month.²⁰⁸ The cyclical rise and fall of child welfare investigations further exacerbates an attorney’s financial uncertainty and pushes them towards other areas of law with higher rates and steadier client streams.²⁰⁹ One goal of a fee structure should be to minimize disruptions in the workforce.²¹⁰ A system in which a smaller number of attorneys commit to a career in child welfare work would appear superior to a system in which a larger number of attorneys constantly dip in and out.

A second alternative—unit fees—would compensate attorneys for the actions they perform on their cases.²¹¹ A simple unit-fee system would assign fixed rates to tasks such as reviewing a case plan, attending a judicial review hearing, or interviewing a witness or service provider.²¹² Unit fee pricing could be used to incentivize parent participation by assigning higher rates to attorney actions that further the client’s involvement in the case, such as filing a motion or

²⁰⁵ See Susanne M. Bookser, *Making Gault Meaningful: Access to Counsel and Quality of Representation in Delinquency Proceedings for Indigent Youth*, 3 WHITTIER J. CHILD & FAM. ADVOC. 297, 305-06 (2004).

²⁰⁶ See JERRY M. CUSTIS, LITIGATION MANAGEMENT HANDBOOK § 4:25 (2014).

²⁰⁷ See *id.* § 4:13.

²⁰⁸ See *id.*

²⁰⁹ See *id.*

²¹⁰ See *id.*

²¹¹ See *id.*

²¹² See *id.*

objection, while assigning lower rates to actions that are simply compliance monitoring and court appearance.²¹³ The downside to unit fees is that attorneys must document their tasks; though by being less granular than hourly billing, unit fee pricing is also less onerous.²¹⁴ The current system compensates reading a judicial review report prepared by the State at the same rate as proactively investigating a case.²¹⁵

A third alternative is to create stronger incentives for parents' attorneys to investigate and litigate the State's noncompliance through automatic fee-shifting provisions that put the cost of enforcement on the private agency that is found responsible for the breach.²¹⁶ One benefit of fee shifting is that it can be handled at the trial level between the parties, and payment can be immediate.²¹⁷ One downside is that it requires the attorney to document time, which could result in litigation over the appropriateness of fees.²¹⁸ The current system leaves quality review to contract managers who may have imperfect information about the experiences of families engaged in those services.²¹⁹

These alternatives are just a starting point for discussion. Any full study into the compensation system must first examine the reasons that attorneys currently choose not to seek fees in excess of the flat rate. Do attorneys believe that they must show that the case involved "extraordinary issues" in order to be paid for the hours they worked? Are attorneys stymied by the hassle of recording time and litigating their right to the fee? Do they refrain from seeking excess fees because

²¹³ *See id.*

²¹⁴ *See id.*

²¹⁵ *See id.*

²¹⁶ *See Maroney, Angry Judges, supra* note 138. *See generally* Maroney, *Emotional Regulation, supra* note 138 (considering a judge's emotional reactions during sentencing).

²¹⁷ *See CUSTIS, supra* note 206, § 4:1 (finding that attention should be given to "matching litigation costs to the value provided," "adjusting the upside and downside risks as between company and outside counsel," "improving the predictability of fees," and "keeping work quality high").

²¹⁸ *Id.* Even with these drawbacks, private enforcement may still be more efficient and effective than the current quality assurance mechanisms focused solely on contract performance monitoring and aggregate outcome measures. *Id.*

²¹⁹ *See id.* § 7:6 (finding the quality of cases is lowered as more individuals become involved).

of the real or perceived threat that doing so will cause them to be removed from the registry in retaliation? Is there simply not enough for them to do on any given case? Extrinsic barriers to attorney engagement must be addressed irrespective of the fee structure adopted.

C. *Studying Quality Representation in Florida*

While the State has long guaranteed parents the right to appointed counsel in both dependency and termination of parental rights cases, there has never been a concerted effort to ensure that attorneys actually provide parents with meaningful and effective representation.²²⁰ There is no quality control or quality assurance mechanism associated with the agency that compensates private court-appointed counsel.²²¹ Neither the Florida Bar nor the Florida Supreme Court has undertaken an evaluation of the performance of parents' counsel.²²² In contrast to counsel for dependent children, parents' counsel do not even have a set of guidelines or standards to guide practice or serve as a starting point for measurement.²²³

Recognizing that the project of measuring the "quality" of representation is itself controversial and the lack of data on representation of parents in Florida is problematic, we propose the following questions for study.²²⁴

²²⁰ See *infra* Sections VI.A-B.

²²¹ The Justice Administrative Commission serves as the State's budget entity for funding the Office of Criminal Conflict and Civil Regional Counsel as well as for contract attorneys. JUST. ADMIN. COMMISSION, <http://www.justiceadmin.org> (last visited Apr. 18, 2016).

²²² Florida has an integrated bar, so all lawyers licensed to practice are members of the Florida Bar. *Regulation of Lawyer Conduct*, FLA. B., <http://www.floridabar.org/tfb/TFBLawReg.nsf> (last visited Apr. 18, 2016). The Florida Bar and the Florida Supreme Court share responsibility for bar admission and the regulation of lawyer conduct. *Id.*

²²³ The Florida Bar Standing Committee on the Legal Needs of Children has promulgated the "Guidelines for Practice for Attorneys Who Represent Children in Abuse and Neglect Cases." See FLA. BAR STANDING COMM. ON THE LEGAL NEEDS OF CHILDREN, *supra* note 177.

²²⁴ See *supra* Section V.B.

What standards do we want for parent representation, and how should they be taught and enforced? The American Bar Association has promulgated Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases that can either be adopted wholesale or adapted to be specific to Florida.²²⁵ Absent a specific list of steps that competent counsel is required to take, neither the court nor the client may have an understanding of the minimal acts counsel should undertake.²²⁶ Once standards of representation are in place, the next logical step is to set up a review system to determine whether counsel are meeting those standards in each case.²²⁷ The State should not continue to compensate lawyers who do not fulfill the minimum expectations of representation in each case.

Is there a difference between staff attorneys and private attorneys, and is that problematic? A second area for future inquiry is whether there is a substantial difference between the representation provided by the offices of civil regional counsels and the representation provided by court-appointed private attorneys.²²⁸ And, given that the regional counsel offices are independently run by appointed heads, is there a difference even among them? Such a difference would matter because if parents under each representation model receive differing treatment based on nothing more than the order they were standing in on the first day of court, then that would appear to raise significant

²²⁵ See generally AM. BAR ASS'N HOUSE OF DELEGATES, *supra* note 85 (finding and identifying “important directions for lawyers representing children in juvenile court matters generally”).

²²⁶ *Id.*

²²⁷ See generally Jilian Cohen & Michelle Cortese, *Cornerstone Advocacy in the First 60 Days: Achieving Safe and Lasting Reunification for Families*, 38 ABA CHILD L. PRAC. 3 (2009) (finding that the State may want to promote and evaluate use of the best practice “Cornerstone Advocacy” model which focuses parent representation on four cornerstone activities: placement, services, conferences and visitation to support family reunification). In addition, Cornerstone Advocacy was created by the New York City Center for Family Representation and first explained in Jilian Cohen & Michelle Cortese, *Cornerstone Advocacy in the First 60 Days: Achieving Safe and Lasting Reunification for Families*, 38 ABA CHILD L. PRAC. 3, 1-2 (2009).

²²⁸ See INDICATORS OF SUCCESS FOR PARENT REPRESENTATION 1 (2015), http://www.americanbar.org/content/dam/aba/administrative/child_law/ParentRep/Indicators-of-Success.authcheckdam.pdf.

equal protection issues.²²⁹ Given that most “first” parents are mothers while fathers are found later and appointed private counsel, the issue may deserve heightened scrutiny.²³⁰

What role does geography play in access to quality representation? Geography appeared to play a role in litigation practices among private attorneys.²³¹ Ripe for study is also whether there is a difference in the “outputs” of counsel depending on location and their status as private or staff. Such a study should explore if staff attorneys at different regional counsel offices contest more petitions, file more motions, attend more staffings, and communicate with clients more than private counsel.

The studies of high-quality representation models suggest that such variables matter greatly.²³² If the split use of offices and private attorneys in Florida is causing different outcomes for different families, then that must be addressed—not by lowering the bar but by raising it for everyone, so that every child has an equal opportunity for successful return to the home. The availability of competent counsel with adequate resources to do the job should not vary by the accident of geography or whether the client is the second parent named on the petition.

VII. CONCLUSION

Prior to the Florida Supreme Court’s ruling on ineffective assistance of counsel in termination cases, the lack of a standard and procedure stood as a conspicuous omission, suggesting that parents’ struggles to retain their parental rights were nothing but selfish roadblocks to their children’s well-being.²³³ The creation of the standard filled an unsightly gap but did so in a way that threatened to

²²⁹ See U.S. CONST. amend. XIV, § 1; FLA. CONST. art. I, § 2.

²³⁰ See, e.g., *In re D.B.*, 385 So. 2d 83, 87 (Fla. 1980).

²³¹ For example, the large variance in the use of expert witnesses by private attorneys by circuit. Overview of Case Studies, *supra* note 24; Robert Latham & Robin Rosenberg, Data Write-Up (June 17, 2015) (unpublished manuscript) (on file with authors).

²³² See *supra* note 100 and accompanying text.

²³³ See *supra* Part V.

cast unarguably bad lawyering as “effective” just because a parent cannot prove but-for causation.²³⁴ Without strong expectations for professional conduct and a clear understanding of the connection between the parents’ representation and the well-being of their child, the effective assistance standard risks further entrenching the idea that families who need the most help should reasonably expect the least.²³⁵

This does not have to be the case. The system should no longer expect parents to be quietly thankful for unnecessary, inefficient, or ineffective interventions, and parents should no longer have to fear raising concerns about both quality and safety for themselves and their children—especially under a threat of termination of parental rights. A robust doctrine of effective assistance by parents’ attorneys is one step in a system where its own effectiveness is in dire need of repair.

²³⁴ See *supra* Section V.A.

²³⁵ See *supra* Part VI.