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A Better Day for Children: A Study of Florida's Dependency System with Legislative Recommendations

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Michael T. Dolce *

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History, despite its wrenching pain,
 Cannot be unlived, but if faced
 With courage, need not be lived again.

Maya Angelou
 excerpted from,
On the Pulse of Morning

I. A TYPICAL DAY

Everyday in Florida children are placed in foster care because of suspected abuse or neglect at the hands of their parents. The intent is to protect, nurture, and restore these children, while either helping their families become healthy and safe for reunification or, where that is not possible or safe, placing the children with new permanent families. However, on any given day the very system intended to protect these children will neglect or abuse many of them, emotionally and physically. On any given day, Florida's foster children will have the following types of experiences: 1) A child will go to bed curled up in anguish because yet another day went by, more than thirty now, in which he has not seen his mother. A court-approved case plan, written by the Department of Children and Families ("DCF" or "Department"), dictates that mom be at work during all of the hours that supervised visitation is offered. For the same reason, another foster child hardly knows her mom and dad because she has seen them only a handful of times in the last three years. Knowing this, today her parents will give up and surrender

their parental rights without a trial; 2) A child will awake in foster care, very excited, anxiously expecting the arrival of her mother. She has counted the days. She may go to bed tonight weeping. Her DCF case worker will never arrive to supervise visitation; 3) A child's health and progress in the Department's care will be reviewed in court. The review will consist of about forty seconds of testimony from two witnesses. Coordinating calendars for the next review will take four minutes. The lawyers, guardian ad litem, parents, and caseworker will spend forty minutes waiting for the hearing to begin; 4) A two-year-old child will have spent five months with strangers in state care. No one has started the process of providing her father with constitutionally required legal notice of the case. As of today, neither the DCF nor its attorneys have asked anyone where her father is. They have not even asked for his name. Today, the Department, through its attorney, will ask for and receive from the court permission to take another sixty days to give him notice, for a total of seven months, even though the law requires this process to be completed in the first twenty-eight days of the case; 5) If she could understand, a child would see her mother offered a case plan for rehabilitative services today, five months after the infant was taken from her mother. By law, these services should have been offered no later than sixty days after the Department took the baby; 6) A nine-year-old child will conclude her ninth month without seeing or speaking to her mother. A DCF case worker felt that the mother's alcoholism recovery was not advanced enough to allow any contact. Today, a judge will find out for the first time that the case worker has violated state law which requires court approval to block visitation; 7) A child's mother will still not have met her attorney, even though the attorney was appointed by the court four months ago; 8) A child will awake in foster care, having been taken from his parents several months ago because of bruising. Today, the DCF will admit in court that they have "no basis to prove the source of the bruising;" 9) A child's mother will be in violation of her case plan because she lacks transportation to reach the services required in the plan, a fact known when the case plan was written and approved by the court; 10) A child's volunteer guardian ad litem will not appear for a statutorily-required shelter review to report on the child's condition and progress of the child's welfare; 11) An infant child will spend his fifth month in State care away from his mother, recovering from an injury alleged to have been caused by abuse at her hands. Today, the DCF's attorney will brag in the mother's presence that she is going to terminate the mother-son relationship at trial because of the alleged abuse. Tomorrow, for the first time, that attorney will obtain the child's medical records from before he was taken from his mom, records which may vindicate her; 12) A child's protective care will almost be ended when a DCF attorney, with the child's caseworker sitting silently at her side, assures a judge the case can be dismissed. The Department, she says, is satisfied the child can be safely

returned to her mother. The mother's attorney will sit idly by. The child's guardian ad litem will not attend the hearing, sending an unknowledgeable sit-in. A cautious judge will ask probing questions of the case worker, only to learn that the child's mother not only failed to complete required counseling and evaluation, but expressly refused to do so. The Department's attorney did not know. She did not speak with the caseworker before the court hearing; 13) A judge will order that a child's best interests be overseen by the Guardian Ad Litem Program. The child may not have an actual volunteer guardian for months. Today, the program is assigned to over 1000 cases, for which it does not have volunteers to serve as guardians, in just one judicial circuit; and 14) A brother and sister will be escorted from the home of foster parents they lived with for two and a half years. The foster parents had intended to adopt them. The adoption fell through because the foster parents could no longer stand the agony and uncertainty of waiting for the system to terminate the birth parents' rights to clear the case for adoption, and the children had become unmanageable, acting out on their frustrations with an uncertain future. The most recent continuance of the termination trial was for ten months. Given the advancing age of the children and their current disposition, child welfare professionals will comment that the children will likely be separated from each other if even one of them is lucky enough to be adopted.

These are real cases from a typical day in August 2000.¹ These types of things, and perhaps worse, will likely happen again today all over Florida to

1. The cases were observed by or reported to the author on August 7, 2000, or August 18, 2000, in the Broward County Courthouse, Florida's 17th Judicial Circuit (notes on file with author). Various child welfare professionals, including guardians ad litem, attorneys, and judicial officers confirmed on those dates that the cases and circumstances were typical. Interviews with child welfare professionals experienced in other Florida judicial circuits confirmed that the observations in the Seventeenth Circuit are relatively typical of other judicial circuits. Interview with Jeanette Wagner, Circuit Director, Seventeenth Judicial Circuit Guardian Ad Litem Program in Ft. Lauderdale, Fla. (Aug. 7 & 18, 2000); Confidential Interview with child welfare professional, private sector service provider (May 23, 2000); Interview with Howard M. Talenfeld, child attorney/class action attorney (Sept. 14, 2000); Interview with Ann C. Jones, Staff Attorney, Sixth Judicial Circuit in Orlando, Fla. (Aug. 30, 2000); Interview with Russell Querry, Staff Attorney, Sixth Judicial Circuit in Orlando, Fla. (Aug. 30, 2000); Confidential Interview with child welfare professional, public sector supervisory employee, in West Palm Beach, Fla. (Oct. 17, 2000); Telephone Interview with Victoria A. Vilchez, birth parent attorney, in West Palm Beach, Fla. (Aug. 25, 2000); Interview with Karen Gievers, child attorney/class action attorney, in Tallahassee, Fla. (June 26, 2000); Fourth Annual Dependency Court Improvement Summit, Aug. 30–Sept. 1, 2000, Orlando, Fla., pertinent public comments from a variety of child welfare professionals statewide were obtained at the DCF District 10 breakout sessions; Innovations in Dependency Practice workshop; Lawyers in the Courtroom workshop; and Case Conferencing workshop (notes of summit and all interviews on file with author).

children who the state is supposed to be protecting, nurturing, and restoring. These types of things, and worse, have been happening to Florida's foster children for decades, and Florida's children are not alone.²

Despite typical days like these, the DCF, the agency principally responsible for the welfare of Florida's dependent children, proclaims on its Internet site on the same typical day in August 2000 that some ninety-eight percent of the children receiving Department services are safe from abuse or neglect.³ Were the observed cases simply among the remaining two percent? Apparently not. Ample evidence indicates that far more than two percent of foster children are not safe from, at the very least, passive abuse or neglect by the dependency system of their basic needs and their interest in reunification with their families, or in achieving other permanent family arrangements. These problems are so endemic to the system that the child welfare community recognizes them with widely used terms, like "foster care drift" and "program abuse." For foster children, all too often the problems are viewed simply as a way of life.⁴ The problems are simply not defined officially as rendering children "unsafe," but they should be.

II. A STUDY OF FLORIDA'S DEPENDENCY SYSTEM

This article reports the findings of a study of Florida's child welfare and dependency system. The recommendations which follow propose legislative action to ensure that foster children in all cases can be expected to achieve the permanent and stable family placements that they need to thrive, and to ensure that dependency proceedings resolve as quickly as possible. These are not new or novel goals. These are long-held, existing goals of child welfare law which, this study finds, escape fruition in far too many cases. Tragically, child after child still spends excruciatingly long periods of time in foster care to the detriment of their safety and health—on average, over three years. Many children spend five, six, or even seven years of their childhood

2. Jill Chaifetz, *Listening to Foster Children in Accordance with the Law: The Failure to Serve Children in State Care*, 25 N.Y.U. REV. L. & SOC. CHANGE 1, 6 (1999), noting, *inter alia*, recognition within the child welfare community of the term, "program abuse," to describe the failure of foster care systems to provide stable homes and needed services for foster children. Also noted is the fact that by 1995, the foster care system in 22 states and the District of Columbia were under some form of court supervision for inadequate or inappropriate care of foster children. *Id.* at 8.

3. FLA. DEP'T OF CHILDREN & FAMILIES, AUGUST 2000 SITUATION REPORT M0077, available at http://www.state.fl.us/cf_web/news/mspt/sitr/0800.html. Of note, approximately the same statewide average is reported for children being safe from abuse and neglect while their families are receiving in-home services. *Id.* at FSP-017.

4. Confidential Interview with attorney for dependent children in Broward County, Fla. (July 26, 2000) (notes on file with author).

in foster care, leaving them day after typical day with uncertain futures, depriving many of them of nurturing childhoods. The children may survive physically, but far too many reach adulthood damaged, scarred, and weak.

To understand why our legislative and social goals for child welfare are not met in so many cases, this study examines extensive statistical and anecdotal evidence of a consensus in Florida's child welfare community that many foster children suffer from protracted uncertainty for their future in lengthy dependency proceedings, leaving them at risk of significant psychological damage. The study also looks across the nation and at the history of child welfare law and public policy to understand why, despite decades of efforts and better intentions, the dependency systems in Florida and elsewhere seem impervious to federal and state government efforts and mandates to expedite cases to ensure the safety and stability of children. Principally, the study concludes that the statutory assignment of responsibilities in the system itself fundamentally and adversely prevent efficacy on a case-by-case basis. This conclusion may well be contrary to the belief of many readers that the primary culprits are inadequate funding, failures of child welfare officials within the Department, or insufficient action by the judiciary. These matters will be explored, but placed in perspective.

The proposed solutions keep in mind two practical constraints of public policy. First, not all problems are best redressed by legislative action. Statutory reform will not always help when a problem arises and greater funding appropriations are not always needed simply because a problem exists. Second, problems of public policy typically take time to redress, often more time than is comfortable. Efforts to redress problems which are underway need to be considered, evaluated and given a respectful opportunity to succeed. Finally, the problems identified in this study are not all which are present in Florida's dependency system, but are limited to those which call into question the effectiveness of child welfare policy imposed statewide by statute.⁵

5. Other studies have concluded that child welfare system problems require the concerted efforts of the several participating groups, including a variety of non-legislative efforts. Donald N. Duquette et al., *We Know Better Than We Do: A Policy Framework for Child Welfare Reform*, 31 U. MICH. J.L. REFORM 93 (1997).

Our central message is that child welfare reform must be broad-based and interdisciplinary. No single group and no single element of a system or a community—social agencies, family advocacy groups, the courts, the state legislature, or a state administrative agency—has the ability to meaningfully improve foster care on its own.

Id. at 101. See also Donald N. Duquette et al., U.S. DEP'T OF HEALTH AND HUMAN SERVS., ADOPTION 2002: THE PRESIDENT'S INITIATIVE ON ADOPTION AND FOSTER CARE; GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCE FOR CHILDREN (June 1999), available at <http://www.acf.dhhs.gov/programs/cb/publications/adopt02/index.htm>;

III. CONCERNING METHODOLOGY AND HUSHED DISCLOSURES

The study was conducted by the author from May to November 2000. Interviews were conducted with over sixty public and private sector child welfare professionals throughout Florida, though many had experience in both. Included were attorneys and guardians ad litem for children, as were birth parent attorneys. Birth parents were interviewed, including one who had prevailed in litigation brought by the Department and two whose parental rights were ultimately terminated at trial. Foster parents were interviewed. Input was received from attorneys for the state at the circuit and statewide level, and from low and high-level supervisory officials and case-level workers at the DCF. Child protection investigators were interviewed, as were supervisory protective investigation officials. Court officials, including dependency judges, at the statewide and circuit level were also consulted. Citizens and parents who have made reports to the Child Abuse Hotline provided their perspectives and experiences. Professionals involved in the delivery of social services to dependent children and their families of origin were also interviewed. Some persons were interviewed multiple times as the study progressed.

Observations were made in visits to dependency court hearings in one Florida circuit and to Department service centers. Additional information, perspectives, and first hand accounts of what is and is not working in the dependency system were obtained over a three-day period at Florida's 2000 Annual Dependency Court Improvement Summit, co-sponsored by the Department and the Office of the State Courts Administrator and attended by over 1000 child welfare professionals from across Florida.

Applicable Florida and federal laws were examined, as were statutory approaches to child welfare in other states. Problems with child welfare experienced by other states and their reform efforts were also studied through written materials and interviews. State and federal government reports and studies of child abuse and neglect and the overall performance of the child welfare system were reviewed. Data, forms, various planning documents, and reports obtained from the DCF were examined. Several articles, commentaries, and books on the topic were considered.

In some instances, persons interviewed for this study asked not to be identified in any oral or written findings. Maintaining these confidences does not compromise the value of the information and perspectives received for two reasons. One, it appeared in each instance that confidentiality provided the reporter desired safety to discuss candidly facts and impressions from extensive experience in the dependency system. There was no sugges-

BETH A. BARRETT ET AL., HILLSBOROUGH COUNTY INFANT AND TODDLER STUDY 25–27 (Aug. 2000), *available at* <http://www.childrensboard.org/analysisreports.html>.

tion of malice. Two, information and perspectives provided in confidence proved to be consistent with the statistical data relied upon in this study, and anecdotal information and impressions tended to repeat themselves among reporters in varied parts of the state and of varied levels of authority. It is left to the reader to assess any significance of so many child welfare professionals requesting anonymity in this report. This study draws no conclusions from this fact.

IV. A NOTE ON DATA

While federal law requires that states, like Florida, which receive federal funding for their foster care system, maintain an information system which tracks, among other things, placement goals for all children in foster care,⁶ Florida is apparently having problems with the reliability of its data. Even basic data currently maintained and reported by the DCF, such as the number of children in foster care, can be significantly unreliable, though efforts are underway to solve this problem.⁷ For example, recently, children in one DCF District were reportedly uncounted by as much as 1000, depriving the system of funding opportunities.⁸ DCF reports reviewed for this study also revealed disparities in baseline performance measures and statistics. For example, the DCF Agency Strategic Plan for fiscal year 2000–2001 reports that in fiscal year 1997–1998, the rate of child protective investigations were 37.2 per 1000 children.⁹ The DCF Agency Strategic Plan for fiscal years 1999–2000/2003–2004, issued earlier, indicates that the rate was 36.2 per 1000 children.¹⁰ Similarly confusing is Department data reflecting that ninety-five percent of children who exited foster care over the past two years did not re-enter within twelve months, while data collected by the

6. 42 U.S.C. § 622(b)(9)(B) (1994).

7. Interview with Peggy Sanford, Assistant General Counsel, Fla. Dep't of Children & Families and Mary C. Allegretti, Chief, Child Protection Policy, Fla. Dep't of Children & Families, in Tallahassee (June 27, 2000).

8. Jacqueline Charles, *Foster Kids Often Lost in Shuffle*, MIAMI HERALD, Nov. 3, 2000, at 7B.

9. FLA. DEP'T OF CHILDREN & FAMILIES, FY 2000–2001 AGENCY STRATEGIC PLAN (PROGRAM FOCUS) 2 (Feb. 2000), available at http://www.myflorida.com/cf_web/myflorida/healthfamily/publications/bureaus/dcf/pubs.html.

10. FLA. DEP'T OF CHILDREN & FAMILIES, AGENCY STRATEGIC PLAN, FY 1999–2000/2003–2004 10, available at http://www.myflorida.com/cf_web/myflorida/healthfamily/publications/bureaus/dcf/pubs.html.

federal government reports that this was the case with only eighty-seven percent of Florida's cases.¹¹

V. PART I—CHILD WELFARE LAWS—AN EFFORT TO ENSURE THE BEST INTERESTS OF CHILDREN

A. *Legal Tender—The Influence of Federal Money*

State government intervention in cases of child abuse, neglect, and abandonment began in the late 1800s, when state governments joined private charitable and religious organizations for the first time in their efforts to protect and care for children. By the 1950s, all states had agencies to redress child abuse, neglect, and abandonment. Federal involvement began in 1935 with the expansion of the Social Security Act to include a child welfare services program. Notwithstanding a relatively minimal financial commitment up to the 1970s, totaling approximately \$200 million annually by the close of that decade, the last two decades have seen explosive growth in the federal commitment to approximately \$4.5 billion in 2000.¹² With that growth, the influence of federal policies on state child welfare laws and practices has become very significant.

Under Title IV-E of the Social Security Act, federal funding is to provide for "foster care and transitional independent living programs" for appropriate foster children, as well as assistance and incentives for adoption of special needs children.¹³ To be eligible for any federal funding, a state must submit a child welfare services plan (the "state plan") to the United States Department of Health and Human Services, which has been jointly developed by the state agency and the federal Department's Secretary.¹⁴ The state plan must meet several requirements, including that the applying agency "administers or supervises" the state's child welfare services and various other matters demonstrating compliance with the substantive and procedural requirements discussed here.¹⁵

11. U.S. DEP'T OF HEALTH AND HUMAN SERVS. CHILDREN'S BUREAU, CHILD WELFARE OUTCOMES 1998: ANNUAL REPORT 3-2-3, 5-59 (1998), available at <http://www.acf.dhhs.gov/programs/cb/publications/index.htm>.

12. Howard Davidson, *Child Protection Policy and Practice at Century's End*, 33 FAM. L. Q. 765, 766-67 (1999).

13. 42 U.S.C. § 670 (1994 & Supp. IV 1998).

14. 42 U.S.C. § 622(a) (1994). "Child welfare services" includes those related to dependent or neglected children. See § 625(a)(1). Regarding case plans, see generally §§ 670-79.

15. § 622(b)(1).

Substantively, federal influence begins with the primary guiding principle of child welfare law. In accord, the health and safety of children are to be the paramount concerns in dependency cases under Florida law, while providing that state intervention into families is to be “constructive,” “nonadversarial,” and respectful of “the integrity of families.”¹⁶ Receipt of federal funding is contingent on states pursuing reunification of families where “safe and appropriate;” alternatively, children are to be placed for adoption or “other planned, permanent living arrangement.”¹⁷

With the Adoption Assistance and Child Welfare Act of 1980 (“AACWA”), the federal government sought to better ensure that children are only removed from their families of origin if “reasonable efforts” are made to prevent the need for removal and, likewise, that permanent termination of parental rights only follows efforts to create a safe environment for the children to return home. This effort was inspired in part by a concern that states were overusing foster care, both as an intervention method and as the ultimate solution to familial problems. Concerns that AACWA’s provisions were promoting protracted and futile efforts at reunification to the detriment of foster children, and that reunification efforts were being made in cases of aggravating circumstances which warranted immediate termination of parental rights, contributed to the Adoption and Safe Families Act of 1997 (“ASFA”), which further amended the Social Security Act.¹⁸

This act is credited with fundamentally changing the national approach to foster care, in particular targeting the problem of how long children stay in foster care.¹⁹ The legislation recognized that a better balance was needed between efforts to ensure a child’s safety, employing reasonable efforts to preserve a child’s family of origin while achieving permanency for a child in each case. The goal was to address the problem of children languishing in foster care while protracted efforts were made to reunify their families of origin.²⁰ In accord with federal funding eligibility requirements, Florida law indicates that the child welfare system is supposed “[t]o preserve and strengthen . . . family ties whenever possible”²¹ Children should only be removed from their homes and remain in shelter care if “the department has made reasonable efforts to prevent or eliminate the need for removal”²²

16. FLA. STAT. § 39.001(1)(b)2, (e) (2000); *see also* 42 U.S.C. § 671(a)(15)(A) (Supp. IV 1998).

17. 42 U.S.C. § 622(b)(9)(B)(iii) (1994).

18. *See* Chaifetz, *supra* note 2, at 4–5; Davidson, *supra* note 12, at 770–73.

19. U.S. GENERAL ACCOUNTING OFFICE, FOSTER CARE: STATES EARLY EXPERIENCES IMPLEMENTING THE ADOPTION AND SAFE FAMILIES ACT I, 3–4 (Dec. 1999), *available at* <http://www.gao.gov/new.items/he00001.pdf>; *see also* Davidson, *supra* note 12, at 772.

20. U.S. GENERAL ACCOUNTING OFFICE, *supra* note 19, at 1, 4.

21. FLA. STAT. § 39.001(1)(f) (2000).

22. § 39.402(10).

Reasonable efforts are not to be required if a parent has subjected a child to an "aggravated circumstance." Such circumstances are to be defined by state law, but federal law offers as possible examples abandonment, torture, chronic abuse, and sexual abuse. For example, reasonable efforts are not to be required where a parent has committed murder or voluntary manslaughter of another child of the parent, where a parent has committed a felony assault resulting in serious bodily injury to the child or another child of the parent, nor where a parent's parental rights have been involuntarily terminated as to a sibling of the child at issue.²³ Reasonable efforts to keep families together are presumed if an emergency exists at the time of the Department's first contact. Similarly, a presumption arises from a "substantial and immediate danger" to a child's health or safety which preventative services can not mitigate or, in cases of extreme abuse, where grounds for expedited termination of parental rights are apparent. Significantly, while the law prohibits children being removed or kept from their homes pending disposition if in-home intervention or preventative services would render the home safe, reasonable efforts are nonetheless presumed if there are no preventative services available which can ensure the child's health or safety in the home.²⁴ Thus, the standard will keep a child away from his or her family and in shelter care if preventative services are simply not available.

Among other things to promote "reasonable efforts" to prevent the need for removal or termination of parental rights, federal law requires a tailored case plan for each child aimed at achieving permanent, safe placement.²⁵ Federal law permits so-called "concurrent planning," that is, that reasonable efforts to reunify a family may be made at the same time that efforts are being made to place the child for adoption, a practice that Florida has adopted.²⁶ Florida law seeks to implement these conditions, requiring that unless a statutory exception for expedited termination of parental rights exists, the Department must demonstrate that it has made "reasonable efforts to reunify" a family where a child is in out-of-home care. Significantly, this includes "the exercise of reasonable diligence and care . . . to provide the services . . . delineated in the case plan."²⁷

Florida law must provide for compliance with federal requirements to support its heavy reliance on federal funding of the dependency system. Almost one-third of Florida's \$724 million child welfare budget comes

23. 42 U.S.C. § 671(a)(15)(D) (1994 & Supp. IV 1998). Similarly, reunification is not required for aiding, abetting, attempting, conspiring, or soliciting for such offenses. § 671(a)(15)(D)(ii)(III).

24. FLA. STAT. § 39.402(7) (2000).

25. See generally Davidson, *supra* note 12, at 771; Chaifetz, *supra* note 2, at 4-5.

26. 42 U.S.C. § 671(a)(15)(B), (F) (1994 & Supp. IV 1998); FLA. STAT. § 39.601(3)(a) (2000).

27. FLA. STAT. § 39.521(1)(f)1. (2000).

from two parts of the Social Security Act, twenty-five percent from Title IV-E and approximately four percent from Title IV-B.²⁸ Title IV-E provides for partial reimbursement of the costs of foster care in return for making reasonable efforts to prevent removal or termination of parental rights. Title IV-B of the Social Security Act addresses services to be provided through the dependency system. Accounting for all sources, a full fifty percent of all foster care expenditures in Florida are from the federal government. Almost ten thousand foster children in Florida are relying on Title IV-E funding. Title IV-E funding pays for many costs of foster care, including food, clothing, shelter, visitation travel expenses, and the like. Similarly, administrative and operational expenses connected with institutional care are recoverable.²⁹

The time it takes for dependency cases to conclude is a significant federal concern which has been met with specific case goals. Safe, permanent homes for children are supposed to be found more quickly as a result of ASFAs enactment; cases were supposed to end where children wait eighteen months or more before adoption or other alternatives to reunification are pursued.³⁰ ASFA employs several measures to attempt to ensure that its goals are met, some substantive in nature, others procedural. Types of extreme abuse cases are identified in which no reunification efforts are required (though these cases are relatively rare) and in those cases alternative permanent homes must be sought within thirty days of the determination that such circumstances apply, provisions which Florida law now contains.³¹ In other cases where reunification might be appropriate, but cannot be accomplished in a reasonable amount of time, time frames are set in which proceedings to terminate parental rights are to begin.³² This includes cases where children have been in foster care for fifteen of the previous twenty-two months, though Florida has adopted a more restrictive twelve-month standard.³³ Federal law allows exceptions for cases where children are in relative care or where the state has failed to provide sufficient services for improving

28. The precise percentages are 24.29% for IV-E dollars and 3.81% for IV-B dollars. See Letter from Margaret Taylor, Financial Administrator, Fla. Dep't of Children & Families (enclosures) (Aug. 29, 2000) (on file with author).

29. *Id.*

30. U.S. GENERAL ACCOUNTING OFFICE, *supra* note 19, at 3-4.

31. 42 U.S.C. § 671(a)(15)(D), (E) (Supp. IV 1998); FLA. STAT. § 39.521(1)(f) (2000); see also FLA. STAT. § 39.806(1)(e), (2) (2000); U.S. GENERAL ACCOUNTING OFFICE, *supra* note 19, at 1-2, 4. Only between three and ten percent of removal cases are estimated to meet the reasonable efforts waiver provision. *Id.* at 9.

32. U.S. GENERAL ACCOUNTING OFFICE, *supra* note 19, at 1; see also FLA. STAT. §§ 39.601(3)(k), .703 (2000).

33. 42 U.S.C. § 675(5)(E) (Supp. IV 1998); FLA. STAT. § 39.703(2) (2000); U.S. GENERAL ACCOUNTING OFFICE, *supra* note 19, at 4.

the home of origin such that it is safe for the child to return, standards of which Florida law takes advantage.³⁴

ASFA contains a number of other strict substantive and time standards from the inception of a case to its close which are designed to achieve the balance between a child's need for permanency and an interest in maintaining familial ties, and which Florida law embodies. With ties to receipt of federal funding, the standards include: 1) At the first hearing regarding the removal of a child from his or her home, the court must find that return to the home is "contrary to [his or her] welfare." Failing this, the case is ineligible for Title IV-E funding, a failure which cannot be remedied at a later hearing.³⁵ Florida law includes this standard to allow for funding eligibility;³⁶ 2) Within sixty days of a child's actual removal from his or her home, a written and tailored case plan must be prepared, a requirement also embodied in current Florida law.³⁷ In this same time frame, a court must enter a finding that "reasonable efforts" were made to prevent the child's removal from the home in the first instance, barring which the case becomes completely ineligible for Title IV-E funding, a standard Florida has actually expanded to require three such findings in sixty days;³⁸ 3) Within twelve months of a child's entry into foster care,³⁹ and thereafter each twelve months if necessary, federal law requires that the state's child welfare agency make reasonable efforts to finalize a permanency plan, evidenced by a court finding that this has occurred. While the failure to do so violates the state plan, it does not permanently disqualify the individual case for Title IV-E funds.⁴⁰ It would appear that failure to meet these requirements renders the child's case ineligible for Title IV-E funding until the proper court finding is made.⁴¹ The permanency hearing is to determine whether and when the child will be returned to their birth parent or placed for adoption, under legal guardians or other permanent living arrangement, as well as the related issue of whether

34. 42 U.S.C. § 675(5)(E); FLA. STAT. § 39.703(2) (2000); U.S. GENERAL ACCOUNTING OFFICE, *supra* note 19, at 4.

35. 45 C.F.R. § 1356.21(a), (c) (2000).

36. *See* FLA. STAT. § 39.402(2), (6), (8)(h) (2000).

37. 42 U.S.C. § 671(a)(16) (1994 & Supp. IV 1998); 45 C.F.R. § 1356.21(g)(1)-(2) (2000); FLA. STAT. § 39.601(1)-(2), (9)(a) (2000).

38. 45 C.F.R. § 1356.21(b) (2000); FLA. STAT. §§ 39.402(8)(h)5., .506(7), .521(1)(f) (2000).

39. The date of entry into foster care is the earlier of the date of the first judicial hearing finding that abuse or neglect has occurred or 60 days after the child is removed from his or her home. 42 U.S.C. § 675(5)(F) (Supp. IV 1998).

40. 45 C.F.R. § 1356.21(e) (2000). *See also* Davidson, *supra* note 12, at 772.

41. 45 C.F.R. § 1356.21(a) (2000); *see* 42 U.S.C. § 675(5)(C) (1994 & Supp. IV 1998).

the state will file a petition for termination of parental rights.⁴² Florida law calls for these matters to occur;⁴³ and 4) That the child's status is reviewed at least every six months by the court or by administrative review for purposes of assessing the safety and appropriate nature of the child's placement, the need for ongoing placement, case plan compliance, and progress towards reunification or other permanency goals. Florida law requires court review.⁴⁴

Aside from the foregoing, federal law leaves to the states development of legal procedures and assignment of responsibilities within the dependency system. While adopting the federal time standards, Florida sets forth in its statutes rather detailed time standards and hearing schedules to direct dependency litigation. Responsibility for various aspects of dependency proceedings and the substantive content of proceedings is also set forth in great detail in Florida law.

B. *Florida Dependency Law—Scrutinizing Every Move*

A dependency case begins with a report of suspected child abuse or neglect. By law, every person has the responsibility to report suspected child abuse or neglect at the hands of a parent, custodian, care giver, or other person responsible for a child's welfare. Reports are made to the Department through its central abuse telephone hotline.⁴⁵ Acting through its fifteen districts, the Department then becomes primarily responsible for the welfare of these children in a variety of ways and in an extensive manner.

After receiving a report, DCF is responsible for undertaking a protective investigation to determine whether the child has been subjected to, or is at risk of, abuse or neglect, except where that responsibility is transferred to a county Sheriff's office (as it has been in four counties).⁴⁶ Immediate investigations are required if the immediate safety of a child is at risk or if the family may flee from the investigation.⁴⁷ In all other cases, an investigation must begin within twenty-four hours, in conjunction with law enforcement if warranted.⁴⁸ Unannounced, onsite investigations are required, with specific statutory requirements that in-person interviews must be had with the child,

42. 42 U.S.C. § 675(5)(C) (1994 & Supp. IV 1998).

43. See FLA. STAT. § 39.701(8)(e), (f) (2000).

44. 42 U.S.C. § 675(5)(B) (1994 & Supp. IV 1998); FLA. STAT. § 39.701(1)(a), (2)(a) (2000); FLA. R. JUV. P. 8.410(e). "Administrative review" refers to a process, which is to be open to the parents, of case review involving a panel of persons where at least one member is not responsible for case management or service delivery to the child or parents. 42 U.S.C. § 675(6) (1994).

45. FLA. STAT. § 39.201(1), (2) (2000).

46. See §§ 39.201, .301, .3065.

47. § 39.201(5).

48. *Id.*

any siblings, parents, and any other adult household members.⁴⁹ The investigation must also include various records checks on each household member.⁵⁰ A standardized risk assessment instrument must also be completed within forty-eight hours of the initial report.⁵¹

Where abuse or neglect is confirmed, the Department must decide whether voluntary in-home services should be offered to the children and parents involved or whether the child must be removed to ensure his or her safety.⁵² A child must be removed in "high-risk" cases, loosely defined as those involving young parents or custodians, the use of illegal drugs, or domestic violence.⁵³ The Department is required to complete its child protective investigations within sixty days, with no exceptions provided at law.⁵⁴ A child may be taken into protective custody for up to twenty-four hours by law enforcement or Department agents based on a probable cause belief that abuse, neglect, or abandonment has occurred, or that there is imminent danger of the same.⁵⁵ Beyond twenty-four hours, a court order finding probable cause is required, typically as a ruling on a "shelter petition" at a "shelter hearing."⁵⁶ The court must specifically find that removal is necessary and that "appropriate and available services" would not change that necessity.⁵⁷ "Shelter" care is intended to be a "temporary" placement "of a child who is alleged to be or who has been found to be dependent, pending court disposition before or after adjudication," with a relative or nonrelative, or a licensed home or facility.⁵⁸ Without an adjudication of dependency a child is not supposed to remain in shelter care for more than sixty days.⁵⁹ Similarly, a child is not to remain in shelter for more than thirty days after adjudication unless an order of disposition has been entered.⁶⁰

Following a shelter determination, a dependency case proceeds with the filing of a dependency petition, followed by an arraignment, an adjudication, and a disposition. Following or during an ongoing child protective investigation, formal dependency proceedings can be initiated in a circuit court by the Department or any other person with pertinent information by filing a peti-

49. § 39.301(11).

50. § 39.301(9)(c).

51. § 39.301(9)(e).

52. *See* § 39.402.

53. § 39.301(8)(b).

54. § 39.301(14).

55. § 39.402(1)(a).

56. § 39.402(6)(b), (8)(a).

57. §§ 39.01(65), .401, .402(1)-(2), (8)(a), (h).

58. § 39.01(64).

59. § 39.402(13). Dependency is explained in more detail *infra* Part V.D.

60. *Id.*

tion for dependency in the name of the child.⁶¹ A petition to terminate parental rights may be filed at any time, but at the least, a dependency petition must be filed within twenty-one days of a hearing in which a child is placed in shelter by court order, or within seven days of any party filing a demand for early filing of a petition.⁶² In any other case, a dependency petition is to be filed within a "reasonable time" of the referral for protective investigation.⁶³

Arraignment hearings are to be conducted for any parent within twenty-eight days of a child being placed in shelter care by court order, or within seven days of filing a dependency petition if demand for early filing has been made.⁶⁴ Likewise, in cases where a child is in shelter care, disposition hearings are to be held within fifteen days of the arraignment if a parent admits or consents to the findings of a dependency petition, absent a continuance.⁶⁵ If there is a denial, an adjudicatory hearing to determine whether a child is dependent must be held within thirty days of the arraignment, absent a continuance granted in accord with the law.⁶⁶ Adjudication is necessary for a child to remain in out-of-home placement.⁶⁷

Within thirty days of the adjudicatory hearing, a disposition hearing for the purpose of receiving and considering a case plan and predisposition study must be held.⁶⁸ The Department prepares the case plan and predisposition study.⁶⁹ A predisposition study includes, among other things, an assessment of the parents' ability to meet a child's basic needs and care; an assessment of the child's historical stability, including exposure to domestic violence; the mental and physical health of the parents; the child's conduct at home, school, and in the community; an assessment of the child's risk at home; and resources available to address those risks, including prevention and reunification services.⁷⁰

Disposition hearings are to be held as to any child adjudicated dependent, at which time the case plan is supposed to be approved, though the court may opt to do so at a second hearing within thirty days of the disposition. A diligent search should have been completed for any parent who cannot be located before a disposition hearing can go forward. At disposition, the court

61. §§ 39.501(1), .802(1); FLA. R. JUV. P. 8.220.

62. § 39.501(4).

63. *Id.*

64. § 39.506(1).

65. *Id.*

66. *Id.*

67. §§ 39.506(1), (5), .521(1)(a). Similar time frames exist for children who are still in a parent's custody. See § 39.506(2).

68. § 39.507(7).

69. §§ 39.507(7), .521(a); see discussion *infra* Part V.C.

70. § 39.521(2).

must approve several things. This includes approving the child's continued placement in out-of-home care or custody, if this is the case, and setting any special conditions on same, setting any "[e]valuation, counseling, treatment activities, and other actions to be taken by the parties;" and identifying supervisors or monitors of services; and child support matters.⁷¹

Virtually every move in a dependency case is reviewed and approved by the circuit court. As noted, there is almost immediate court involvement when a child has been removed and placed in a temporary shelter. The court reviews and approves continued placement in a shelter, and then conducts shelter reviews at least within thirty days after the shelter hearing, and every fifteen days thereafter, each time to review the child's status and approve the continuation of the shelter placement.⁷² These hearings continue beyond arraignment and no more than fifteen days thereafter until a child is either returned home or a disposition hearing is conducted.⁷³ Written determinations regarding a child remaining in a shelter are required within twenty-four hours of any time violation for filing a dependency petition or before granting a continuance for holding a disposition hearing.⁷⁴

At the disposition hearing, the court is to schedule the initial judicial review essentially within ninety days, though the case plan review and approval may be postponed for thirty days from the disposition hearing.⁷⁵ In no event is the initial judicial review to occur more than six months after the child is removed from the home.⁷⁶ Under all circumstances, the court is required to review the status of any dependent child at least once every six months, including as to case plan progress.⁷⁷

Under state law, there are to be no fewer than eight court hearings in a year in every dependency case, presuming that all statutory deadlines are met, no continuances are sought or granted, and no extraordinary circumstances arise requiring any hearing not otherwise dictated by law. Particularly because of required shelter reviews every fifteen days, the number of hearings can be much greater if the filing of a case plan is delayed or arraignments are not timely held, problems which regularly occur as discussed below. Due to delays, cases reviewed in this study would have required as many as sixteen court hearings in a year.

Under concurrent case planning, the Department may be responsible for simultaneously providing rehabilitative services to abusive or neglectful parents and preparing to terminate the parental rights. The Department is

71. § 39.521(1)(d)3.; FLA. R. JUV. P. 8.340.

72. § 39.506(8).

73. *Id.*

74. §§ 39.402(14), .506(8).

75. § 39.521(1)(a), (c).

76. §§ 39.521(1)(c), .701(3)(a).

77. § 39.701(1)(a), (2)(a); FLA. R. JUV. P. 8.410(e), 8.415(b).

directed that when children are removed from their homes, permanent placement with a biological or adoptive family is to be “achieved as soon as possible” and in no case are children to “remain[] in foster care longer than 1 year.”⁷⁸ As the foregoing indicates, the court is to ensure that these goals are met.

C. *Case Plans as a Guiding Light Under Florida and Federal Law*

Under federal and state law, the Department is responsible for developing a case plan with input from all parties. The plan is intended to be a tool to direct a rehabilitative plan for parents and to coordinate services for children, birth parents, and foster parents, whether or not a child is removed from his or her home, or termination of parental rights is sought.⁷⁹ Case plans are to be prepared within sixty days of a child’s removal from his or her home.⁸⁰ Only for good cause shown should this be extended, and if so, for no more than one extension of thirty days.⁸¹ Amendments, even with the consent of all the parties, require court approval.⁸²

In accord with the goal that children spend no more than twelve months in foster care, case plans may only continue in effect for more than twelve months if an extension is granted by the court.⁸³ The twelve-month period begins the earlier of the child’s removal from the home or date of court approval of the case plan.⁸⁴ Case plans may be extended due to the Department’s failure to provide necessary services to the parents, but extensions are limited to six months.⁸⁵ There is no provision to extend a case plan based on a parent’s failure to meet plan requirements. Indeed, failure to comply substantially is grounds to terminate parental rights.⁸⁶

D. *Florida and Federal Law on Concluding Dependency Cases*

In addition to the time standards of state and federal laws, a number of substantive provisions apply to the conclusion of dependency cases. In cases where reunification is an option, it is contingent on a showing that the parent has “substantially complied with the terms of the case plan to the extent that

78. § 39.001(1)(h).

79. §§ 39.01(11), .601(1)(a); FLA. R. JUV. P. 8.400(a)(1), (2).

80. §§ 39.601(9)(a), .603(1); FLA. R. JUV. P. 8.400(a), 8.410(a).

81. § 39.601(9)(a); FLA. R. JUV. P. 8.400(a)(3), 8.410(c).

82. § 39.601(9)(f); FLA. R. JUV. P. 8.400(b).

83. § 39.601(7).

84. *Id.*

85. § 39.701(f); FLA. R. JUV. P. 8.415(e)(3).

86. §§ 39.601(3)(k), .703.

the safety, well-being, and physical, mental, and emotional health of the child is not endangered by the return of the child to the home."⁸⁷ However, termination of parental rights must be sought if a child is not returned home by the twelve-month judicial review hearing, and the petition for same must be filed within thirty days of that hearing.⁸⁸ The standard for court waiver of this requirement and extension of the case plan is extreme, "[o]nly if the court finds that the situation of the child is so extraordinary" and in accord with the child's best interests.⁸⁹ The petition need not be filed if the child is being cared for by relatives who choose not to adopt, or where the state has failed to make reasonable efforts at reunification by providing appropriate services to the parents.⁹⁰

Once a petition for involuntary termination of parental rights is filed, an advisory hearing is to be held as soon as possible, followed within forty-five days by an adjudicatory hearing on the petition's merits, barring consent of the parties otherwise, or based on a reasonable continuance for preparation or attendance of witnesses, or under court rules, for good cause.⁹¹ At the advisory hearing, parents are informed of their right to counsel and receive appointed counsel, if appropriate.⁹² The court must also consider whether the parents will admit or deny the petition, or otherwise consent to the petition; and appoint a guardian ad litem.⁹³ At the adjudicatory hearing, the court determines whether clear and convincing evidence exists to terminate parental rights.⁹⁴

In cases where the birth parents' rights are to be terminated, the permanency options authorized by law include the favored goal of adoption, with four other options if that is not achievable or in the child's best interest, including: 1) legal guardianship; 2) long-term custody with an adult, whether or not a relative of the child; 3) long-term licensed custody for certain children over the age of fourteen; and 4) independent living.⁹⁵ Long-term custody can be a permanency option for any dependent child over fourteen who has been in foster care for more than six months, reunification at a later date is not precluded, and protective services or supervision are no longer indicated.⁹⁶ Long-term licensed custody may be a permanency option for children over fourteen years of age who have been in a stable foster care

87. § 39.522(2).

88. § 39.703(2).

89. *Id.*

90. *Id.*

91. § 39.809(1), (2); FLA. R. JUV. P. 8.525(b).

92. FLA. R. JUV. P. 8.510(a)(2).

93. *Id.*

94. FLA. R. JUV. P. 8.525(a).

95. §§ 39.621–624.

96. § 39.622(1)–(4).

placement for more than twelve months, and continue the foster placement until the child's majority.⁹⁷ Independent living may be a permanency option for children over the age of sixteen if found to be the most appropriate option consistent with the child's safety.⁹⁸

E. *Representation of the Parties Under Florida and Federal Law*

Court proceedings significantly influence how dependency cases impact the parties. Providing for legal representation of the interests, perspectives, and responsibilities for the various participants is rather disparate under Florida law. The Department must be represented by an attorney in all proceedings.⁹⁹ Depending on the particular district, the Department may be represented by an in-house attorney, the state attorney's office, or the state attorney general's office.

Birth parents are entitled to legal representation at all stages of dependency proceedings, including appointed counsel if they are indigent, which they typically are.¹⁰⁰ By state law, the right to counsel arises at the time of the shelter hearing such that if a parent arrives at a shelter hearing without counsel, but requests one, the shelter hearing may be continued for up to seventy-two hours to obtain and consult with counsel.¹⁰¹ During that time, the child remains in shelter care.¹⁰² The fees paid to court appointed attorneys for parents in dependency cases are limited by statute.¹⁰³ They are to be paid by and as established by the county.¹⁰⁴ In termination of parental rights proceedings, compensation is capped at \$1000 at the trial level and \$2500 at the appellate level, though these caps are raised at least in some counties where warranted by the demands of the case.¹⁰⁵ There are no such caps under state law on the expenditure per case by Department attorneys.

Under state law, the best interests of children are to be represented by a guardian ad litem.¹⁰⁶ Like their parents, an appointment is to be made at a shelter hearing, unless the court finds it unnecessary.¹⁰⁷ However, unlike their parents, there is no provision in state law to continue a shelter hearing

97. § 39.623.

98. § 39.624.

99. FLA. R. JUV. P. 8.255(a).

100. § 39.013(9)(a).

101. § 39.402(5)(b).

102. *Id.*

103. *See* § 39.0134.

104. § 39.0134(1).

105. § 39.0134(2); Telephone Interview with Mary Ann Scherer, birth parent attorney, in Ft. Lauderdale, Fla. (Aug. 16, 2000) (notes on file with author).

106. § 39.402(8)(c)1.

107. *Id.*

because a guardian is not available or has not had time to consult with the child or otherwise learn of the details of the case. A guardian ad litem is a volunteer who need not be a licensed attorney competent to address a child's legal interests.¹⁰⁸ The guardian him or herself, or another guardian ad litem program representative, becomes a party to the proceedings, required to be present for "all critical stages of the dependency proceeding," to review disposition recommendations, and any proposed changes in a child's placement.¹⁰⁹ The duties of a guardian ad litem in representing "the interests of the child" include: 1) investigating and reporting in writing to the court as to the allegations of abuse or neglect and any other subsequently arising matters; 2) reporting to the court as to a child's wishes; and 3) making recommendations to the court.¹¹⁰ The Guardian Ad Litem Program does have a limited number of staff attorneys. However, due to either a shortage of volunteers or shortage of paid and skilled staff to supervise more guardians, many children do not have a guardian to monitor their progress and safety, or evaluate and report to the court on their best interests.¹¹¹ In the limited instances where an attorney ad litem is appointed for a dependent child, there are no statutory directives as to representation of a child's legal interests, nor are there any directives in court rules, with the exception of a pilot program for attorneys ad litem, discussed below.¹¹²

Federal law does not require the appointment of an attorney to represent a child in dependency cases, nor a court appointed special advocate, known as a "CASA."¹¹³ Commentators suggest that this leaves the child's interests lacking for a need of an attorney or similar advocate in dependency cases.¹¹⁴ Federal law does require appointment of a guardian ad litem for children who are the subject of judicial proceedings involving abuse or neglect, though there is some debate as to whether this provision was intended to require appointment of attorneys for children.¹¹⁵ There is no specific requirement that the state plan filed for Title IV-E funding eligibility provide, in any particular fashion or manner, for legal representation for children or the state in child welfare cases. Florida law simply does not

108. See §§ 39.820–.822; FLA. R. JUV. P. 8.215(c), (f).

109. § 39.822(3); FLA. R. JUV. P. 8.210(a).

110. FLA. R. JUV. P. 8.215(c).

111. Wagner, *supra* note 1.

112. See FLA. H.R. COMM. ON CHILDREN AND FAMILIES, HB 2125, 14 (May 24, 2000); see also *infra* notes 302–07 and accompanying text.

113. Davidson, *supra* note 12, at 768.

114. *Id.* at 768–69.

115. 42 U.S.C. § 5106a(b)(2)(A)(ix) (Supp. IV 1998). See also Susan Vivian Mangold, *Challenging the Parent-Child-State Triangle in Public Family Law: The Importance of Private Providers in the Dependency System*, 47 BUFF. L. REV. 1397, 1450–51 (1999).

guarantee that anyone in a dependency case will represent the child's legal interests.

F. *Assumptions of the Dependency System*

Emerging from the laws creating Florida's dependency system are some fundamental assumptions about the roles and expectations of the parties and their representatives. The core assumption is that the DCF will act in accord with the best interest of dependent children, even protect those interests, as it fulfills the extensive duties assigned to it. The Department is entrusted with the needs and care of dependent children, including safeguarding their interest in family reunification or preservation. The Department is to plan a course for those children and their families to achieve better health and functioning. The Department is expected to balance tensions between the needs of children and families with what services and resources may be available. In many cases, the Department is expected to reconcile its role of helping families reunite, while concurrently planning for and even pursuing the family's demise. The Department's attorneys are expected to file and prosecute civil dependency actions, literally acting in the name of the child and, presumably, in accord with the best interests of the child, though their client remains the Department itself.

It is likewise assumed that when volunteer guardians ad litem are appointed in dependency cases that they will advise the courts as neutral participants to safeguard the best interests of children in a timely manner. As the only party expressly charged with representing the best interests of children, it may also be assumed that the guardian can and will act to monitor the child's needs on a regular basis. It may also be assumed that the guardian will promptly seek to remedy any failings of the system which threaten to visit harm on the child. For children in out-of-home care, the guardian would also presumably be a check on abuses in foster care or other such placements.

There appears an expectation that the circuit court will oversee and ensure in a timely manner that the Department and other parties act expeditiously in the best interests of children and families. In an effort to ensure that the courts actually do this, an extensive hearing schedule is established by statute to review and approve everything that happens to a child and everything that is planned for the child. The detail of the statute and its demands for timely and extensive hearings suggest that none of the parties were actually trusted when the statutes were written. A similar sentiment of distrust can be construed from the painstaking detail of case plan requirements to guide the conduct of parties, discussed below. The courts check up on everyone and the courts are told how and when to do this.

It is presumed that the court can accomplish its oversight role based on most probably complete information received from the other system actors, including the DCF and its attorneys, the parents and their attorneys, and any guardian ad litem who may be assigned to a child. This point is particularly significant because the courts must necessarily rely upon information received from the parties and the lawyers. As the National Council of Juvenile and Family Court Judges (the "Council") recognizes, not only do attorneys largely control what information a judge sees, but also that "[e]ach party must be competently and diligently represented" for the system to function as it is intended.¹¹⁶ More significantly, the Council notes that the failure of attorneys to behave timely, both in correcting errors and advancing cases, adversely impacts "the quality and timeliness of the court's decision-making"¹¹⁷ Child welfare professionals in Florida recognize that this is a problem for Florida now, even as to statutorily required information at status hearings.¹¹⁸

It is presumed that the courts can and will act as a check to ensure that all involved act at virtually every step and decision point in accord with the best interests of the children involved. This basic structure and its core assumptions, particularly as to the role of the court, exist nationally. The Council observes that "judges make critical legal decisions and oversee social services efforts to rehabilitate and maintain families, or to provide permanent alternative care for child victims."¹¹⁹ The current reliance on the courts as the key mechanism to ensure that children are not re-abused or neglected within or by the dependency or foster care system is one which has certainly not escaped the courts' attention.¹²⁰ The Council notes the "more active" and "significant new role" the courts play in ensuring that "a safe, permanent and stable home is secured" and making decisions for each dependent child.¹²¹

This present role of the courts, arising from changes in federal and state law, including the Adoption and Safe Families Act ("ASFA"), constitutes a significant expansion from their limited role in the 1970s to determine simply whether a child had suffered from abuse or neglect, and whether in-home services or out-of-home placement was the necessary response.¹²² The

116. NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, RESOURCE GUIDELINES; IMPROVING COURT PRACTICE IN CHILD ABUSE & NEGLECT CASES 22 (SPRING 1995), available at <http://www.pppncjfcj.org/html/publications.html>.

117. *Id.* at 10, 22; see also DUQUETTE ET AL., *supra* note 5, at ch. VII.

118. Fourth Annual Dependency Court Improvement Summit, *supra* note 1.

119. NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, *supra* note 116, at 10.

120. *Id.*

121. *Id.*

122. *Id.*

expanded role necessitates handling more complex issues, more hearings, and more people. Dependency litigation places courts in a “managerial and directive” role, which is unsurpassed in the degree to which it intrudes into the actions of an executive branch agency. The Council finds that “many courts have neither the ability nor the resources to meet these new demands.” The demands on judges render the dependency division among the most stressful, if not *the* most stressful, in a courthouse.¹²³ The Council finds that the present day structure of the dependency system effectively requires that “step-by-step the judge must determine how best to assure the safe upbringing of the child, and that the child is eventually placed in a safe and permanent home.”

If these statutory assumptions were seeing fruition when practically applied, dependency cases might be progressing well and timely. However, in practice, the assumptions of the dependency system are failing in many cases. Dependency system participants are aware of this and trying to compensate for the failures, and children and their families in the system are still being hurt.

VI. PART II—THE FINDINGS—HOW THE PRACTICAL APPLICATION OF DEPENDENCY LAW RESULTS IN SIGNIFICANT HARM TO CHILDREN

A. *Dependency Litigation Delays Are Harming Children Significantly*

A foster child described her nine years in foster care this way:

I’ve moved most of my life and, I tell you, it’s like a wave getting ready to come for you while you are on the sea. And in my life, I have experienced that, I am still experiencing it and I will experience it the rest of my life. It’s like a storm getting ready to wreck the ship and everything aboard, like my life, my soul, my heart, my future.¹²⁴

It is widely agreed that prolonged stays in foster care are detrimental in the precise manner indicated by this child, resulting in serious, life-long problems.¹²⁵ As reported by the National Conference of State Legislatures:

123. Interview with Judge John Frusciant, Circuit Judge, Fla. 17th Judicial Circuit, in Ft. Lauderdale, Fla. (Aug. 18, 2000) (notes on file with author).

124. Madeleine M. Landrieu & Jesse R. Adams, Jr., *On Behalf of Our Children*, 46 LA. B.J. 469, 470 (April 1999).

125. For an excellent report of first-hand experiences and perspectives of foster children themselves, see Chaifetz, *supra* note 2.

Child welfare experts generally agree that prolonged stays in foster care and frequent moves from one foster home to another are not conducive to a child's healthy development. Children who grow up in foster care often exhibit emotional and behavioral problems that contribute to expensive social problems such as school failure, teen pregnancy, homelessness, unemployment, criminal activity, incarceration and welfare dependency.¹²⁶

Similarly, the National Council of Juvenile and Family Court Judges has cited the "widely accepted principle[]" that "stable and continuous care givers for children are very important to normal emotional growth . . . [and that] children need secure and uninterrupted emotional relationships with adults who are responsible for their care."¹²⁷ Failing this, the Council acknowledges damage to "a child's ability to form close emotional relationships after reaching maturity."¹²⁸ Legal commentators have recognized for decades that even the best of foster care placements can be detrimental to children, simply because they have been separated from the families and lives that they know and to which they are bonded. As one commentator explains, foster children "suffer anxiety and depression from being separated from their parents, and they are forced to deal with new caretakers, playmates, school teachers, etc. As a result, they often suffer emotional damage and their development is delayed."¹²⁹

The American Bar Association likewise recognizes these circumstances in its model standards for lawyers who represent children:

In general, a child needs decisions about the custodial environment to be made quickly. . . . [I]f the child must be removed from the home, it is generally in the child's best interests to have rehabilitative or reunification services offered to the family quickly. . . . [I]f it appears that reunification will be unlikely, it is generally in the child's best interests to move quickly toward an alternative perma-

126. National Conference of State Legislatures, *A Place to Call Home: Adoption and Guardianship for Children in Foster Care: Executive Summary*, at <http://www.ncsl.org/programs/pubs/BKFSTR2.HTM> (last visited May 15, 2001); see also Duquette et al., *supra* note 5, at 130 (stating that "[l]ong delays in the courts and in matching children with nurturing families are extremely detrimental to healthy emotional development").

127. NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, *supra* note 116, at 13.

128. *Id.*

129. Michael S. Wald, *Thinking About Public Policy Toward Abuse and Neglect of Children: A Review of Before the Best Interests of the Child*, 78 MICH. L. REV. 645, 662 (1980).

nent plan. Delay and indecision are rarely in a child's best interests.¹³⁰

Unfortunately, Florida's foster children are subjected to delay and indecision on a regular basis. The statewide average length of stay in active cases for foster care children is almost three years, at 34.3 months (excluding relative care giver cases), with a range among the fifteen DCF districts of twenty-two months to fifty-six months.¹³¹ While the head of one DCF district reportedly counters these statistics by explaining that the average stay for children who have entered the system since 1997 is only two years,¹³² statewide data still shows an increase in these numbers over the previous year, when the average length of stay statewide was 32.4 months, with a district range of twenty-six months to 55.6 months.¹³³ The target of eighteen months under the federal Adoption and Safe Families Act, which no district meets.¹³⁴ Similarly, as of August 1999, the percentage of dependent children exiting foster care within fifteen months averaged only 26.4% statewide, with a district range of 14.3 to 44.7%.¹³⁵

Undue delay exists regardless of the permanency goal in the case. In fiscal year 1995/1996, the statewide average length of stay in foster care with a reunification goal was approximately 20.5 months, which actually crept up to 23.3 months by 1999.¹³⁶ In fiscal year 1995/1996, for termination cases with a goal of adoption, the statewide average length of stay was approximately forty-five months.¹³⁷ These numbers are not far from the national average stay in foster care of three years.¹³⁸ Not until parental rights are terminated do delays ease for Florida's children. The average length of time from termination of parental rights to finalization in fiscal year 1998/1999

130. AMERICAN BAR ASS'N, STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES pt. I § B-5, commentary (1996).

131. FLA. DEP'T OF CHILDREN & FAMILIES, *supra* note 3, at FSP-027.

132. Carol Marbin-Miller, *S. Fla. Kids 'Growing Up' in Foster Care*, MIAMI HERALD, Sept. 20, 2000, at 1A.

133. See FLA. DEP'T OF CHILDREN & FAMILIES, *supra* note 3, at FSP-027.

134. FLA. DEP'T OF CHILDREN & FAMILIES, AUGUST 1999 SITUATION REPORT FSP-003 (Aug. 1999), available at http://state.fl.us/cf_web/news/mspt/docs/sitr/0899/admin.pdf.

135. *Id.*

136. FLA. DEP'T OF CHILDREN & FAMILIES, PERFORMANCE REPORT, THIRD QUARTER, FY 96/97 5 (June 1997), available at http://www5.myflorida.com/cf_web/myflorida/health_family/publications/bureaus/dcf/docs/3rdquart.pdf; OFFICE OF THE STATE COURTS ADMINISTRATOR MEANINGFUL REFORM ON THE FRONT LINES: DEPENDENCY COURT IMPROVEMENT INITIATIVES 1997-2000 (undated).

137. *Id.*

138. Duquette et al., *supra* note 5, at ch. I.

was 12.52 months, compared with an ASFA goal of twelve months.¹³⁹ This would seem to indicate that advancing cases to termination of parental rights or other such permanency determination is a more significant problem than the process of finalizing a permanent placement once a child is legally available for adoption or other permanency option.

Protracted dependency litigation and delayed permanency also impacts foster families as a unit. At least one court has recognized the severe strain on foster parents or prospective adoptive parents due to protracted litigation and delayed permanency, and how those factors may put children at further risk of unstable lives: “[a]t some point in time, custodial parents must earn the right to claim a child permanently, lest they discharge their duty with something less than completeness or worse yet, throw up their hands and abandon their efforts for the sake of their own emotional well-being.”¹⁴⁰

As noted at the opening of this article, a glance into a typical day in Florida's dependency system revealed one foster family, likely destined to be an adoptive family, which simply crumbled under delay-induced stress. Not only did the potential adoptive family fail to solidify, but the siblings may now grow up without each other for support, a sense of stability, and the nurturing experience of a family. Still, other families which may have reunited never do simply because protracted litigation causes their bonds to dissolve, an example of which was also seen with a glance into a typical day in Florida's dependency system. Commentators have noted that a family's integrity is increasingly eroded in its own eyes, as well as the community at large, the longer children remain in foster care without final adjudication of their cases.¹⁴¹ Other families may simply have no chance when delays in planning for and providing rehabilitative services clash with legal requirements for expediency, discussed in greater detail below. Several examples of this were seen in the glance taken by this study into a typical day in Florida's dependency system.

Like Florida, Connecticut courts have also suffered from difficulty meeting basic statutory deadlines, with initial evidentiary hearings typically being delayed twice as many days as permitted by statute in the mid-1990s, though eventually recovering to an average much closer to statutory requirements.¹⁴² In the interim, the state was sued in *Pamela B. v. Ment*¹⁴³ for

139. FLA. DEP'T OF CHILDREN & FAMILIES, *supra* note 134, at FSP-033.

140. *In re Adoption of M.A.H.*, 411 So. 2d 1380, 1384 (Fla. 4th Dist. Ct. App. 1982).

141. Pamela McAvay, Note, *Families, Child Removal Hearings, and Due Process: A Look at Connecticut's Law*, 19 QUINNIPIAC L. REV. 125, 137 (2000) (stating that “[w]here investigation is improperly motivated, delay between removal and hearing simply allows more time during which the internal and external perception of the parents and the family may be denigrated”)

142. *See id.* at 130.

143. 709 A.2d 1089 (Conn. 1998).

constitutional due process violations. The fundamental constitutional right to family integrity was at issue for taking several months to completely adjudicate removal hearings.¹⁴⁴ The *Pamela B.* court recognized that judicial delay can interfere with the constitutional right to family integrity to the degree that any delay is only constitutionally justified to the extent it is “unequivocally needed to safeguard and preserve the child’s best interests.”¹⁴⁵ The court spoke of a need for a “congruence of rights and remedies” in such cases, which require timely and enforced hearing schedules.¹⁴⁶ Significantly, the court found that its responsibility in this regard was restricted to the proper allocation of its resources and that any remaining responsibility rested with the legislature.¹⁴⁷ The court would not be responsible for delays, even if considered objectively undue, if those delays resulted from a lack of appropriated resources.¹⁴⁸

Similarly, in Florida, the Department’s predecessor, the Department of Health and Rehabilitative Services, was found in a class action lawsuit to have violated statutory rights to six-month foster care review hearings by failing to initiate such proceedings, “creat[ing] irreparable harm for which injunctive relief is particularly appropriate.”¹⁴⁹ The court highlighted that the statutory review hearings were intended to promote permanency and adoption of foster children in out-of-home care for more than a year.¹⁵⁰

144. McAvay, *supra* note 141, at 131–32.

145. 709 A.2d at 1100.

146. *Id.*

147. *See id.* at 1101.

148. A concurring opinion in that case disagreed, asserting that a constitutional due process violation occurred when the statutory time frame requiring a substantive hearing in ten days was not met, taking instead up to six months under colloquially accepted continuances, and that summary judgment on this point for the parents was warranted. *Id.* at 1110. (Berdon, A.J., concurring) The concurring Justice highlighted the fact that fundamental constitutional liberty interests were at issue, demanding that due process be afforded regardless of resource allocation issues. *Id.* at 1111. The criticism of the majority opinion was blunt and direct, stating:

[T]he majority would have us believe that the state could remove a child from a parent’s custody on the ground of neglect and then deny that parent a timely hearing if [the court administrator] could prove insufficient resources caused the delay. This reasoning is fundamentally flawed. . . .

Any suggestion that this unusual theory of constitutional “hydraulics” can dissipate the fundamental federal constitutional rights of the plaintiff class—rights that do not depend upon the state’s resources, [the court administrator’s] discretion or any other such state consideration—is also unavailing.

Pamela B., 709 A.2d at 1113.

149. *Pingree v. Quaintance*, 394 So. 2d 161, 162 (Fla. 1st Dist. Ct. App. 1981).

150. *Id.*

The integrity of the family unit is constitutionally protected, and therefore, more than worthy of protection under the actual functioning of law, appropriately balanced with considerations of child safety.¹⁵¹ The right to family integrity is one to which a child has an equal claim to that of a parent.¹⁵² Federal courts have characterized this right for children in terms of their interest in regular, emotional contact with their parents, stating, “[the right to family integrity] is the interest of . . . the children in not being dislocated from the ‘emotional attachments that derive from the intimacy of daily association,’ with the parent.”¹⁵³ As the foregoing demonstrates, expediency in dependency litigation is inextricably tied with the best possible balance between a child’s interest in family integrity and a child’s interest in stability and permanent family placement.

For the foregoing reasons, this study finds that children in foster care in Florida, likely thousands of them, are being significantly harmed by protracted delays in dependency litigation, before even addressing the day-to-day conditions in foster care and even if the children appear to be physically “safe.” It cannot be assumed that children will be any safer or better off in foster care than they were with their families of origin. While life for most does improve markedly, many others are placed in neglectful and overcrowded foster homes, many are subjected to serious physical violence and sexual abuse from foster parents or other foster children, possibly of a worse nature than they ever suffered with their birth parents, and some have even died.¹⁵⁴

These are not isolated risks. In one DCF district, at least sixty-five foster homes currently have more foster children than the home is licensed to have.¹⁵⁵ Last year, almost four hundred dependent children under protective supervision either ran away or simply “aged out” of the system without resolution of their cases.¹⁵⁶ Still others are believed to be subjected to worse abuse in the system than experienced with their parents. Consider reports of one child’s lawyer, that in Broward County alone, some fifty instances of child on child sexual abuse in foster care were brought to his attention in an eighteen-month period.¹⁵⁷ Based on all of these conditions and risks, ad-

151. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

152. *See Smith v. Org. of Foster Families for Equity & Reform*, 431 U.S. 816 (1977).

153. *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977).

154. Interview with Howard M. Talenfeld, children’s attorney/class action attorney, in Ft. Lauderdale, Fla. (July 28, 2000) (notes on file with author).

155. Editorial, *Foster Parents Needed*, FLA. TIMES-UNION, May 22, 1999, at B4.

156. Letter from Maria Leon, Family Safety, Fla. Dep’t of Children & Families, (enclosures) (Oct. 18, 2000) (on file with author).

157. National Coalition for Child Protection Reform, *Foster Care vs. Family Preservation: The Track Record on Safety*, text at note 5 (citing Aff. of David S. Bazerman, Esq., filed

addressing the factors which cause dependency litigation to be delayed is warranted.

B. *Gobbledy Guck, Cookies and Other Debris Gunking up the System*

A main statutory mechanism under state and federal law enacted to ensure timely permanency for children is the required court hearing to approve a permanency goal within twelve months of children entering the system. This is a key indicator of system efficacy. One of the main reasons that permanency is not being achieved timely is that often these hearings are simply not being held within twelve months.¹⁵⁸ Some data and anecdotal experience gathered by others suggest why, as do matters observed in this study.

As noted, in a typical day in Florida's dependency system observed in this study, cases simply were not advancing in accord with interim time deadlines leading up to the one-year permanency hearing. Adjudications were not occurring within twenty-eight days and the Department was seeking extensions of time to do so, and in one case seeking and obtaining from the court sixty additional days in a case already five months old. Case plans to map the progress of a case were being prepared as much as three months late, when the law provides for only sixty days to prepare the plan. Department investigations were not being completed timely and lengthy continuances of court proceedings were being granted. Department attorneys were simply not communicating with their client to verify and assess progress and compliance with the law.

Observations made on that typical day are confirmed by the Department itself and others to be, indeed, typical and widespread. In one judicial circuit, a committee of a dependency court improvement program concluded that the Department is simply not prepared to address permanency at one year due to a failure to staff cases for permanency far enough in advance.¹⁵⁹ In accord with this conclusion, a preliminary investigation by federal officials, as to state response to ASFA, finds that Florida has not incorporated changes into its social work practice relating to ASFAs requirement that termination petitions be sought for any parent whose child is in foster care for fifteen of

in *Ward v. Feaver*, Case # 98-7137, U. S. District Court, Southern District of Fla. (Dec. 16 1998)), at <http://www.nccpr.org/newissues/1.html> (last visited May 15, 2001).

158. Margaret Taylor, Financial Administrator, Fla. Dep't of Children & Families, Address at Fourth Annual Dependency Court Improvement Summit, Prelude to ASFA Audit (workshop) (Aug. 30, 2000) (notes on file with author).

159. Fla. 17th Judicial Circuit Dependency Court Improvement Program, Children's Services Comm., *Notes on "Permanency Delays"* (April 2000) (on file with author).

twenty-two consecutive months.¹⁶⁰ Federal officials also note the need for “establishing effective working relationships with agency attorneys” which could also impact on Departmental awareness and planning for statutory guidelines in individual cases.¹⁶¹

The Department itself has identified, in its handling of dependency litigation, extensive failures to use state and federally authorized mechanisms to advance cases promptly. When the Department audited cases in eight of its districts for pursuing expedited termination of parental rights in cases of the most egregious abuse or neglect, no district had qualified cases which were regularly supported by a court finding to expedite the case, and in only one district were petitions for expedited termination filed in all cases.¹⁶² In the best of the remaining districts, petitions for expedited termination were filed in only forty-three percent of the audited cases. One district was found to file expedited petitions in as few as fourteen percent of qualified cases, while one district completely failed to file in any of its cases. These failures keep foster children from being available for adoption and compromise their ability to ever be adopted as they grow older and older in “temporary” care.¹⁶³

The Department similarly identified a widespread failure to take advantage of concurrent case planning as a method of expediting cases. In applicable cases, the Department found that more often than not its districts fail to place children in a home that could serve as an adoptive placement or with a legal custodian while reasonable efforts for reunification were pursued concurrently. Concurrent case planning was not pursued in as much as ninety-three percent of qualifying cases in one DCF district. The average failure rate among districts was over sixty-eight percent.¹⁶⁴ Another study specific to dependency cases in Hillsborough County similarly found that a lack of concurrent case planning was a “barrier” to achieving permanence for children, calling it “one of the most frequently observed” problems.¹⁶⁵

160. U.S. GENERAL ACCOUNTING OFFICE, *supra* note 19, at 8–9.

161. *Id.* at 9.

162. *See* Address by Taylor, *supra* note 158. The Department used an auditing procedure identical to that which the federal government will use to determine Florida's compliance with the Adoption and Safe Families Act. *Id.* For a detailed description of audit procedures, see U.S. DEP'T OF HEALTH AND HUMAN SERVS., CHILD AND FAMILY SERVICES REVIEWS, PROCEDURES MANUAL ch. 4 (Aug. 2000).

163. The courts were typically more responsive. In cases where the expedited petition was actually filed, termination hearings were conducted within 60 days in as high as 75 percent of the cases in one district, though none was held in District Fourteen. The remaining districts for which data was available had hearings held within 60 days 60, 50, 38, and 20 percent of the time. Letter from Taylor, *supra* note 28.

164. *Id.*

165. BARRETT, *supra* note 5, at 23.

It is critical to recognize that simply conducting court hearings and issuing court orders is apparently not sufficient to ensure timely progress of cases. A Department audit of its files found cases where court orders were signed several months after a hearing because Department attorneys failed to provide drafts to judges as ordered. In one case, a draft order directing the Department to file a petition for termination of parental rights within ninety days of the hearing was sent to the judge 150 days after the hearing. The petition had not been filed, a fact not detected by the court and not remedied by any participant to the proceedings.¹⁶⁶ A case worker supervisor reported regular delays of six to seven weeks in getting court orders signed because Department attorneys were not sending orders.¹⁶⁷ Problems of this type prompted one judge interviewed for this study to request resources for a case coordinator to check on the status of compliance with court orders, recognizing that simply rendering an order is not enough to ensure that action ordered to ensure the best interests children is actually taken timely.¹⁶⁸

Lest all the blame be placed on the Department, it warrants note that the courts themselves acknowledge that their functioning is a significant problem. The National Council of Juvenile and Family Court Judges states:

in many jurisdictions, the quality of the court process has gravely suffered. Hearings are often rushed in child abuse and neglect cases. There are also frequent and unfortunate delays in the timing of hearings and decisions, causing children to grow up without permanent homes. Many courts know little about relevant agency operations or services. All too often, child welfare agency employees spend unnecessary hours waiting for court hearings while they could be "out working in the field."¹⁶⁹

Especially with heavy and increasing case loads, time to "work in the field" is critical, particularly as to case planning and execution. Numerous child welfare professionals interviewed in this study reported that the amount of time spent in statutorily mandated court hearings detracts from the ability of caseworkers to spend time with dependent children and assist parents.¹⁷⁰ The impact on parents is also significant. As one judge interviewed for this study emphasized, parents are attending excessive court hearings rather than

166. Address by Taylor, *supra* note 158.

167. Confidential Interview in Broward County, Fla. (Sept. 29, 2000) (notes on file with author).

168. Interview with Judge Frusciante, *supra* note 123.

169. NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, *supra* note 116, at 10.

170. See Confidential Interviews, *supra* notes 1 & 4; Telephone Interview with Scherer, *supra* note 105.

being at work or attending rehabilitative services, giving rise to a plea that we "get these people out of this building" for their own good.¹⁷¹

While court time is a factor, it must also be concluded that low quality in case planning is a significant problem. While case plans are intended by statute to be individualized to the needs of the families involved and a unique map of how many families can be restored, a Department audit of cases in eight of its districts found that only one district regularly maintained individualized case plans, with goals "behaviorally stated and measurable." On average, the remaining seven districts failed to do so in twenty-five percent of their cases.¹⁷² Case plans are routinely "cookie cutter" in nature, rather than being tailored to the specific needs of the children and families involved.¹⁷³ In some cases, "cookie cut" case plans, which obtain court approval, fail to comply with logic and the facts of the case. A Department audit discovered at least one case plan which discussed the efforts of birth parents in a completely different case towards meeting reunification tasks. The case in which the plan was filed and approved was solely a termination case, in which reunification services were not being pursued at all.¹⁷⁴

The failure to include parents and guardians in case plan development was also independently observed in this investigation.¹⁷⁵ In addition, Department officials acknowledge that, "routinely parents are not included in case planning, and reasons are not documented," and further that, "many [DCF] districts are not developing case plans within sixty days of removal," as is legally required.¹⁷⁶ It appeared in this study that the practical impact of failing to include parents in case plans was to render the plans impractical. For example, it was regularly acknowledged by child welfare officials and even a judge that case plans are knowingly written to include rehabilitative services which parents cannot access for lack of transportation, a problem even in urbanized areas. The Department reports that standards of care

171. Interview with Dorian Damoorgian, Circuit Judge, Fla. 17th Judicial Circuit (Nov. 1, 2000) (notes on file with author).

172. Letter from Taylor (enclosures), *supra* note 28.

173. Fourth Annual Dependency Court Improvement Summit, *supra* note 1, with reports from at least four DCF districts.

174. Address by Taylor, *supra* note 158.

175. Visit to DCF Service Center, North Lauderdale (Sept. 29, 2000). During this visit, a case worker, who requested anonymity, acknowledged preparing a case plan unilaterally for a hearing the next business day. The case worker requested anonymity (notes on file with author).

176. Address by Taylor, *supra* note 158. One should not conclude that the DCF is the only party responsible for delays in case plan development. For example, one case was reported in this study in which a birth parent insisted on use of her psychologist, which caused delay, as the DCF needed to check the psychologist's credentials. Interview with Judge Frusciant, *supra* note 123.

can vary significantly in different areas of the state.¹⁷⁷ Parents, guardians, dependency system attorneys, and department officials all reported that case plans are regularly difficult to understand, particularly for parents of limited formal education.¹⁷⁸ One Department official described case plans as “gobbledy guck.”¹⁷⁹ This consensus is all the more troubling considering that courts must review and approve all case plans.

Another study, which performed a case-by-case sampling and review of sixty dependency cases in Hillsborough County, similarly found case plans lacking in addressing the comprehensive needs of families to achieve reunification. That study found that most cases failed to address services needed to resolve such core “collateral” issues contributing to family disfunction as, “substance abuse, domestic violence, or chaotic lifestyles.”¹⁸⁰ Appropriate case plans “were the exception, rather than the rule.”¹⁸¹ Similarly, case plans often fail to include all tasks and services ordered by the court. Only in one of its districts did the DCF find that all case plans included all court ordered tasks and services. The remaining audited districts failed in at least five percent of the cases and in as much as forty-four percent of the cases, with an average failure rate among audited districts of twenty-three percent.¹⁸² Moreover, case plans effectively continue beyond their expiration without required court approval in “many areas” and case plans are extended because the Department has failed to provide reasonable efforts towards reunification.¹⁸³

The problems extend beyond simply writing a good case plan. The Department’s failure to provide timely services can directly hinder the ability of parents to comply with case plan requirements. Typical of the complaints that this study received from birth parent attorneys was that of a birth parent required to pass fifteen random drug screenings within the time frame of the case plan. As of the date the case plan expired, the Department had only subjected the parent to three screenings, causing the case to be delayed. Such

177. Telephone Interview with Vilchez, *supra* note 1; Confidential Interviews of May 23, 2000 and July 26, 2000, *supra* notes 1 & 4; Interview with Judge Frusciante, *supra* note 123; FLA. DEP’T OF CHILDREN & FAMILIES, COMPREHENSIVE PLAN TO REORGANIZE THE DEPARTMENT OF CHILDREN AND FAMILIES 6 (Jan. 1, 2000).

178. Fourth Annual Dependency Court Improvement Summit, Case Conferencing Workshop and Circuit Breakout, *supra* note 1; Interview with Wagner, *supra* note 1; Telephone Interview with Scherer, *supra* note 105; Confidential Interview, *supra* note 4; Confidential Telephone Interview with birth parent in Broward County (Oct. 2, 2000) (notes on file with author).

179. Interview with Allegretti & Sanford, *supra* note 7.

180. BARRETT, *supra* note 5, at 22.

181. *Id.*

182. Letter from Taylor (enclosures), *supra* note 28.

183. Address by Taylor, *supra* note 158.

failures can cause even further delay. For example, the delay may cause a need for an updated psychological evaluation.¹⁸⁴ Another experienced dependency attorney interviewed for this study reported extended delays waiting for department action, such as waiting for approval of a psychological evaluation and another cited one case in which a DCF expert witness took nine months to complete a report.¹⁸⁵ Similar problems were cited by a committee of one judicial circuit's dependency court improvement project, described as a "waiting list for services," and further that new tasks are added after completion of those in the written case plan.¹⁸⁶ Reports of identical problems were cited by a Department caseworker supervisor.¹⁸⁷

An independent study of dependency cases in Hillsborough County finds conclusively that these conditions delay cases and, necessarily, permanency and stability that children need for their safety and health:

delays [by the Department] in following up with parents led judges and parents' attorneys to demand additional time for the parent to complete case plan tasks, and therefore extended children's time in temporary out-of-home care. This, in addition to frequency of movement, led children to have increasing problems with attachment and behavioral development.¹⁸⁸

C. *Social Conditions Joining Public Policy to Harm System Efficacy*

The dependency system's overall case load can impact the length of dependency litigation in each individual case. There has been a significant increase in the child welfare caseload in recent years, including a rapid escalation in the number of reports of suspected child abuse or neglect and responsive protective investigations. The number of calls to the child abuse hotline from August 1998 to August 1999 increased fifty-three percent.¹⁸⁹ The past five years has seen a sixteen percent increase in the number of investigations, from 109,869 to 127,859.¹⁹⁰ Caseload increases do not appear to be due merely to population increases, because the number of investiga-

184. Telephone Interview with Vilchez, *supra* note 1.

185. Telephone Interview with Scherer, *supra* note 105. Telephone Interview with John Coleman, in Ft. Myers, Fla. (Aug. 17, 2000) (notes on file with author).

186. See Fla. 17th Judicial Circuit Dependency Court Improvement Program, Children's Services Comm., *supra* note 159.

187. Confidential Interview with DCF caseworker in Broward County (Sept. 29, 2000) (notes on file with author).

188. BARRETT, *supra* note 5, at 23.

189. FLA. DEP'T OF CHILDREN & FAMILIES, *supra* note 9 at 4.

190. *Id.* at 2.

tions per 1000 children in the past five years has risen from 32.3 to 37.2.¹⁹¹ This has contributed to a significant increase in the number of cases of verified abuse or neglect. For example, in Hillsborough county, the number of verified reports of child maltreatment increased ten percent in just one year.¹⁹² The Department identifies three social conditions as the main contributors to a rise in the incidence of abuse and neglect, including rising substance abuse among adults, lack of affordable child care, and increasing incidence of family violence.¹⁹³

The societal dynamics contributing to high case loads may not yet have been met with sufficient resources, as the Department is calling for additional resources and alternative approaches to prevention, including greater funding of the primary prevention program sponsored by the Department, Healthy Families Florida.¹⁹⁴ Prevention efforts may need substantial reinforcement, as they appear inadequate now. At present, only forty-three of Florida's sixty-seven counties even have the main child abuse prevention program provided through the Department, Healthy Families Florida, and a few more counties only have partial coverage. The fiscal year 2000–2001 budget allocation of the child abuse and prevention program is \$24.5 million. By contrast, spending for intervention after child abuse or neglect that has already occurred is almost twenty times that amount, at \$482.8 million.¹⁹⁵

Failing to address this disparity will have long-term impact. The Department reports that because prevention services are currently insufficient, there is a risk of more serious problems for children, families, and the state at large to face later "many other critical services, particularly in the area of prevention and early intervention, remain limited or nonexistent. As a result, many individuals and families are unable to access services until they are in crisis when the costs in dollars and human terms are much higher."¹⁹⁶

A related issue is the impact on current resources from the growing number of children removed from their families. Removal of a child places particular stress on the child welfare system, because removal requires financial and other resources to address greater needs, perhaps most significantly, recruiting suitable foster homes. The number of children alleged to be victims of abuse or neglect who enter out-of-home care is increasing significantly. Hillsborough County, for example, saw a staggering eighty percent increase in the number of children entering out-of-home care from

191. *Id.*

192. Elizabeth Bettendorf, *Report: Child Abuse Climbs 10%*, TAMPA TRIBUNE, Oct. 25, 2000.

193. FLA. DEP'T OF CHILDREN & FAMILIES, *supra* note 9, at 2–3.

194. *Id.* at 4.

195. *Id.* at DCF/Family Safety charts 2–4.

196. FLA. DEP'T OF CHILDREN & FAMILIES, *supra* note 177, at 6.

1999 to 2000.¹⁹⁷ However, it does not appear that child removal cases are out pacing the increase in the total number of cases. Statewide, a recent measure showed an eighteen percent increase in child protective investigations, but only a thirteen percent increase in the number of children in foster care.¹⁹⁸

Notwithstanding data indicating a lack of proportional increases in dependent children being removed from their families, many child welfare professionals believe that removal often occurs when it is not needed. The primary reason cited is a lack of sufficient in-home services.¹⁹⁹ A sampling and review of dependency cases in Hillsborough County by child welfare professionals concluded that the availability of in-home services would have prevented removal in five percent of the cases.²⁰⁰ In another DCF District, the District Administrator reportedly estimates that some thirty-five percent of her District's foster children could have been left with their families of origin if appropriate services had been available.²⁰¹

Aside from a lack of in-home services, many attribute unnecessary removal of children from their families to a perceived shift in Departmental philosophy, originating with the Department's Secretary. It is asserted that the Secretary has created an atmosphere of overreaction in the "emergency" removal of scores of children by caseworkers and investigators attempting to protect their jobs, while claiming "safety" for children. The criticism has been put this way:

[Secretary] Kearney's policies set off a foster-care panic. Workers quickly got the message that they could be suspended, fired, maybe even prosecuted for wrongly leaving a child in his or her own home. But take away scores of children needlessly from loving homes and, while enormous harm would come to the child, the workers and their jobs were safe.²⁰²

197. BARRETT, *supra* note 5, at 5.

198. TERESA MARKOWITZ, FLORIDA COMMUNITY BASED CARE EVALUATION 1999-2000 7 (rev. Mar. 17, 2000) (prepared for the Fla. Dep't of Children & Families).

199. Fourth Annual Dependency Court Improvement Summit, Circuit Breakout and Case Conferencing Workshop; *supra* note 1; Interview with Karen Gievers, *supra* note 1; Confidential Interview of May 23, 2000, *supra* note 1; Interview with George B. Atkinson, Program Administrator, Broward Sheriff's Office, Child Protective Investigations Section, in Plantation, Fla. (July 27, 2000) (notes on file with author).

200. BARRETT, *supra* note 5, at 21.

201. Richard Wexler, *Children Paying High Price for Panic at DCF*, PALM BEACH POST, Oct. 1, 2000, at 1E.

202. *Id.*

The perception is shared by others. One news account characterized the Department's philosophy as, "remove [the] child at all costs," while noting that a child's death resulted in the suspension or firing of five workers and resignation of the two top district administrators.²⁰³ One may also find historical support for this belief in an appellate case concerning a ruling by the DCF Secretary, while serving in her previous capacity as a circuit judge in the dependency division.²⁰⁴ In that case, she was cited for "bureaucratic overkill" for erring too much on the side of caution in the interest of child safety.²⁰⁵ A DCF official, speaking on the condition of anonymity, reported in this study that, "I don't dare say 'reunification' in [the Secretary's] presence."²⁰⁶ Another Department spokeswoman is reported to have described a "new philosophy" at the DCF under Secretary Kearney's leadership this way: "If there's even a shadow of doubt about safety, that child will be removed. . . . Our new philosophy is to remove the child at all costs."²⁰⁷

However, the Secretary attributes current conditions not to any personal disposition, but rather a necessary reaction to the federal Adoption and Safe Families Act and to the state Kayla McKean Child Protection Act.²⁰⁸ Others apparently agree with her. The National Center for Youth Law reports a "widespread impression among [Florida] caseworkers and administrators that ASFA 'ended family preservation,'" as well as a general belief that this federal legislation is "widening the net" of children placed in out-of-home care.²⁰⁹ A report prepared for the Department likewise concludes that the Kayla McKean Act causes "a built-in implication that . . . if one is to err in their professional judgment, the error must be on the side of safety for the child."²¹⁰ At least one attorney who regularly represents birth parents reported to this study that if too many children are being removed, the Kayla McKean Act is the reason.²¹¹ Other Department officials indicate that the Department's philosophy actually has a greater emphasis on preserving families, reporting the Department's efforts to fund and promote community

203. Sarah Eisenhauer, *Foster Parent Shortage on Treasure Coast 'A Crisis' Officials Say*, FORT PIERCE NEWS, July 9, 1999, at A4.

204. See *In re C.G.*, 570 So. 2d 1136, 1137 (Fla. 4th Dist. Ct. App. 1990).

205. *Id.*

206. Confidential Interview with child welfare professional, public sector supervisory employee, in West Palm Beach, Fla. (June 13, 2000) (notes on file with author).

207. Eisenhauer, *supra* note 203, at A4.

208. Gwyneth K. Shaw, *Parents Say State Overreacts*, ORLANDO SENTINEL, June 11, 2000, at B1.

209. MARTHA MATTHEWS & MICHELLE CHENG, REPORT ON CHILD WELFARE ADVOCATES' CONFERENCE, YOUTH LAW NEWS 3 (undated report of Nat'l Center for Youth Law conference held November 5-6, 1999).

210. MARKOWITZ, *supra* note 198, at 9.

211. Telephone Interview with Scherer, *supra* note 105.

involvement in prevention efforts, consistent with the agency's published strategic plan.²¹²

Given the noted statistical evidence that the proportion of abuse and neglect cases which result in removal of children has not increased under Secretary Kearney's stewardship, the claim that she has created an atmosphere of overreaction to almost arbitrarily remove children would be hard to endorse. Likewise, the percentage of confirmed cases of abuse and neglect where children are actually removed remains relatively low at approximately seven percent.²¹³ Also noteworthy is the fact that over the past five years (the Secretary was appointed two and a half years ago) approximately the same percentage of all protective service cases, sixty percent, are closed with the children remaining with or being reunified with their parents.²¹⁴

The evidence indicates that any "unnecessary" removal of children is occurring due to a lack of in-home services, which accords with legal standards described above, not from any personal philosophy of Secretary Kearney. It would actually be more appropriate to recognize these cases as "avoidable" removals. As noted, federal and state law, which the Secretary is obligated to enforce, were amended at approximately the same time her tenure began to require removal of children when "available" services will not render the child safe in the home. At most, the anecdotal evidence would indicate that the Secretary requires personal accountability from child welfare professionals not to look past dangers to children based on consideration of scarce resources, which is certainly a commendable policy in the best interests of children and in accord with the law. The issue raised by this debate is whether the child welfare system at large is equipped to redress timely, and on a case-by-case basis, the inappropriate removal of children from their homes which can happen in individual cases. It is submitted that it is not due to the lack of independent representation for children's legal interests and the lack of reasonable assurance that court proceedings will adhere to statutory deadlines necessary for the health and welfare of children, as more fully explored below.

212. Shaw, *supra* note 208; Interview with Allegretti & Sanford, *supra* note 7; FLA. DEP'T OF CHILDREN & FAMILIES *supra* note 9.

213. FLA. DEP'T OF CHILDREN & FAMILIES, CHILD PROTECTIVE SERVICES, ANNUAL STATISTICAL DATA TABLES, FISCAL YEAR 1998-99 Table D-2, available at http://www5.myflorida.com/cf_web/myflorida/healthfamily/publications/childreissues/childabuse/9899chnt.pdf. This is the most recent data available. See Letter from Maria B. Leon, Family Safety, Fla. Dep't of Children & Families (July 31, 2000) (on file with author).

214. See Letter from Leon (enclosures), *supra* note 156.

D. *On Visitation Resources and Family Integrity*

On that typical day in Florida's dependency system, when a judge learned that a DCF case worker had blocked contact between a mother and her nine-year-old child for nine months without court approval and in contravention of state law, the judge queried as to how the case worker expected to achieve reunification for the family, which was the case plan goal, by keeping the family apart.²¹⁵ The judge's query recognized not only the child's constitutionally protected interest in the integrity of her family unit, but also the practical and significant damage done to the parent-child bond when contact is deprived for a protracted period of time. Florida courts have also recognized expert testimony that a lack of sufficient visitation can deprive a parent of an opportunity to demonstrate the ability to safely parent a child and thereby achieve reunification.²¹⁶

Department officials expressed confusion over whose rights are at issue regarding visitation, specifically whether it is a right of the child or a right of the parent.²¹⁷ In practice, visitation is so infrequent as to be almost meaningless in maintaining the child's bond to a parent. There appears consensus in the child welfare community that foster children are developing attachment disorders due to the limited visitation they are afforded with their parents, a devastating condition that harms the child's ability to form bonded relationships with anyone.²¹⁸ Visitation occurs once a month at best in most cases.²¹⁹ Visitation occurs frequently in locations which are impersonal and intimidating to parents and perhaps even the children, like a courthouse or at DCF offices. There are efforts to make visitation rooms appear like a "home" with noninstitutional furniture and décor, as were viewed in this study, but the parental awareness of the circumstances and surroundings calls into question the fairness of DCF workers subsequently critiquing parents in court for showing a lack of "intimacy" with their children during visitation.²²⁰

215. Under Florida law, visitation is supposed to be granted absent clear and convincing evidence that such would not be in the child's best interest. FLA. STAT. § 39.402(9) (2000). Visitation is to be ordered at the time of arraignment for any child in out-of-home placement, unless there is a "clear and convincing showing that visitation is not in the best interest of the child." § 39.506(6).

216. See *Simms v. Dep't of Health & Rehab. Servs.*, 641 So. 2d 957, 963 (Fla. 3d Dist. Ct. App. 1994) (Jorgenson, J., concurring in part and dissenting in part).

217. Interview with Allegretti & Sanford, *supra* note 7.

218. Fourth Annual Dependency Court Improvement Summit, *supra* note 1.

219. Telephone Interview with Vilchez, *supra* note 1.

220. A visitation room was viewed during the course of this study in DCF District 10 on September 29, 2000. Additional testimony on this point was received from Vilchez, *supra* note 1.

It would stand to reason that it is hard for a parent and child to maintain or improve a close relationship with visitation only once a month. However, Florida law does not even guarantee that to a child and a parent, setting only nonbinding "goals" for children who are in shelter or foster care to visit with their parents "at least" once a month, and siblings once a week.²²¹ Time and again in this study it was made clear that greater frequency of visitation would only be possible with greater resources, and that monthly visitation was often not achieved. Case workers already burdened with case loads above recommended levels and still spending too much time in court, away from the children who are their wards, lack the time to supervise visitation more frequently, not to mention scheduling problems with case plans that require parents to be at work during the same hours that supervised visitation is offered.²²² It will be truly hard to ever forget the faces of the mom and the dad, holding hands and choking back tears on that typical day in Florida's dependency system, as they tried to find words to explain how they could give up on reunifying their family after three years because their daughter simply did not know them any more.

E. *The Significance of a National Problem*

Florida is not alone in the nature or extent of dependency system problems, the tragedies it creates, and those it fails to stop. State child welfare systems nationally face questions about their efficacy.²²³ The federal government acknowledges that state programs are "plagued" by problems, including substantially increasing caseloads, persistent and growing social conditions contributing to the incidence of abuse and neglect, and weaknesses in state response systems, all of which are present in Florida. Workforce issues and poor agency relations with the courts are also specifically identified.²²⁴ Similarly, the efficacy of court involvement is

221. FLA. STAT. § 39.4085(15), (16) (2000).

222. Confidential Interview of May 23, 2000, *supra* note 1; Confidential Interview of July 26, 2000, *supra* note 4; Interview with Lisa Magrino, Program Operations Administrator (District 10), Fla. Dep't of Children & Families (Sept. 29, 2000) (notes on file with author); Telephone Interview with Vilchez, *supra* note 1.

223. National Conference of State Legislatures, *Child Welfare Project: New Directions for Child Protective Services, Executive Summary*, at <http://www.ncsl.org/programs/cyfl/cpsexsum.htm> (last visited May 15, 2001) (stating that "[Child Protective Services] is widely viewed as a system in crisis. . . [n]ot protecting children from abuse and . . . not supporting families that need help."); Duquette et al., *supra* note 5, at 93. (stating that "[t]he need for comprehensive reform of child welfare policies and systems has long been evident.")

224. U.S. GENERAL ACCOUNTING OFFICE, REPORT TO THE HONORABLE NYDIA VELAZQUEZ, HOUSE OF REPRESENTATIVES, CHILD PROTECTIVE SERVICES: COMPLEX CHALLENGES REQUIRE NEW STRATEGIES 6-7 (July 1997) (GAO/HEHS-97-115).

cited, with causes for delays in permanency identified as high case volume, inefficient case scheduling, and unprepared and burdened attorneys, all factors identified in this study as problematic in Florida.²²⁵

Along with growing public awareness and increased reporting of child abuse and neglect, the National Council of Juvenile and Family Court Judges cites poverty, drug use, and dissolved family units as social conditions contributing to increased case volume, similar to the problems identified by Florida's DCF.²²⁶ A major critique of child welfare systems nationally is a belief that resources for investigation and prosecution of abuse and neglect are overemphasized, while insufficient resources are directed to families in need of services to address these problems, including preventative or remedial services.²²⁷ Again, like Florida.

Commentators in other states lament the same impact on foster children which concern Florida. These comments about Louisiana's dependency system could just as soon have been made about Florida:

Unfortunately, in Louisiana and across our nation, too many children go to sleep at night not knowing where they will be tomorrow. These are our nation's foster care children. . . . It is not enough that these children are abused and neglected but, once removed from their homes by the state in an effort to protect them, their fate often does not improve. Too many of these children end up in "foster care drift" and spend their childhood waiting either to be reunited with their families or to be placed in new homes. Far too many of them simply wait away their childhood.²²⁸

The reasons identified for problems in dependency systems are also shared from state to state. Consider, for example, a recent task force report to the Georgia Department of Human Resources citing inadequate prevention resources and a lack of a comprehensive plan to address problems within its child welfare agency.²²⁹ Specifically cited are inexperienced and inadequately trained caseworkers, high caseloads, and, notably, systemic "mistrust" marked with private providers who "fear retribution and negative

225. *Id.* at 12.

226. NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, *supra* note 116, at 10; *see also*, National Conference of State Legislatures, *supra* note 223.

227. State and federal expenditures for out-of-home care total approximately seven billion dollars annually, more than is spent on child abuse prevention, child protection, family support and adoption services combined. National Conference of State Legislatures, *supra* note 126.

228. Landrieu, *supra* note 124, at 469-70.

229. GA. DEP'T OF HUM. RES., CHILD PROTECTIVE SERVICE TASK FORCE REPORT TO THE COMMISSIONER OF THE DEPARTMENT OF HUMAN RESOURCES 3 (Apr. 20, 2000).

consequences" for raising complaints about the functioning of the state agency.²³⁰ Similar problems are reported in Pennsylvania, where at least one county-based child welfare agency is alleged to be interfering with the ability of birth parents to accomplish goals to achieve reunification.²³¹ Of note, there is a specific allegation that supervised visitation with foster children is "routinely" scheduled when parents have to be at work, and that the parents are criticized regardless of their response.²³² They are either criticized for missing visitation or for missing work, precisely the complaints received in this study.²³³

The fact that Florida's problems exist so prevalently elsewhere, and have done so for so long, suggest that the problems must continue. It does suggest that some reform is still necessary. Reform of a type which may not have been tried elsewhere. Perhaps fortunately for Florida's children, the dependency system is about to be put to a substantial test by the federal government, with significant incentives for improvement. Or perhaps there is more reason than ever to worry.

F. *A Looming Moral Crisis Created by the Law*

With its extensive problems likely unresolved, in 2001 Florida's dependency system will be audited by the federal government relative to its participation in Social Security Act funding of foster care. Approximately twenty-eight percent of the state's child welfare budget will be at stake. Among other things, the audit will assess whether court reviews and permanency hearings are occurring timely, whether expedited termination of parental rights is pursued when warranted, and whether adoptions occur timely.²³⁴ Excepting the latter item, Florida's performance appears below standards.²³⁵ If Florida fails to meet ASFA requirements in more than ten

230. *Id.* at 7-8.

231. Barbara White Stack, *When the Bough Breaks: Beaver County Moves Faster Than Average to Sever Parents' Legal Rights to Their Children*, PITTSBURGH POST-GAZETTE, Dec. 13, 1999, at A17.

232. *Id.*

233. *Id.*

234. Secretary Judge Kathleen A. Kearney, Address at the Fourth Annual Dependency Court Improvement Summit (Aug. 30, 2000).

235. Federal auditors are also expected to be assessing the quality of rehabilitation services provided to parents and the quality of reunification decisions, emphasizing results over methods. It is expected that auditors will be examining data on the re-entry into foster care by children who have been re-united with their parents to ensure that children are not returned too soon or inappropriately. Address by Taylor, *supra* note 158. By one measure, the percentage of children who exit foster care who do not re-enter foster care within twelve months after protective supervision is terminated, Florida is doing relatively well. The

percent of its cases, the Department will be placed under a two-year corrective action plan, after which significant sanctions will be levied against its Title IV-B grant for persisting failures.²³⁶ "Substantial conformity" must ultimately be achieved in ninety-five percent of cases.²³⁷

On a case-by-case basis, ASFA presents a significant moral crisis for state intervention in the lives of children and families. As discussed, state failures to advance the initial stages of proceedings significantly contributes to keeping many children in foster care for fifteen of twenty-two consecutive months, thus implicating federal funding.²³⁸ This includes delays in conducting arraignments, preparing case plans, and providing meaningful and timely rehabilitative services to birth parents. Where statutory deadlines are honored, a child's parent should have no less than ten months to take advantage of rehabilitative services outlined in a case plan. State caused delays are contributing to parent-child relationships becoming subject to automatic termination, where the circumstances may not have otherwise warranted that in the first instance.

Federal law effectively decides that, regardless of whether delayed litigation is caused by the state or a birth parent, children will not suffer with delayed permanency. Even if the state fails to provide reunification services in the first fifteen months of the case, it is effectively relieved of providing such services because it must pursue termination of parental rights at that time.²³⁹ The plan to achieve permanent placement for the child is to prevail

statewide average for the past two fiscal years has maintained a steady 95%, an improvement from 89% in fiscal year 1995/1996. FLA. DEP'T OF CHILDREN & FAMILIES, FY 96/97 PERFORMANCE REPORT ii (Dec. 1997), available at http://www5.myflorida.com/cf_web/myflorida/healthfamily/publications/bureaus/dcf/docs/annual.pdf; FLA. DEP'T OF CHILDREN & FAMILIES, *supra* note 134, at FSP-026; FLA. DEP'T OF CHILDREN & FAMILIES, *supra* note 3, at FSP-026.

236. Address by Taylor, *supra* note 158; U.S. DEP'T OF HEALTH AND HUMAN SERVS., *supra* note 162, at ch. 7 § B, F. As discussed above, individual cases can also lose Title IV-E funding eligibility.

237. *Id.* at ch. 6 § A-3, A-4.

238. As noted, Florida law actually imposes a more stringent requirement, that terminations be sought once a child has been in foster care for twelve months if parents have not substantially complied with case plan requirements. FLA. STAT. § 39.806(1)(e) (2000).

239. AACWA has also been criticized for promoting placement of children in out-of-home care by providing open-ended funding for foster care, while funding for rehabilitative and preventative services are limited. There is no indication that the scheme adopted by ASFA remedied this problem because the state is effectively relieved of its rehabilitative obligation once a child has been in foster care for fifteen of twenty-two consecutive months, even if delays are caused by the state. See Roger J.R. Levesque, *The Failures of Foster Care Reform: Revolutionizing the Most Radical Blueprint*, 6 MD. J. CONTEMP. LEGAL ISSUES 1, 19 (1994-1995).

over continuation of “reasonable efforts” towards reunification.²⁴⁰ Federal law presumes that the state will responsibly pursue cases, with any delay caused by birth parents themselves, leaving them responsible for whether their families reunify or are destroyed. Given these standards, the arrival of federal auditors to Florida can create significant pressure to compromise familial and child interests in order to maintain federal funding.²⁴¹ The pressure to make the wrong and arguably immoral choices has been suggested by other commentators:

Through [ASFA], Congress now wants federal and local officials responsible for oversight of the nation’s foster care population to concentrate primarily on reducing the time children spend in foster care. This focus will divert attention from both the prevention of foster care and the devotion of money and services to reunification efforts. Instead, new federal policy will encourage adoptions once children have been in foster care for a certain length of time, even in cases where there was no compelling need for foster care placement or where no efforts were undertaken to reunify children with their birth families.²⁴²

In order to prevail in the face of the moral dilemma created by ASFA, and embrace its invitation to honor family integrity without sacrificing child safety, efficacy at the case level must be addressed and assured, precisely because that is where success or failure for a child and a family is and must be made.

240. 42 U.S.C. § 671(a)(15)(C) (Supp. IV 1998).

241. Federal authorities will assuredly be cognizant of ASFAs intent to reduce the number of children in foster care and the length of stay in foster care. See NATIONAL CONFERENCE OF STATE LEGISLATURES, 1998 STATE LEGISLATIVE RESPONSES TO THE ADOPTION AND SAFE FAMILIES ACT OF 1997, 24 STATE LEGISLATIVE REPORT 5 (Mar. 1999), available at <http://www.ncsl.org/programs/cyf/asfaslr.htm>. For this reason, latitude given to states as to these ultimate performance measures will likely be limited. Federal auditors affirmatively indicate an intent “to use a new, results-oriented approach to monitor states’ child welfare programs, including compliance with ASFA amendments.” U.S. GENERAL ACCOUNTING OFFICE, *supra* note 19, at 16. Moreover, these auditors indicate an intent to depart from traditional evaluations of “the accuracy and completeness of case files,” in favor of evaluating compliance with “required legal processes and protections” which impact on child permanency and safety. *Id.*

242. Martin Guggenheim, *The Foster Care Dilemma and What To Do About It: Is the Problem That Too Many Children Are Not Being Adopted Out of Foster Care or That Too Many Children Are Entering Foster Care?*, 2 U. PA. J. CONST. L. 141, 144 (1999). Mr. Guggenheim’s discussion of the adverse impact that these circumstances will have on the poor and minorities, who are overrepresented in the foster care system, warrants serious consideration. *Id.* at 145–46.

VII. PART III—TAMING THE HYDRA—HOW TO ENSURE CASE-BY-CASE EFFICACY

A. *Two Heads Are Not Better Than One*

“The Department is like a hydra, with many heads, each not knowing what the other is doing,” commented a widely respected general master interviewed for this study.²⁴³ His remark aptly describes the multiplicity of roles that the Department is expected to fulfill in each dependency case and the difficulty attendant with that task. The inherent conflict between the missions of caring for families and of investigating and prosecuting parents is recognized by federal authorities, who state:

Caseworkers must balance the often conflicting roles of investigator and social worker. As investigators, [child protective services] caseworkers collect evidence and work with law enforcement officials; as social workers, they work with families to identify services needed to improve conditions in the home and provide a safe environment for the child.²⁴⁴

In a similar manner, the National Association of Child Advocates finds this to be the case in the “traditional” child protective services model.²⁴⁵ The Association describes the traditional role of child protective services to be “semi-prosecutorial,” given the role of fact-finding to support legal findings of abuse and neglect.²⁴⁶ Assigning the task of providing or coordinating rehabilitative services with this prosecutorial role makes it “difficult to achieve the necessary trust between families and the [child protective services] agency worker” and interferes with open communication necessary for provision of successful services.²⁴⁷

Following the traditional child welfare model, Florida law provides for termination of parental rights if a parent fails to comply substantially with a case plan, while also providing that the Department is primarily responsible for preparing the case plan and assisting the parent in pursuing case plan

243. Interview with Nicholas Lopane, General Master, Fla. 17th Judicial Circuit, in Ft. Lauderdale, Fla. (Aug. 7, 2000) (notes on file with author). Several child welfare officials interviewed in the Circuit provided unsolicited and very high praise for General Master Lopane’s performance in the dependency division.

244. U.S. GENERAL ACCOUNTING OFFICE, *supra* note 224, at 3.

245. HEITZI EPSTEIN, NAT’L ASSOC. OF CHILD ADVOCATES, A CHILD ADVOCATE’S GUIDE TO STATE CHILD PROTECTIVE SERVICES REFORM 1 (Winter 1999).

246. *Id.* at 3.

247. *Id.* at 6.

requirements. These are roles which, in order to succeed, require trust and cooperation between the Department and the parent. The ethics and wisdom are suspect of also requiring the Department in many cases to simultaneously develop evidence to prove that the parent has failed to pursue case plan requirements. It would seem that this arrangement would be analogous to, in criminal matters, asking the prosecutor to try to rehabilitate the accused while pursuing prosecution, and expecting trust to develop between the prosecutor and the accused. Clearly, the prosecutor could only pursue one of these roles in good faith at a time. The accused is only going to develop limited, if any, trust for the person who may ultimately seek to prosecute. Given that the Department's participation in the case plan is at least intended to protect a child's interests in family integrity, the arrangement also calls into question whether the child's interests will be appropriately protected in every case.

These observations are not merely academic. One caseworker interviewed for this study reported that the impact of this dual role was for families in need of help to become simply "defensive," a view shared by many child welfare professionals who note that parents often mistrust caseworkers for this reason.²⁴⁸ Anger regularly develops between parents and DCF caseworkers relative to testimony over case plan progress, rising to the level of shouting in courtrooms.²⁴⁹

Concern exists that in cases where the Department believes that birth parents will ultimately fail to rehabilitate themselves and achieve reunification, lackluster assistance is provided to the birth parents in accomplishing the requirements of their case plan; in short, the Department displays limited interest in rehabilitation when its attention shifts to proving a case for termination of parental rights.²⁵⁰ Confirmation of this concern is found in reports of Department caseworkers in another recent study. These workers objected both to judges and parents' attorneys who sought to maintain family reunification as a goal until the parent "proved" they were unable to achieve case goals, particularly where the caseworker's assessment was that the parents were "unlikely" to rehabilitate themselves into safe parents for their children.²⁵¹

When the Department fails to provide appropriate support and services for a birth parent to achieve reunification, a birth parent can receive addi-

248. Confidential Interview with DCF case counselor in Broward County (Sept. 29, 2000) (notes on file with author); Fourth Annual Dependency Court Improvement Summit, Case Conferencing workshop, *supra* note 1; Confidential Interview, *supra* note 4.

249. Interview with Lopane, *supra* note 243; Fourth Annual Dependency Court Improvement Summit, Lawyers in the Courtroom workshop, *supra* note 1.

250. Interview with Vilchez, *supra* note 1; Confidential Interview of September 29, 2000, *supra* note 248.

251. BARRETT, *supra* note 5, at 23.

tional time to pursue reunification services. This is consistent with state law and Florida's state plan for Title IV-E funding, which acknowledges that case-by-case eligibility is contingent on a judicial determination that reasonable efforts are made by the Department (as the agency responsible for implementing the plan) to, at the least, make it possible for a child to return home if not stay there in the first instance.²⁵² Knowing that its failure to demonstrate this to the Court compromises funding provides a strong disincentive for the DCF to bring to the court's attention that it has failed to provide such services timely, despite the detriment to the child. Likewise, a particular case worker may risk employment-related sanctions. This study, in viewing a typical day in Florida's child welfare system, saw multiple cases with significant case plan delays and other actions contrary to a child's best interests, such as providing for parental visitation, none of which were reaching the court's attention on a timely basis. In many cases, the simple passing of time can be contrary to the child's best interest or, at the least, contrary to the child's interests in maintaining family integrity, particularly in light of federal law pressures.

Even in cases where services are provided timely under a case plan, undue litigation delay may very well result nonetheless from the melding of the caretaking role and the prosecutorial role within the Department. Confusion and lack of resolve would be expected. One child welfare professional interviewed for this study emphatically attributed delayed cases resulting from neither the courts nor the DCF having "the guts" to proceed to termination of parental rights.²⁵³ A similar perception is that case workers are slow to advance cases and make decisions due to a generalized fear of making wrong decisions.²⁵⁴ Likewise, many find "confusion" in the roles of Department attorneys given the fact that the Department is the client, but the real party in interest is a child.²⁵⁵ As one caseworker described it, "our interest is the child's."²⁵⁶ Despite the Department's mission to safeguard the child's interests in family integrity, the same caseworker described parents' attorneys as being "on the family's side."²⁵⁷

The inherent conflict of missions between reunification and prosecution can be aggravated when case counselors and their supervisors disagree as to

252. U.S. DEP'T OF HEALTH & HUMAN SERVS., STATE PLAN FOR TITLE IV-E OF THE SOCIAL SECURITY ACT, FOSTER CARE AND ADOPTION ASSISTANCE, STATE OF FLORIDA § 2, at 1 (1998) (citing 42 U.S.C. § 472(a)(1); FLA. STAT. §§ 39.395, .401-02, .501-08).

253. Telephone Interview with Peter Ballisaris, co-chair, Broward Child Welfare Initiative (Aug. 3, 2000) (notes on file with author).

254. Confidential Interview, *supra* note 4.

255. *Id.*; Fourth Annual Dependency Court Improvement Summit, Lawyers in the Courtroom workshop, *supra* note 1.

256. Confidential Interview, *supra* note 248.

257. *Id.*

whether termination of parental rights should be pursued. Department employees report cases where a case counselor and a supervisor disagree on what is best for the child, leaving the case counselor in conflict over court testimony on the best interests of a child.²⁵⁸ In these cases, while the caseworker would have an obligation to provide accurate testimony to the court as to observations and facts supporting one position, the caseworker would at the same time be acting contrary to the will and direction of a supervisor. The position of the caseworker would seem to be untenable, especially given personal concerns for performance evaluations, career references, and the like. The best interests of the child would seem to be left hanging in the balance.

The conflict of missions imposed by statute on the Department has not escaped the attention of Florida courts. The Third District Court of Appeal commented that, "there are instances in which the best interests of the child and the [Department] may differ."²⁵⁹ The First District Court of Appeal expounded further:

In keeping with the welfare and best interests of the child or children being the dominant or controlling consideration in all custody proceedings we may not overlook the probabilities that instances may occur wherein the best interests of the child and of the agency may be divergent. Indeed, in the case sub judice, one of the agents of the Division of Family Services testified that there were agency fears that their foster home or shelter would be lost if the agency insisted that the five children remain there together. We recognize the validity of the agency's concern for the loss of a facility but that fear, though a legitimate interest of the agency, may not be permitted to interfere with the best interests of the subject children.²⁶⁰

The court's observations underscore the fallibility of a system which requires the service provider role to be responsible for proving that service provision failed. The statutory assumption that the Department will always act in accord with the best interests of children is likewise invalidated. The National Court Appointed Special Advocations Association similarly acknowledges that the interests of children during dependency litigation may not only be adverse to their parents, but also adverse to the state, thus giving

258. Fourth Annual Dependency Court Improvement Summit, Lawyers in the Courtroom workshop, *supra* note 1.

259. *Simms v. Dep't of Health & Rehab. Servs.* 641 So. 2d 957, 962 (Fla. 3d Dist. Ct. App. 1994).

260. *Div. of Family Servs. v. State*, 319 So. 2d 72, 77 (Fla. 1st Dist. Ct. App. 1975).

rise to the need for independent representation.²⁶¹ Notably, the primary advocate for including a guardian for a child as a federal law mandate has proposed a broad role for the guardian to include both legal and nonlegal matters.²⁶²

Other comments note how a child's best interests may be compromised by the conflict of interest that may arise when the governmental agency charged with providing reunification services is the same agency empowered to petition for termination of parental rights. One argues that use of private sector agency case petitioners would relieve the conflict:

The burden is on the public child welfare agency to provide services, but it is often the private agency that is actually delivering services and in frequent contact with the family. When the private agency is allowed to petition for termination, in effect it acts to release the public agency from the responsibility of providing further reunification services. . . . Allowing the private provider, not just the public agency, to make this petition avoids resource conflicts for the public agency and helps to insure that the petition is in the individual child's best interest.²⁶³

Above all else, these perspectives underscore the untenable position that the Department is placed in by the multiplicity of missions and roles assigned to it by statute. It would stand to reason that by removing from the Department its "prosecutorial" role, the Department ought to be better positioned to stay focused on the mission of simply helping families achieve case plan goals and developing services for them, the mission it is uniquely equipped to fill. Likewise, by removing the Department's prosecutorial mission, parents will more likely develop trusting relationships with the Department that are necessary for successfully rehabilitating parents in a timely manner, as well as helping children. This can only serve to improve the safety and stability of dependent children and provide for the best possible protection for their interest in family integrity as well as permanency. Concluding that the Department ought to be relieved of its prosecutorial role in dependency cases necessarily gives rise to the question of where else that role ought to be repositied.²⁶⁴ It is submitted that it can be repositied with counsel for children

261. Rebecca Hertz, *Guardians Ad Litem in Child Abuse and Neglect Proceedings: Clarifying the Roles to Improve Effectiveness*, 27 FAM. L.Q. 327, 330 (1993).

262. *Id.* at 331.

263. Mangold, *supra* note 115, at 1447.

264. This report is not the first to recommend that a person other than a representative of the Department be the primary moving party in dependency litigation. See generally Albert E. Hartmann, *Crafting an Advocate for a Child: In Support of Legislation Redefining the Role*

who, in addition to helping resolve the problems of conflicting missions for the DCF, would provide other benefits to children in dependency litigation.

B. *Counsel for Children*

Child welfare professionals working in jurisdictions where children have attorneys report a positive impact on case progress. One highly placed child welfare professional reported in this study that counsel for children "yield a more vigorous case process" and help ensure that the parties are on equal footing.²⁶⁵ In accord, the American Bar Association ("ABA") took the opportunity when promulgating its proposed standards for lawyers representing children in dependency cases, to express a belief that "all children subject to court proceedings involving allegations of child abuse and neglect should have legal representation."²⁶⁶ Some forty states require that children who are the subject of dependency actions be represented by an attorney. Of those, approximately thirty provide for an attorney who attempts to jointly represent the best interests and the wishes or express interests of the child, while the remaining ten states keep these functions split between an attorney to represent the child's wishes and a guardian to represent the child's best interests.²⁶⁷

Where adequately funded and provided sufficient direction as to duties, counsel for children promotes the interests of children in prompt case progress. Efforts in Utah demonstrate this point. In a study of efforts to provide counsel for children in Utah (termed "attorney guardian ad litem") it was found that use of privately contracted attorneys, who split their professional energies with more lucrative private practices, "had strong incentives to do as little work as possible on their dependency cases, for which they were paid almost nothing."²⁶⁸ The pay was approximately \$120 per case at best.²⁶⁹ The role of the attorney was also vaguely defined.²⁷⁰ Needed legislative reforms, which were implemented, included funding to train children's attorneys and

of the Guardian Ad Litem in Michigan Child Abuse and Neglect Cases, 31 U. MICH. J.L. REFORM. 237 (1997).

265. Telephone Interview with Peter Digre, formerly Deputy Secretary of Operations for the Florida Department of Health and Rehabilitation Services, DCF's predecessor, Los Angeles County child welfare services agency (Aug. 25, 2000).

266. AMERICAN BAR ASS'N, *supra* note 130, at Preface.

267. DUQUETTE ET AL., *supra* note 5, at ch. 7, § 11.

268. Pat McElroy, *New Guardian Ad Litem System Key to Utah Child Welfare Reform* XV YOUTH LAW NEWS 3, 5 (Sept./Oct. 1994), available at <http://www.youthlaw.org/advocacy.htm>.

269. *Id.* at 2.

270. *Id.*

increased funding to adequate levels for compensation and expenses of representation.

Clarification of the attorney's role was also critical. Among other things, Utah law directs the attorney to independently investigate and inform the court where services are not being provided to a child or the child's family, assess options of residential placement, when parents are not using court-ordered services or where services are not working as expected, and where the agency fails in its duties, including holding statutorily-required administrative reviews and hearings.²⁷¹ Of particular interest, Utah law requires the child's attorney to notify the court of "any violation of orders, new developments, or changes . . . that justify a review of the case."²⁷² With these reforms in place in 1998, Utah markedly achieved more timely permanency for foster children than Florida achieved. In reunification cases, the average length of stay in foster care was only 9.7 months.²⁷³ Adoption cases saw children in foster care an average of 27.8 months.²⁷⁴ The average length of stay in "permanent foster" homes, as a case goal, was thirty-four months.²⁷⁵ A permanency decision was achieved in twelve months in ninety-three percent of cases, forty-three percent were assigned a permanency goal and parental rights were terminated in fifty-one percent in twelve months.²⁷⁶ By January 1999, only twenty-six percent of Utah's foster children lacked a permanency goal after six months in care.²⁷⁷ Of foster children under the age of six, permanency goals were lacking after six months for only three of them—not three percent—three children.²⁷⁸ Moreover, the average time to close a case with a successful adoption after termination of parental rights was less than thirteen months in the fiscal year 1997 and less than ten months in the fiscal year 1998.²⁷⁹

It would seem that counsel for children can help ensure that children's legal interests do not fall victim to the litigation interests of other parties, particularly as to delays in the progress of litigation which may only be in the interests of the child welfare agency or birth parents, several examples of which were seen during this study. However, it would seem that the child welfare agency must not be the one to represent the child's legal interests or even to execute the interests of the state in protecting the welfare of children.

271. *Id.* at 4; UTAH CODE ANN. § 78-3a-912(3)(x) (1996 & Lexis Supp. 1990).

272. § 78-3a-912(3)(x)(v).

273. *See infra* note 275.

274. *See id.*

275. UTAH DIV. OF CHILDREN & FAMILY SERVS., STATE OF UTAH, DIVISION OF CHILD AND FAMILY SERVICES OUTCOME MEASURES REPORT, 1998 11 (Jan 15, 1999).

276. *Id.* at 21.

277. *Id.*

278. *Id.* at 23.

279. *Id.* at 24.

The Supreme Court of Florida, for example, has recognized that any agency or person may do so, stating that "a petition for termination of parental rights is not a criminal prosecution which must be brought and prosecuted by the state. . . . It is a civil action initiated to protect the rights of abused, neglected or abandoned children."²⁸⁰

Observations and reports received in this study reveal that reliance on the Department and its attorneys to protect a child's legal interests is simply not working. Communication between Department caseworkers and their legal representatives is extremely poor in many areas of the state, causing information to simply not be available for the court.²⁸¹ Regularly, caseworkers and Department attorneys communicate for the first time only shortly before a hearing or during the hearing itself. One caseworker reported that in four years with the DCF, the earliest consultation he had with a Department attorney was in the court hallway right before a hearing and that regularly "we go into hearings with no consultation with" Department attorneys. He also reported being threatened with a contempt of court charge because he failed to attend three hearings, each time because Department lawyers failed to provide advance notice of the hearing. Ironically, this caseworker reported that communication with parents' attorneys was reported to be "very good."²⁸² Likewise, Department attorneys do not follow up with caseworkers or supervisors to ensure that court orders are followed, nor do caseworkers believe their written reports are read by the attorneys.²⁸³

Accepting that counsel for a child can be expected to provide better protection for the child's legal interests, and that a state's child welfare agency need not represent the legal interests of the state in dependency litigation, the issue of whether a child's attorney can act in a manner consistent with the child's legal interests while also ensuring that the state's interest in protecting the welfare of the child is not compromised ought to be addressed. This would seem possible for two reasons. Most importantly, the child's best interests ought not be different from the interests desired by the state in dependency litigation. Any information that the state acquires through its child welfare agency about the progress or condition of the parties can still be conveyed to the court for due consideration, guided by the agency's counsel, in a fact witness capacity. In addition, any changes made to the model of legal representation would not change the role of the court as

280. *Simms v. Dep't of Health & Rehab. Servs.*, 641 So. 2d 957, 961 (1994) (stating that the guardian ad litem can "exercise[] concurrent power" with the state child welfare agency "to initiate and litigate" dependency proceedings).

281. Confidential Interviews, *supra* notes 187, 206, and 248; Interviews with Query, and Jones, *supra* note 1.

282. Confidential Interview, *supra* note 248.

283. *Id.*

the state's ultimate representative in adjudicating what is in the best interests of a child.

As noted, some states provide for counsel to represent a child's best interests as well as express interests, while others provide for an attorney simply to represent a child's legal and express interests. A review of the debate over which model is more appropriate will help reveal why the latter model is best suited for supplanting the role of the child welfare agency as the primary moving party in dependency litigation, while ensuring that a child's legal interests and best interests are duly protected. The debate necessarily begins with an assessment of whether a single attorney can represent both the child in the traditional sense of representing a client's wishes and representing the child's best interests.

Many opine that the roles are incompatible, giving rise to serious confusion and ethical dilemmas.²⁸⁴ The ABA likewise takes the position, in its standards for legal representation of dependent children, that the role of representing a child's best interests as a guardian ad litem and as a traditional attorney for a child will not be compatible in many cases. The ABA observes that:

A lawyer appointed as guardian ad litem is almost inevitably expected to perform legal functions on behalf of the child. . . . [I]n many states, a guardian ad litem may be required by statute or custom to perform specific tasks, such as submitting a report or testifying as a fact or expert witness. These tasks are not part of functioning as a "lawyer."²⁸⁵

For these reasons, the ABA recommends appointment of a separate guardian when the child expresses a wish which is not simply contrary to the attorney's view of the child's best interest, but potentially "seriously injurious to the child."²⁸⁶

While these concerns exist, note that the attorneys representing the Department have for years been effectively conducting litigation regarding childrens' best interests under the auspices of representing the Department, though at best representing the Department's point of view of the child's best interest. This is because the Department is the client. Where the Department's interests are contrary to the child's best interests, the responsibility to ensure the child's best interests are upheld has fallen to the courts. This reliance is misplaced. As specific cases revealed in this study demonstrate, much damage can be done to a child while information is either not brought

284. Hartmann, *supra* note 264, at 238.

285. AMERICAN BAR ASS'N, *supra* note 130, at pt. I, § A-2.

286. *Id.* at B-4(3).

to the court's attention or simply escapes its attention for a protracted period of time. This condition is aggravated by operation of certain child welfare laws, particularly laws mandating that time frames be met notwithstanding the state's failures to perform reasonable efforts to protect a child's interests in family integrity and rehabilitation.

Counsel for a child, assigned solely to protect their legal interests, can be an effective mechanism to ensure that matters are brought timely to the court's attention. Under this model, litigation can be advanced without decisions being compromised by agency interests which are contrary to a child's best interests. Unlike agency attorneys responsible for the agency as their client, a child's attorney remains accountable to the child, ethically and otherwise, particularly where litigation must be advanced in accord with the child's legal interests. Nonetheless, it is important that the Department maintain counsel to present to the court its professional recommendations and perspectives, and information held as a fact witness.²⁸⁷ A child's legal interests are defined by the ABA as follows:

The determination of the child's legal interests should be based on objective criteria as set forth in the law that are related to the purposes of the proceedings. The criteria should address the child's specific needs and preferences, the goal of expeditious resolution of the case so the child can remain or return home or be placed in a safe, nurturing, and permanent environment, and the use of the least restrictive or detrimental alternatives available.²⁸⁸

In practice, it would also seem possible for representation of dependent children to proceed in accord with the lawyer's assessment of the child's "best interests," subject to objective presentation of all pertinent evidence for the court's determination of the child's best interests, an approach consistent with representing a child's legal interests.²⁸⁹ For children old enough to have some appreciation of what their interests or wishes might be, an attorney representing the legal interests of a child can advocate for the wishes of the child, while also executing statutory responsibilities for ensuring that the legal rights of the child are met.²⁹⁰ As the ABA points out, where this role

287. Consistent with this point of view, see DUQUETTE ET AL., *supra* note 5, at ch. 7 § 8.

288. AMERICAN BAR ASS'N, *supra* note 130, at pt. I, § B-5.

289. Mangold, *supra* note 115, at 1452.

290. One must be cautious to consider the motivations of the child and the capacity of the child to appreciate why they may choose a particular viewpoint, even as to wishing to remain silent. Commentators have observed:

From a developmental perspective, children's cognitive perception of the world is quite egocentric until age eight or so. The child sees self as the cen-

may become problematic, a guardian ad litem can be effective in achieving resolution.

At present, Florida law relies upon volunteer guardians ad litem to represent the best interests of children in essentially all dependency litigation. Representing a child in this manner satisfies federal law, which requires only that a nonlawyer guardian ad litem or court appointed special advocate be appointed to represent the child in every abuse or neglect case. The guardian is supposed to obtain first hand knowledge of the pertinent facts to assess and advise the court of a child's best interests, but need not address a child's legal interests and may very well not be legally competent to do so.²⁹¹ In practice, the guardian program is often assigned to cases for which it lacks an actual embodied guardian. In addition to first hand reports received in this study, the Florida House of Representatives Committee on Children and Families cites to "unofficial reports" that as many as fifty percent of foster children do not have guardians ad litem appointed to represent their interests.²⁹² In the limited instances where attorneys ad litem are appointed, the statutes lack even a definition of "attorney ad litem," and lack any further direction on the role or expectations of the attorney.²⁹³ In many cases, an appointed volunteer guardian ad litem will only visit a child a few times, perhaps even just once, during the course of a case.²⁹⁴

The guardian ad litem program itself recognizes that its role is not primarily to safeguard the *legal* interests of a child. As indicated in a memorandum of law filed by the guardian ad litem program in one dependency case, the program only sends one of its attorneys to dependency hearings with the volunteer lay guardian if it anticipates that legal arguments will have to be advanced or the program is affirmatively seeking relief through a motion to execute its role in the case.²⁹⁵ The guardian program observed that "the legislature has entrusted the Court with ensuring that the legal rights of

ter and cause of all that happens, which—when traumatic events such as severe sexual and physical abuse are occurring, being removed from one's home, etc.—is terrifying. Telling the child to take on even more responsibility and "direct" his or her adult attorney may be overwhelming and traumatic for the child and exacerbate feelings of blame.

DUQUETTE ET AL., *supra* note 5, at ch. 7, § 14.

291. 42 U.S.C. § 5106a(b)(2)(A)(ix) (Supp. IV 1998).

292. FLA. H.R. COMM. ON CHILDREN AND FAMILIES, HB 2125, 13 (May 24, 2000).

293. *Id.* at 14.

294. Interview with Judge Frusciante, *supra* note 123.

295. See Amended Memorandum of Law in Support of Shelter Review Hearings, § V, *In re* Minor Children (17th Cir. Filed April 5, 2000) (No. 99-770-DP) (on file with author) The memorandum was supplied by the guardian program with the childrens' identifying information redacted due to confidentiality in the case.

children are protected"²⁹⁶ While one may suggest that the legislature has otherwise assigned this task to the Department, one must recognize that in the conduct of litigation the Department may and does have instances when its interests, or at least its actions, depart from the child's best interests. Expecting the Department's attorneys to seek out court assistance or even inform the court of these instances is wholly contrary to the professional responsibilities of these attorneys to their client, the Department.²⁹⁷

For these reasons, it is clear that counsel for children would not only serve different purposes than a guardian ad litem, but may also provide a basis for more selective appointment of volunteer guardians, particularly to cases where the child is old enough to express wishes which may be contrary to the attorney's assessment of the child's best interests.²⁹⁸ This would allow for a more readily directed guardian program as a specialized and limited resource, rather than its widespread assignment in what appears to be a vain attempt to provide all children with some degree of independent representation through the guardian ad litem program.

For an additional reason, the guardian ad litem function would still be necessary in some cases. Having an attorney represent the legal interests of children cannot be assured to provide for the best interests of the children, for example, where an abuse victim wishes to return to an abusive home. The express wish to return would still have to be represented by a child's attorney while representing the child's legal interests and would call into question the efficacy of best interests advocacy. The converse is true of a guardian ad litem representing the best interests of children.²⁹⁹

The ABA recommends appointment of counsel for children at the earliest point, including upon removal from their home and when the court obtains jurisdiction.³⁰⁰ To best ensure that the goals of this proposal are achieved, it is recommended that counsel for children be appointed at the time of shelter review hearings, at which time the prosecutorial function would be assumed from the Department. Following this appointment, counsel for children should operate under statutory standards for representation and duties. The failure to provide specificity has decreased efficacy in other

296. *Id.* § VII.

297. There should be no doubt that the Department itself, not a dependent child, is the client recognized by Department attorneys, even when the attorney is employed and housed outside of the Department itself. See Letter from Patrice Paldino, Assistant Attorney General (Apr. 25, 2000) (on file with author).

298. See also AMERICAN BAR ASS'N, *supra* note 130, at pt. I, § B-4(1) (wherein the A.B.A. recommended that attorneys for children seek a separate guardian ad litem where a child is unable to express a position or appreciate the proceedings, such as with younger and preverbal children).

299. See generally McElroy, *supra* note 268.

300. AMERICAN BAR ASS'N, *supra* note 130, at pt. II, § H-1, commentary.

jurisdictions, such as Utah prior to recent statutory changes, as discussed above.

State laws typically do not, but perhaps should, adopt standards for lawyers who represent children in dependency cases.³⁰¹ The ABA developed nonbinding model standards.³⁰² It is reported that these standards “have become de facto standards of practice” for lawyers representing children.³⁰³ A similar need for clear standards for attorneys representing child welfare agencies is expressed as follows:

Ambiguity of role and lack of clear practice standards is not only a problem for lawyers representing children, it is also a challenge for attorneys who represent parents or the child welfare agency. National standards for legal representation of the child welfare agency and of parents accused of child maltreatment are not currently available, but their development may be very important to improve professional practices.³⁰⁴

Notwithstanding these cautions, in 2000, the Florida Legislature created an attorney ad litem pilot program (hereinafter “the Program”) to provide attorneys for some children in out-of-home care without articulating such standards. The Program is established by the Office of State Courts Administrator either a private or public entity, independent of any other agency responsible for the care of the dependent children.³⁰⁵ In part, the program aspires to reduce the length of time children spend in foster care.³⁰⁶ In cases where the court determines that attorney ad litem representation is necessary, the Program is appointed at the shelter hearing, though the court may appoint the Program later if the need arises.³⁰⁷ Once appointed, the attorney ad litem represents “the child’s wishes . . . as long as the child’s wishes are consistent with the safety and well being of the child.”³⁰⁸ The role of the attorney in representing the child is consistent with those representing an adult client.³⁰⁹

Beyond this statutory direction, the “duties, responsibilities, and conduct” of attorneys in the Program are left to the courts to establish by rule.³¹⁰

301. Duquette et al., *supra* note 5, at 122–23.

302. *Id.* at 123.

303. See FLA. H.R. COMM. ON CHILDREN AND FAMILIES, HB 2125, 15 n.1 (May 24, 2000).

304. Duquette et al., *supra* note 5, at 123.

305. FLA. STAT. § 39.4086(2)(b) (2000).

306. See *id.*

307. § 39.4086(2)(f).

308. § 39.4086(2)(g).

309. *Id.*

310. § 39.4086(3).

While perhaps practical for attorneys simply representing the child's express wishes, such an approach would be ill-advised for the proposal for counsel for children made in this report, particularly due to the proposed responsibility for progress of the litigation. Statutory standards ought to specify what legal interests of children ought to be protected, as suggested by the ABA. For example, it would seem that representing the child's legal interests ought to include many of the matters set forth in the Utah model, particularly as to timely progress of litigation, receipt of appropriate foster care services for children in out-of-home care, parental access to rehabilitative services, and regular visitation if reunification is a case plan goal. The ABA identifies several other litigation-related duties, including conducting independent investigation and discovery, maintaining contact with other litigants and representatives, requesting services for the child and parents, and negotiating settlements.³¹¹

Given the need for independence, as well as the value of specialized representation, it is recommended that counsel for children be primarily provided through a discreet independent office, similar to the Program already established by the Florida Legislature. Another model of publicly-sponsored representation established in Florida presents a similar and successful approach, that being providing appellate legal representation of criminally convicted persons sentenced to capital punishment.³¹² This model, termed "capital collateral regional counsels," provides for fiscal control in the public's interest, as well as quality control to ensure efficient and timely representation, and independence of the office.³¹³

A significant advantage of this proposed model of representation is the ability of dependency proceedings to be "self-executing," that is requiring less frequent judicial intervention. Existing law calls for such a multitude of regular hearings to utilize the court to ensure timely case progress. With counsel for children monitoring a child's circumstances, case plan progress, compliance with court orders and the like, the need for such regular hearings should be diminished. Matters requiring court attention would be brought to its attention by the parties, rather than presuming that the parties must all be brought to court regularly for inspection.

C. *Enough Already—Reducing the Number of Dependency Hearings*

A committee of one circuit's dependency court improvement project attributed to the courts four main reasons contributing to delays in permanency for dependent children. Two reasons pertain to caseload and hearing

311. AMERICAN BAR ASS'N, *supra* note 130, at pt. I.C.

312. *See* §§ 27.7001–.708.

313. *See* §§ 27.7001, .702, .705.

volume, specifically an “inability to get timely trials [sic] dates” and “piece meal trial dates.”³¹⁴ The remaining two reasons cited reveal an attitude or belief that dependency judges should be, or at least have been directed to be, responsible for monitoring cases. The cited reasons were, “the Courts are not always assertive in directing that cases are staffed for permanency when appropriate (in a timely manner)” and “the Courts are not always assertive in holding the parents and parties to target dates and time frames to accomplish tasks.”³¹⁵ These viewpoints suggest that the parties themselves ought not be responsible for their failure to meet time standards, but rather that the judge is at fault for not checking to make sure deadlines of which all parties are aware are actually met.

While it is easy to criticize the parties for not accepting responsibility, the attitudes expressed arguably match those of the statutes. The statutes set forth a rigorous hearing schedule, including conducting hearings in every case on average every two weeks for the first three months of the case, and every fifteen days until an arraignment occurs, all to require the court to monitor what the parties are doing. As discussed above, the efficacy of this approach is questionable for a number of reasons. At the least, it seems clear that the aggressive hearing schedule is certainly not working to reduce litigation delays, evidenced by the longstanding problem of protracted litigation delays that dependent children experience despite all the court hearings. Moreover, it appears that statutory mandates of court hearings may actually be impeding effective court monitoring of cases. At least one judge and one DCF supervisory official commented in this study that some cases warrant more frequent review hearings, while others could go with less frequent hearings.³¹⁶ However, the demands of conducting all statutorily-required hearings consumes all available court time, preventing courts from exercising discretion to monitor cases as it sees appropriate.³¹⁷

Federal law requirements for in-court reviews, as a condition of receipt of federal funding, are relatively modest, numbering no more than three a year and tied to necessary substantive steps. Case plans must be prepared within sixty days of a child’s removal from the home to detail the efforts and services which will be expended to attempt to achieve safe conditions for reunification, unless reunification is not appropriate, in which case permanent homes must be sought within thirty days of the determination that reunification will not be pursued. Within twelve months of removal, and

314. Fla. 17th Judicial Circuit Dependency Court Improvement Program, Children’s Services Comm., *supra* note 159.

315. *Id.*

316. Interview with Judge Frusciant, *supra* note 123; Interview with Lori I. Day, Service Center Director, District 10, Fla. Dep’t of Children & Families (Sept. 29, 2000).

317. Interview with Judge Frusciant, *supra* note 123.

every twelve months thereafter if necessary, a permanency hearing must be held to assess efforts towards permanency and make decisions for permanency, with interim six month reviews to assess the safety and appropriateness of the child's placement. Florida directs all of these hearings and then adds fifteen day shelter reviews up to the time of case adjudication, almost tripling federal requirements even in cases where all other deadlines are achieved. It is submitted that these excess reviews could be safely eliminated in favor of additional court hearings only as needed in the judgment of the court and on petition of a party, provided counsel for children is provided to ensure that the measures can become "self-executing," as discussed above.

D. *Shortened Permanency Deadlines for Younger Children*

Recognizing the damage that results to children from delayed permanency has contributed significantly to the philosophy of child welfare laws. For this basic reason, time limits are placed on reunification of families, failing which, other permanency options must be pursued.³¹⁸ While recognizing that, especially for younger children, delays in legal status are less important than the actual commitment of their caretakers, older children likely confer greater significance to their legal status.³¹⁹ It appears that foster care nonetheless carries significant pain for children, including the shame and stigma of being foster children and the pain of family separation.³²⁰ However, damage to children and their parental bonds is exacerbated with younger children:

Emotionally, and intellectually, an infant or toddler cannot stretch her waiting more than a few days without feeling overwhelmed by the absence of her parents. . . . [H]er emotional and intellectual memory has not matured sufficiently to enable her to hold on to the parent she has "lost." During such an absence, the child under two years of age "quickly" latches on to the new adult who cares for the child's needs.³²¹

318. See Marsha Garrison, *Parents' Rights vs. Children's Interests: The Case of the Foster Child*, 22 N.Y.U. REV. L. & SOC. CHANGE 371, 377 (1996) (stating that "it is the child's need for an undisrupted parental relationship in a permanent home that provides the basis for proposals to sever the parent-child bond at the end of a time-limited period in foster care")

319. *Id.* at 388-89.

320. Chaifetz, *supra* note 2, at 21; Confidential Interview of May 23, 2000, *supra* note 1; Confidential Interview, *supra* note 4.

321. McAvay, *supra* note 141, at 138, (quoting JOSEPH GOLDSTEIN ET AL., *THE BEST INTEREST OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE* 42 (1996)).

Not until adolescence does a child's sense of time resemble that of an adult.³²² As to all children, the Department seems to recognize that delays in permanency do result in "detachment from the parents."³²³ One attorney for children reported that long delays in permanency cause children to "lose hope and become angry."³²⁴ The National Council of Juvenile and Family Court Judges provides this succinct statement of the prejudicial passage of time on children subjected to dependency proceedings:

The passage of time is magnified for children in both anxiety levels and direct effect. Three years is not a terribly long period of time for an adult. For a six-year-old, it is half a lifetime, for a three-year-old, it is the formative state for trust and security, and for a nine-year-old, it can mean the difference between finding an adoptive family and failing to gain permanence because of age. If too much time is spent in foster care during these formative years, lifetime problems can be created.³²⁵

Approximately two-thirds of Florida's dependent children are within these critical, formative years. Twenty-one percent are under the age of two, nineteen percent are between three and five, and twenty-six percent are between six and nine years of age.³²⁶ The average dependent child in Florida is just over eight-years-old.³²⁷

Three states attempt to address the particular need for permanency for younger children. Minnesota requires permanency hearings for children under the age of eight to be held no later than six months after out-of-home placement, while permitting twelve months for cases involving children over the age of eight.³²⁸ Similarly, Oklahoma requires a permanency hearing for a child under three within six months, instead of the usual twelve months.³²⁹

322. *Id.* at 138–39.

323. Interview with Allegretti & Sanford, *supra* note 7.

324. Confidential Interview, *supra* note 4.

325. NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, *supra* note 116, at 14.

326. FLA. DEP'T CHILDREN & FAMILIES, CHILD PROTECTIVE SERVICES ANNUAL STATISTICAL DATA TABLES FISCAL YEAR 1998–99 Table D-5 (July–June), available at http://www5.myflorida.com/cf_web/myflorida/healthfamily/publications/childreissues/childabuse/9899chnt.pdf.

327. OFFICE OF PROGRAM POLICY ANALYSIS AND GOVERNMENT ACCOUNTABILITY, SUBJECTS OF CHILD PROTECTIVE INVESTIGATIONS: SURVEY RESULTS AND CASE CHARACTERISTICS 8 (Report No. 98-26) (1998), available at <http://www.oppaga.state.fl.us/reports/pdf/9826rpt.pdf>.

328. MINN. STAT. ANN. § 260C.201Subd 11. (West Supp. 2001).

329. OKLA. STAT ANN. tit. 10 § 7003-5.6g (West Supp. 2001).

Vermont law provides for permanency hearings every six months for children between the ages of three and six, and every three months for children under three.³³⁰ Florida joins most other states in making no adjustments to dependency systems of procedures for these younger children.

Given the foregoing, it is recommended that Florida consider shortening permanency deadlines in cases involving younger children who are in foster care. However, implementation of such efforts should likely be delayed until such time as case planning more regularly accords with statutory deadlines and assurances can be made that rehabilitative services can be promptly provided. These measures would seem to be necessary to provide due respect for a young child's interest in family integrity while balancing the uniquely pronounced need for permanency experienced by younger children.

E. *Time Out on Continuances*

In football games they are called "time outs"—two-minute pauses in the action so a team can regroup before getting back into the fray. The other side waits. Under the strict rules, teams get only three for each thirty minute half of the game. For this reason, time outs are used sparingly and only when really needed. In child welfare litigation they are called "continuances." Unlike football, they can be days or weeks or even months long as a party catches up on delinquent tasks. The other parties wait, including the child. Unlike football, each party gets as many time outs as the judge is willing to issue. Use them too early or too often and, well, nothing really happens. You can always get another, with no accounting required for previous delay.

Significantly, the legislature has specified only the following four circumstances when continuances may be granted in dependency litigation: 1) Continuances at the request of, or with the consent of, a child's counsel or guardian ad litem;³³¹ 2) Continuances at the request of the Department's attorney, but only if material evidence is unavailable, due diligence has been exercised to obtain the evidence timely, and it is believed that the evidence will be available within thirty days, or otherwise under exceptional circumstances;³³² 3) Continuances for "[r]easonable . . . delay necessary to accomplish notice of the hearing to the child's parents[,]" though the Department must "continue regular efforts to provide notice" during such

330. VT. STAT. ANN. tit. 33 § 5531(a)(2) (Lexis Supp. 1999). These provisions are not self-executing; they require an order on a party's motion or a *sua sponte* order.

331. FLA. STAT. § 39.013(10)(a) (2000).

332. § 39.013(10)(b). If the Department will not be prepared in 30 days, the statute empowers the parent to move for an order to show cause for sanctions, including dismissal of the case. § 39.013(10)(b)1.

delay;³³³ and 4) Continuances for reasonable delay at the request of the birth parent.³³⁴

Under court rules governing dependency cases, continuances may be granted simply on a showing of good cause.³³⁵ In cases witnessed in this study, continuances were granted and waiver of time standards were made typically without the parties addressing the statutory criteria. This included waiver of statutory time standards in advance of an express or demonstrated need. It appeared in some instances that judges really had no choice but to grant continuances grudgingly because certain tasks must be completed for cases to progress. By placing the interests of parents and the Department above children's interests in permanency in this manner, the intent of the law to provide deadlines to ensure that children achieve permanency in their lives is being frustrated.

The observations made in this study were confirmed by others in reports. For example, a Department employee complained that significant litigation delays are resulting from multiple rescheduling of the same hearings due to continuance requests and scheduling conflicts.³³⁶ A committee of the dependency court improvement program in one judicial circuit similarly concluded that attorneys for parents are "getting excessive continuances for trials, months of delays."³³⁷ Football teams are limited in their time outs so that the players can go home at a reasonable hour. It would stand to reason that dependency litigants, especially children, should be assured that they get a permanent home in a reasonable amount of time.

The foregoing suggests two legislative changes. One is to add a statutory provision that any continuance or waiver of time standards must be considered individually and not be waived in advance of the particular circumstances arising which may warrant a continuance. Another is to limit the parties to a total number of days of continuances which can be sought during the pendency of litigation, in order to provide an incentive for parties to limit the number of times delays in litigation are sought. This is intended to balance the litigation interests of the various parties with the interests of children in expediency. It is recommended that continuance requests be limited to sixty days annually.

333. § 39.013(10)(c).

334. § 39.013(10)(d).

335. FLA. R. JUV. P. 8.255(f).

336. Interview with Day, *supra* note 316; Confidential Interview, *supra* note 4.

337. Fla. 17th Judicial Circuit Dependency Court Improvement Program, Children's Services Comm., *supra* note 159.

F. *Simplified Case Planning*

As discussed above, case planning is supposed to provide direction on all key matters in a dependency case, including what services will be provided to the children and parents, and what expectations are made for efforts to reunify families or to keep children safely in their homes.³³⁸ Case plan requirements under federal law are rather straightforward and to be applied for all foster children.³³⁹ To qualify for federal funding under the Social Security Act, states are to require that case plans address the following four basic matters: 1) A description of services offered and provided to prevent removal of the child or to reunify the family, as applicable;³⁴⁰ 2) A description of the type of home or institution where the child will be placed, with a discussion of safety and appropriateness of the placement;³⁴¹ 3) A plan for assuring safe and proper care is provided to the child and services provided to parents for reunification or other permanent placement, and description of those that have been provided;³⁴² and 4) A plan for necessary services for the child and foster parents.³⁴³

The case plan should also have attached documentation of efforts to achieve adoption or other permanency and the child's health and education records.³⁴⁴ Under special circumstances, the case plan must include: 1) If pertaining to foster children over sixteen-years of age, a transition plan, including provisions as to independent living;³⁴⁵ and 2) If a child is to be placed in a foster family home or institutional placement far from the home of origin, or is to be placed in an out-of-state foster placement, a statement of how a child's best interest will be served by that placement and plans for an annual visit by a caseworker in that state, with a report to the state of origin.³⁴⁶

As with required court reviews, Florida law substantially exceeds federal case plan requirements for cases involving children in out-of-home care by including at least the following eleven matters: 1) A description of the problem being addressed, including that which precipitated the dependency case;³⁴⁷ 2) The tasks required of the parent, and the services and treatments to be provided, including the type, frequency, location and accountable

338. § 39.601.

339. 42 U.S.C. § 671(a)(16) (1994 & Supp. IV 1998).

340. 45 C.F.R. § 1356.21(g)(4) (2000).

341. 42 U.S.C. § 675(1)(A) (1994 & Supp. IV 1998).

342. § 675(1)(B).

343. *Id.*

344. 42 U.S.C. § 675(1)(C), (E) (Supp. IV 1998).

345. § 675(1)(D).

346. 42 U.S.C. § 675(5)(A)(i)–(ii) (1994 & Supp. IV 1998).

347. FLA. STAT. § 39.601(2)(a) (2000).

Department staff person or service provider;³⁴⁸ 3) Performance measures, including time frame, relative to the services and treatment;³⁴⁹ 4) The child's permanency goal and type of placement;³⁵⁰ 5) The reasonable efforts to be made to place the child in an adoptive home or legal custodial relationship if reunification efforts fail, and any concurrent plan to prepare for termination and reunification;³⁵¹ 6) The type of home or institution where the child is placed, as well as a description of its safety and appropriateness, including as to how it is the least restrictive and most family-like option, and in close proximity to the child's home;³⁵² 7) Ongoing financial obligations, including health insurance, to be maintained by the parents;³⁵³ 8) A description of the foster parents' or legal guardians' role in providing or developing services for themselves or the child;³⁵⁴ 9) A description of the child's need for services and how they will be implemented;³⁵⁵ 10) How the child's educational placement will remain stable;³⁵⁶ and 11) Written notice to the parent that failure to comply substantially with the case plan may result in termination of parental rights and, somewhat ironically, that a petition to terminate rights may actually be filed sooner than required by statute based on such failures.³⁵⁷

As if the foregoing is not enough, there is an entirely separate requirement that the Department describe how it will actually assure that the services set forth in the case plan will actually be provided, and how they will improve the home and facilitate reunification or other permanent placement with those services.³⁵⁸ Moreover, a separate description is required of how the Department will assure that the services described in the case plan will be provided and will address the child's needs and why all of this is appropriate in the first place.³⁵⁹ In addition, one case plan requirement suggests the need for a crystal ball or other such fortune telling device. In the first sixty days of the case before the court has made any truly final decisions about a child or a family, the Department is supposed to explain how it "plans to carry out the judicial determination made by the court, with respect to the child, in accor-

348. § 39.601(2)(b).

349. § 39.601(2)(c).

350. § 39.601(3)(a).

351. *Id.*

352. § 39.601(3)(b), (e).

353. § 39.601(3)(c).

354. § 39.601(3)(e).

355. *Id.*

356. § 39.601(3)(f).

357. § 39.601(3)(k).

358. § 39.601(3)(h).

359. § 39.601(3)(i).

dance with this chapter and applicable federal regulations.”³⁶⁰ By law, the case plan needs to be created before any substantial judicial determinations are actually made at the time of adjudication.

The meticulous case plan requirements under state law give rise to arguably onerous and confusing case plans. The Department has attempted to develop a streamlined, standardized form to be used to report all of the foregoing in a case plan. When completely blank, the form is twenty-eight pages long.³⁶¹ As set forth above, the result of the state case plan requirements are widely cited among child welfare professionals as promoting confusing case plans. Moreover, it would seem that the painstaking statutory detail promotes “cookie cutting” of case plans. The extensive statutory directives leave little room for case by case determinations of the individualized needs of the parties, detracting from the overriding directive and intent that case plans be specially tailored and remain flexible to the needs of the children and families involved.

Case plan requirements in some other states are much simpler than in Florida. Ohio, for example, simply directs that case plans be standardized under rules developed by the child welfare agency which comply with content requirements of Title IV-E of the Social Security Act and the stated goals under federal laws for funding eligibility.³⁶² Given the foregoing considerations, it is proposed that Florida replace its detailed case plan requirements with an approach similar to that taken in Ohio.

VIII. PART IV—WHAT WORKS—GUIDANCE FOR FLORIDA FROM OTHERS’ SUCCESS

A. *Quit Weighing Pigs and Other Lessons from Alabama*

In 1991, the State of Alabama settled a class action lawsuit brought on behalf of foster children for the impact of similar systemic problems to those currently experienced in Florida. The consent decree embodying the settlement is credited as being “the first, state-wide, bottom-up reform of a child welfare system in the United States.”³⁶³ It is founded on “reform . . . driven not by procedural requirements but by the principles of good practice.”³⁶⁴

360. § 39.601(3)(g).

361. See Letter with enclosure from Maria B. Leon, Family Safety, Fla. Dep’t of Children & Family Servs. (July 18, 2000) (on file with author).

362. OHIO REV. CODE ANN. § 2151.412(B)(1) (Anderson Supp. 1998).

363. BAZELON CENTER FOR MENTAL HEALTH LAW, MAKING CHILD WELFARE WORK: HOW THE R.C. LAWSUIT FORGED NEW PARTNERSHIPS TO PROTECT CHILDREN AND SUSTAIN FAMILIES 1 (1998).

364. *Id.* at 6.

Results are measured simply by whether the system “is meeting the child’s needs for stability and family integrity, by whatever means it takes.”³⁶⁵

“Bottom-up reform” refers to reform which begins with principles on how agency social workers are to work with children and families, and what supports they will need for that interaction, rather than starting with agency structure from the “top down.”³⁶⁶ For example, promoting visitation between dependent children and their parents is recognized in the Alabama consent decree as being one of guiding principles for an appropriate “system of care.” Visitation is “viewed as an essential ingredient of family reunification services. . . . [to] be actively encouraged” and any necessary transportation assistance is to be provided.³⁶⁷ Resources needed to support this principle are then to be put in place.

Alabama’s focus on principles and resources, directed essentially from the child’s view, have allowed Alabama, unlike Florida, to enjoy a decrease in the number of child abuse and neglect reports received each year since 1997 which result in a finding of abuse or neglect or reason to suspect such maltreatment.³⁶⁸ Similar success is found when measuring the number of children in out-of-home care, which has fluctuated over the past several years, but in raw numbers never reaches the levels experienced prior to 1992.³⁶⁹ Given that the Alabama model has been phased in over time among the counties, as a so-called “conversion” process, Alabama has been able to measure contemporaneous success of its reform efforts among its counties. Of particular note is the fact that the rate of children in foster care (cases per 1000 children) in “converted” counties versus “non-converted” counties has been lower every year since 1992.³⁷⁰ Moreover, the rate difference between converted and non-converted counties has steadily widened virtually every year since 1992.³⁷¹ Alabama’s success has come without any significant change in the permanency goal for children over the past five years, with statewide trends remaining relatively constant for all permanency options.³⁷²

From Alabama’s experience, the federal court monitor, Dr. Ivor Groves, concludes that “child safety does not correlate strongly with the number of children taken into custody . . . and, in fact, exposes children to other poten-

365. *Id.*; see app. 1.

366. *Id.* at 26–27.

367. *Id.* at 89.

368. IVOR D. GROVES, A STATUS REPORT ON IMPLEMENTATION OF THE *R.C. v. PETELOS* CONSENT DECREE 32 (Dec. 1999).

369. *Id.* at 38.

370. *Id.* at 40.

371. *Id.*

372. *Id.* at 46.

tial sources of harm."³⁷³ Dr. Groves attributes Alabama's success in foster care primarily to the strengthening service provision on initial contact. Suggesting support for reducing reliance on court hearings to ensure compliance and actions in the best interests of children, as this article urges, Dr. Groves opines that you "cannot monitor into compliance." In a similar, though more colorful manner, Dr. Groves comments, "you can weigh the pig, but that can't make it fatter."³⁷⁴ Resource development is critical to success and much of Alabama's efforts in this regard have been geared towards home-based services.³⁷⁵

In part for this reason, this article proposes allowing the DCF to focus on providing social services without contending with potential conflicts in its missions, especially for generating a trusting relationship with birth parents and providing services to protect the interest of children in family integrity. Moreover, providing counsel for children can allow for reduced litigation, allowing all of the parties to focus on services.

Consistent with the successes in Alabama, the need for "front-end" services is routinely recognized.³⁷⁶ Compliance with federal ASFA requirements is also recognized by the National Conference of State Legislatures to place urgency on the need to ensure that social services are available:

Even after ASFA, the permanency goal for most children in state care will be to return home as quickly as possible. States will find it hard to achieve that goal if appropriate and effective services are not provided to families in a timely manner. When services are delayed, agencies and courts are unable to make informed decisions about parents' ability to protect and care for their children, and such children will continue to languish in foster care.³⁷⁷

Dr. Groves opines that Florida is weak in its provision of services immediately following the child protective investigation, causing more children to be removed from their families.³⁷⁸ At the least, the finding of this

373. *Id.*

374. Telephone Interview with Ivor D. Groves, Federal Court Monitor (Aug. 25, 2000) (notes on file with author).

375. BAZELON CENTER FOR MENTAL HEALTH LAW, *supra* note 363, at 62-64.

376. *See, e.g.,* Duquette et al., *supra* note 5, at 96 (stating that "[t]he child welfare system still focuses its efforts to develop family support services on families who enter the system by way of child maltreatment reporting mechanisms. . . . [O]ur social policies activate the most extensive interventions when we believe that disruption or severing of family ties is required.")

377. NATIONAL CONFERENCE OF STATE LEGISLATURES, STATE LEGISLATIVE REPORT, *supra* note 241.

378. Telephone Interview with Groves, *supra* note 374.

study that case plan development is seriously delayed in many cases in itself prevents Florida's dependency system from providing early services in a case, as has been successful in Alabama. Likewise, Alabama's model prioritizes flexibility in service provision and, therefore, case planning. For this reason, this article urges simplifying Florida's statutes on case planning.

B. *The Partial Promise of Community-Based Care*

Efforts are underway in Florida to improve the provision of services. With the reorganization of the Department by the legislature in the 2000 legislative session, steps are to be taken to privatize the delivery of direct child welfare services, with the Department remaining primarily responsible for "contract management, monitoring compliance with contract requirements, and assuring fiscal integrity and quality in the service provided by private entities."³⁷⁹ This direction follows legislative mandates for the privatization of the delivery of foster care and related services, commonly referred to as "community based care," beginning in 1996 with model programs and then in 1998 with a directive that privatization be implemented state-wide.³⁸⁰ Florida's efforts in this regard accord with methods being tried nationally to improve overall system performance.³⁸¹

The promise of community-based care is to improve service delivery and availability, which, as seen in Alabama, is the proven method to solving many of the problems experienced by children and families in the dependency system. Reliance on the implementation of community-based care initiatives as the sole means to ensure timely permanency and appropriate care of all foster children and families would be suspect for two reasons. One, community-based care systems do not have a direct impact on the role or expectations of the judiciary. Two, the model community-based care systems implemented over the past four years in Florida have faltered. A report prepared for the Department reviewed model community-based care projects that have been implemented in five of the Department's fifteen districts at various points over the past three years.³⁸² The deficiencies in one project go to the core of the dependency system mission, the report noting that the "Department of Children and Families does not have confidence that the coalition staff can achieve the required levels of safety and permanence for the children and families being served . . ."³⁸³ The oldest program was found to suffer from at least one significant problem historically experienced

379. FLA. H.R. COMM. ON CHILDREN AND FAMILIES, HB 2125, 9 (May 24, 2000).

380. FLA. STAT. § 409.1671 (2000).

381. MARKOWITZ, *supra* note 198, at 13-14.

382. *See generally id.*

383. *Id.* at 19.

by the DCF itself, high staff turnover, as well as “little confidence [among Department staff] that the [private] provider line staff knew what they were doing.”³⁸⁴

The transition to privatization, though not necessarily privatization itself, presents an interim (though potentially lasting for a number of years) risk to the provision of needed services for family reunification, children’s needs in foster care, and other such services. A principal source of the problem lies with compensation methods under the private sector contracts. The Department has observed that an unresolved “risk factor” exists with some private service contracts, particularly from “unanticipated caseload increases or an unusual incidence of families with catastrophic service needs.”³⁸⁵ The Department projects that these risk problems can ultimately be addressed “by moving toward a case-rate funding approach,” but that will take “experience data” which is not available at this time.³⁸⁶

C. *What We Teach Our Children*

Public policy and government action are teaching tools for society, particularly for children, whose appreciation and understanding of the values and expectations conveyed through laws and governmental acts grow as they do. Jurisprudential philosopher H.L.A. Hart wrote, “[t]he law of every modern state shows at a thousand points the influence of both the accepted social morality and wider moral ideals.”³⁸⁷ In the spirit of Professor Hart’s observations, we know that when the State exercises its *parens patriae* role and acts through its dependency system to raise a foster child, its daily impact inevitably teaches that child. Two years after I adopted my son at age four from an overseas orphanage, he asked, “why are you my dad?” The silence of my long pause to grasp for the right answer caused him to ask further, “because you teach me things?” To this day, I can find no better answer, but I do find myself awed by the responsibility that his questions remind me I have. I must be ever vigilant in my actions, because he will be looking to me to learn, even when I am not trying to teach, and I will make mistakes.

When our public policy fails to achieve for a foster child a permanent, stable family over the course of many years, the child may learn that family is not important to us whether we intend that or not. No child will be reading legislative intent language to discover otherwise. When we move a child from one crowded foster home to another every few weeks or months, we

384. *Id.* at 29.

385. FLA. DEP’T OF CHILDREN & FAMILIES, *supra* note 177, at 23.

386. *Id.*

387. H.L.A. HART, THE CONCEPT OF LAW 203–04 (2d ed.1961).

teach that child to have a life of temporary, poorly-developed relationships. When we fail to keep our promises to a child, such as by failing simply to show up to supervise anxiously awaited visitation with a parent, the child learns that we, the State, cannot be trusted. Public policy must be prepared to act timely and responsibly in dependency cases when things go wrong, because they will. Accomplishing this goal will help ensure that a child does not learn the wrong things, because on the typical day that we create for Florida's dependent children, they will learn from their parents, even the lessons that we do not want to impart.