CHILD WELFARE REQUIRES ADEQUATE REMEDIAL SERVICES

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INTRODUCTION

The Due Process Clause of the Constitution's Fourteenth Amendment guarantees to both parent and child due process of law. Accordingly, when a child is involuntarily, albeit temporarily, removed from the parent's custody, the state must establish cause for removal with the preponderance of the evidence, the lowest level of proof to better accommodate the welfare of the child. If a parent's right to custody of his or her child is terminated, a final severance, the evidence must be clear and convincing and based on state

statutory standards, which are strictly construed.[1] In many cases, removal is objectively warranted because of "severe child abuse, and failure to manifest a willingness and ability to parent."[2] At other times, temporary removal or possible termination is based on more subjective criteria, perhaps based on past parental misconduct, arguably cured, but sufficient to anticipate that logically, abuse or neglect may occur in the future. Removal or termination based on subjective predictions factors is far less objective, based upon conjecture of what may be termed imminent abuse or predictive neglect, what may occur in the future. State interference in the parent-child relationship occurs often in the United States, adversely affecting fundamental rights. Nonetheless, a portion of this interference, predicated upon predictive neglect, is especially onerous because of its subjective underpinning and the possibility that it unfairly imposes adverse stereotypes on parents. However, predictive neglect is only one part of a child welfare system that serviced 3,476,000 children throughout the United States in 2019.[3]

Courts describe predictive neglect as when "a parent has committed severe and recurrent acts of abuse towards his [or her] child, logic and life experiences dictate the presumption that an unreformed parent will continue to be a threat to the welfare of the child for the foreseeable future."[4] While recurrent acts of abuse or

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[1] *See* Santosky v. Kramer, 455 U.S. 745, 766 (1982) ("For the natural parents, however, the consequence of an erroneous termination is the unnecessary destruction of their natural family."). *See also In re* K.S.L., 538 S.W.3d 107, 116 (Tex. 2017) ("Termination of parental rights is a grave decision, and a searching and painstaking legal process is required . . . ."); *In re* Doe I, 463 P.3d 393, 403–04 (Idaho 2020) (Due Process requires that proper formalities be met prior to termination of parental rights); *In re* N.R.C., 94 S.W.3d 799, 811 (Tex. Ct. App. 2002) (termination is tantamount to a civil death penalty); Troxel v. Granville, 530 U.S. 57, 65 (2000) (a parent's right to raise her child is one of the oldest fundamental liberty interests recognized by the United States Supreme Court).

[2] *See, e.g.*, *In re* Caydan T., No. W2019-01436-COA-R3-PT, 2020 WL 1692300, at *1 (Tenn. Ct. App. Apr. 7, 2020).

[3] CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., CHILD MALTREATMENT 2019 ii (2021) [hereinafter CHILD MALTREATMENT 2019].

[4] J.L.G. v. Dent Cnty. Juv. Off., 399 S.W.3d 48, 60 (Mo. Ct. App. 2013) (quoting *In re.* T.M.E., 169 S.W.3d 581, 588 (Mo. Ct. App. 2005)).

neglect are objective, predictive neglect is conjecture, far from certain. It invites questions as to how we determine that a parent is "unreformed," and then to conclude that similar abusive or negligent acts will continue into the future. This consideration is compounded by the fact that significant numbers of parents adversely affected by predictive neglect often are victims of adverse stereotypes, hence targets of discriminatory conjecture because of race, physical or mental disability, poverty, poor living conditions, or substance abuse.[5] Consistently, parents allege that "removal of their children from their custody constituted discrimination against them on the basis of their perceived disabilities."[6] In spite of statutory protections pertaining to race,[7] language proficiency,[8] or gender identity,[9] populations most negatively affected by abuse and neglect assertions are those historically vulnerable to stereotypes, such as pregnant black women, LGBTQ parents, and parents with language barriers.[10]

When abuse or neglect allegations were made, children were routinely removed from the custody of their parents and placed in temporary placements while the parents were offered rehabilitative services under a state's parenting plan. Federal law required the removal of the child from the custody of the parent before federal funds were available to the state to pay for services, hence the automatic removal of the child. As of 2018 and the passage of the

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[5] For a discussion of poverty and its impact on termination of parental rights, see David Pimentel, *Punishing Families for Being Poor: How Child Protection Interventions Threaten the Right to Parent While Impoverished*, 71 OKLA. L. REV. 885 (2019); H. Elenore Wade, Note, *Preserving the Families of Homeless and Housing-Insecure Parents*, 86 GEO. WASH. L. REV. 869 (2018); Joan M. Shaughnessy, *An Essay on Poverty and Child Neglect: New Interventions*, 21 WASH. & LEE J. C.R. & SOC. JUST. 5, 11–12 (2014); Michele Estrin Gilman, *The Poverty Defense*, 47 U. RICH. L. REV. 495 (2013); Raymond C. O'Brien, *Reasonable Efforts and Parent-Child Reunification*, 2013 MICH. ST. L. REV. 1029, 1049–51 (2013); Janet L. Wallace & Lisa R. Pruitt, *Judging Parents, Judging Place: Poverty, Rurality, and Termination of Parental Rights*, 77 MO. L. REV. 95 (2012).

[6] *In re* Joseph W., Jr., 79 A.3d 155, 162 (Conn. Super. Ct. 2013).

[7] *See* Palmore v. Sidoti, 466 U.S. 429 (1984).

[8] *See*, *e.g.*, S.Y. v. Superior Ct., 240 Cal. Rptr. 3d 137, 144 (Cal. Ct. App. 2018).

[9] Pavan v. Smith, 137 S. Ct. 2075, 2076 (2017) (same-sex couples must be treated equally as opposite-sex couples for benefits linked to marriage). *See also* Palomo v. Bustamante, 2019 Guam 5, 10 (appellate court found no evidence in the trial court's decision that discrimination was made based on gender).

[10] Caitlyn Garcia, Essay, *Replacing Foster Care with Family Care: The Family First Prevention Services Act of 2018*, 53 FAM. L.Q. 27, 40–41, 46 (2019).

federal Family First Prevention Services Act ("Family First" or "FFPSA"), children may remain with the parent or a family member while the parents receive rehabilitative services. Commentators suggest the Family First legislation "dramatically shifts the national child welfare focus" by keeping children with their families.[11] Nonetheless, the new legislation does not alter two significant facts. First, adequate reasonable services must be offered to the parent, and the parent must positively overcome the adverse conditions within a specified period of time. Specifically, if the child is in nonrelative foster care, the time specified is whenever the child is apart from the parent for fifteen of the most recent twenty-two months.[12] If the child remains with the parent or a relative, any rehabilitative services may cease after twelve months.[13] Second, the adequacy of reasonable services is elusive at best since the cause of removal is persistent. What services are adequate to address the major risk factors prompting the involuntary removal of children from parents (domestic violence, substance abuse, mental illness, poverty, and overall inability to parent)?

This Article argues that the focus of child welfare should be upon the adequacy of reasonable services provided to parents prior to and after their child has been declared dependent because of an abuse or neglect allegation. Admittedly, recent federal legislation funding rehabilitation services while permitting a child to remain with an offending parent may result in less trauma, but this feature should not distract from the point that states must develop adequate reasonable services, and these must be provided within a specified period of time. The consequence of inadequate reasonable services, unable to address adverse conduct within a specified time frame, is the termination of parental rights. As such, remaining with the parents while services are offered is a temporary respite. The point is simple: to adequately address neglect, abuse, or exploitation of children, both preventative and remedying services

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[11] Fabiola Villalpando, *Family First Prevention Services Act: An Overhaul of National Child Welfare Policies*, 39 CHILD. LEGAL RTS. J. 283, 283 (2019).

[12] Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 103, 111 Stat. 2115, 2118 (1997) (codified as amended at 42 U.S.C. § 1305) (requiring states to terminate parental rights for children in nonrelative care for fifteen months).

[13] Family First Prevention Services Act (Family First) of 2018, 42 U.S.C. § 671(e)(1)(A).

must be made available earlier so that what is reasonable becomes what is effective.

I. PARAMETERS OF CHILD ENDANGERMENT

A. Statistical Profile

Statistics reveal that during 2019, at least 656,000 children throughout the United States were victims of abuse or neglect.[14] Classified according to race or culture, Native American children have the highest rate of victimization, but African American children have the second-highest rate.[15] Also, "[t]he rate of African-American child fatalities is 2.3 times greater than the rate of White children and 2.7 times greater than the rate of Hispanic children."[16] Earlier statistics confirm continuing racial imbalance. In 2000, "[m]ore than half of all victims were White (50.6%); a quarter (24.7%) were African American; and a sixth (14.2%) were Hispanic. American Indian/Alaska Natives accounted for 1.6 percent of victims, and Asian-Pacific Islanders accounted for 1.4 percent of victims."[17] These numbers are significant considering the proportion of the population each group represents.

The vast majority of cases involving child abuse and/or neglect, resulting in the temporary removal of a child from a parent, include domestic violence, drug and alcohol abuse, mental illness, or poverty.[18] "Black children are more likely reported to child protective agencies as victims of neglect, more likely to be investigated, and subsequently more likely to be subject to emergency removals."[19] In addition, parents of color often exhibit categories of "caregiver risk factors," automatically generating an

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[14] *See* CHILD MALTREATMENT 2019, *supra* note 3, at xi.

[15] *Id.* at 45 tbl.3-8.

[16] *Id.* at xii.

[17] CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., CHILD MALTREATMENT 2000 4 (2002) [hereinafter CHILD MALTREATMENT 2000].

[18] *See generally* A.J. SEDLAK ET AL., U.S. DEP'T OF HEALTH & HUM. SERVS., FOURTH NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (NIS-4) (2010), https://www.acf.hhs.gov/opre/report/fourth-national-incidence-study-child-abuse-and-neglect-nis-4-report-congress [https://perma.cc/2ADU-8QEF].

[19] Tamara Louis-Jacques, Note, *Don't Call It a Comeback: The Promotion of Rehabilitation and Reunification of Families Affected by Poverty-Related Neglect*, 58 FAM. CT. REV. 1087, 1090–91 (2020).

increase in the perception of child maltreatment in households of color. Among these caregiver risk factors are alcohol abuse, domestic violence, drug abuse, financial problems, inadequate housing, public assistance, and physical or mental disabilities.[20] The largest percentage of neglect and abuse cases arise from homes where there is domestic violence and drug use. Taken as a whole, more than a quarter of all victims live with caretakers living on public assistance.[21] Sadly, "children in their first year of life have the highest rate of victimization at 24.8 per 1,000 children."[22]

Additional statistics further reveal the magnitude of the problem of child welfare. Each day in the United States, child protective services "removes approximately 750 children from their homes."[23] These are cases of actual removal, supposedly temporary. The number of children who were the subject of a child protective services investigation or alternative response during the 2019 federal fiscal year is far larger: a total of 3,476,000.[24] During this same time period, 1,840 children died from abuse or neglect caused by a parent.[25] Most allegations involve neglect (74.9%), followed by physical abuse (17.5%), and then by sexual abuse (9.3%).[26] Included within these statistics is, in addition to objectively verifiable abuse and neglect, any act or failure to act, which presents an *imminent risk* of serious harm, a more nebulous category precipitating predictive neglect.[27] States routinely incorporate an "imminent risk of serious harm" standard into practice. For example, when a mother was mentally incapable of caring for an infant and the father displayed no credible willingness to fully protect and care for the child, the child was removed from the parents' custody even

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[20] CHILD MALTREATMENT 2019, *supra* note 3, at 23.

[21] *Id.* ("In 38 reporting states, 29.4 percent of victims have the drug abuse caregiver risk factor and 28.8 percent of victims have the domestic violence caregiver factor.").

[22] COLO. DEP'T OF HUM. SERVS., COLORADO FAMILY FIRST PREVENTION PLAN 15 (2020) [hereinafter COLORADO FAMILY FIRST] (citing CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., CHILD MALTREATMENT 2016 19 (2018)).

[23] Pimentel, *supra* note 5, at 887 (citing CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., NO. 24, THE AFCARS REPORT 1 (2017)).

[24] CHILD MALTREATMENT 2019, *supra* note 3, at ii.

[25] *Id.*

[26] *Id.* at xi. *See also* MICHAEL T. FLANNERY & RAYMOND C. O'BRIEN, THE SEXUAL EXPLOITATION OF CHILDREN 125–356 (2016).

[27] CHILD MALTREATMENT 2019, *supra* note 3, at 16.

though as yet there was no harm done.[28] State statutes provide for temporary removal whenever there is reasonable cause to believe that the child suffers serious physical injury or, as statutes are often prone to say, in "immediate physical danger" from his or her surroundings.[29] Colorado, for example, defines "candidacy of serious risk" as based on "circumstances and characteristics of the family as a whole and/or circumstances and characteristics of individual parents or children that may affect the parents' ability to safely care for and nurture their children."[30]

Predictive neglect is considered a form of child endangerment.[31] Inadequate child supervision—specifically inattention to safety, disregard for nutrition, clothing, or personal hygiene—is illustrative of child endangerment based on predictive neglect. Children are often removed from their parents' homes because of suspicions that the child may come to harm in the future.[32] Objective suspicions justifying foreseeable maltreatment and immediate child removal are instantaneously verifiable, yet few statistical studies verify the parameters of justifiable likely recurrence or predictive neglect. One study monitored 1,181 families with a previously substantiated reported incident of neglect or abuse of a child.[33] The study found that within five years of the initial report, "42.6% had 1 or more new substantiated reports, 20.4% had 2 or more, 9.8% had three or more, 4.8% had 4

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[28] *See In re* Joseph W., Jr., 79 A.3d at 222–23 (Conn. Super. Ct. 2013). *See also In re* E.G., 726 S.E.2d 510 (Ga. Ct. App. 2012) (parent's absence was likely to cause serious harm to the child in the future); D.A. v. Dep't Child. & Fam. Servs., 84 So. 3d 1136 (Fla. Dist. Ct. App. 2012) (parent suffered from bipolar disorder and substance abuse precipitating two recent admissions to a treatment facility creating possibility of future harm to the child).

[29] *See, e.g.*, CONN. GEN. STAT. ANN. § 46b-129b(b) (West 2020).

[30] COLORADO FAMILY FIRST, *supra* note 22, at 8.

[31] For a discussion of child endangerment in the context of clergy sexual abuse allegations, see Raymond C. O'Brien, *Church and State and Child Endangerment*, 56 CRIM. L. BULL. 601 (2020).

[32] *See, e.g.*, Dep't of Hum. Servs. v. J.H., 425 P.3d 791 (Or. Ct. App. 2018) (mother's past drug use endangered child to risk of domestic violence between the mother and her partner); New Jersey Div. of Child Prot. and Permanency v. M.C., 89 A.3d 225 (N.J. Super. Ct. App. Div. 2014) (father's past conduct was sufficient to indicate that children's physical, mental, or emotional condition was in imminent danger).

[33] Hyunil Kim & Brett Drake, *Cumulative Prevalence of Onset and Recurrence of Child Maltreatment Reports*, 58 J. AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY 1175, 1175 (2019).

or more, and 1.8% had 5 or more."[34] Another study from St. Louis, Missouri followed 5,884 low-income children [and] found that by age eighteen years, "58.7% had at least one, 39.7% had at least 2, 27% had at least 3, and 19.1% had at least 4 reports."[35] Overall, data suggests that "child maltreatment report recurrence is a commonplace occurrence . . . It is further estimated that by age 12 years, 1 in 36 children will have at least 5 reports and 1 in 56 children will have at least 6 reports."[36] While these reports confirm plausible recurrence, they neglect to report on the level of services offered to parents found to be endangering their children. The level of services, what is offered, and what it utilized is the lynchpin of child protection prior to the 2018 enactment of Family First and remains the cornerstone thereafter.

Once a child is deemed endangered, until very recently, the practice was to remove the child from the custody of the offending parent or parents and place the child into foster care or, if none was available, into a group home setting. Indeed, removal from the parent's home was emblematic of dependency procedures until very recently. States could only receive federal reimbursement for child care expenses *if* the child was placed in an out-of-home foster care placement, and payments range between 50 to 83% of the cost of foster care payments.[37] As a result, states were incentivized to remove children and assign them to foster care or group homes. Under Title IV-E of the Social Security Act, federal and state governments share costs to care for maltreated children *outside of the home*, albeit foster care or group placements, with states providing one dollar for every three dollars they receive from the federal government.[38] Federal funding for child welfare relied upon the states to decide who qualified, but if approved, the child was

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[34] *Id.* (citing Diane DePanfilis & Susan J. Zuravin, *Epidemiology of Child Maltreatment Recurrence*, 73 SOC. SERV. REV. 218, 221–37 (1999)).

[35] *Id.* (citing Melissa Jonson-Reid, Patricia L. Kohl & Brett Drake, *Child and Adult Outcomes of Chronic Child Maltreatment*, 129 PEDIATRICS 839 (2012)).

[36] Kim & Drake, *supra* note 33, at 1181.

[37] Not all children are eligible for foster care payments because of the Title IV-E lookback requirement that links eligibility to the Aid to Families with Dependent Children, a child welfare program that ended in 1996. *See* Rosie Frihart-Lusby, Note, *Unconstitutional or Just Bad Policy?: Title IV-E's AFDC "Lookback" and the Constitutional Guarantee of Equal Protection*, 93 S. CAL. L. REV. 1069, 1080 n.78 (2020).

[38] EMILIE STOLTZFUS, CONG. RSCH. SERV., IF 10590, CHILD WELFARE: PURPOSES, FEDERAL PROGRAMS, AND FUNDING 2 (2019).

provided with a safe and stable environment until a permanent placement became available.[39] Because the child was safe and most of the cost was borne by federal grants, children and parents were forcibly separated and children placed in foster care, often for years, while the state, in many cases, offered the parents inadequate remedial services while simultaneously planning on terminating parental rights.

Time limits imposed by the Adoption and Safe Families Act of 1997 curtailed many instances of indefinite stays in foster care.[40] Likewise, states imposed time limits on services, California imposing a twelve-month limit on most services.[41] Overall, the child deserves permanency, so if the parent cannot reasonably rectify the adverse conduct in the foreseeable future, parental rights need to be terminated to accommodate the child's needs. The child has Due Process rights too.[42] To provide a modicum of protection to the child, the court must decide if the "child would be harmed by a continued relationship with the parent" within a reasonable amount of time.[43] The adequacy of remedial services provided during this time is the lynchpin.

B. Federal Legislation

1. Title IV-E of the Social Security Act

"Since [fiscal year] 2012, the number of children in [foster] care on the last day of each fiscal year through [fiscal year] 2017 have

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[39] *See, e.g.*, Child Abuse Prevention, Adoption, and Family Services Act of 1988 (CAPAFSA), Pub. L. No. 100-294, § 102 Stat. 102 (1988); Child Abuse Prevention and Treatment and Adoption Reform Act of 1978, Title II of CAPAFSA, Pub. L. No. 100-294, §201-02, 102 Stat. 102, 122-24 (1988); Promoting Safe and Stable Families Amendments of 2001, 42 U.S.C. 1305; Title XX of the Social Security Act, Pub. L. No. 93-647.

[40] *See, e.g.*, State *ex rel.* Child., Youth & Fams. Dep't v. Jalexus S., No. A-1-CA-37966, 2020 WL 3970209 (N.M. Ct. App. July 9, 2020). For a description of the Adoption and Safe Families Act, see Elizabeth O'Connor Tomlinson, *Termination of Parental Rights Under Adoption and Safe Families Act (ASFA)*, 115 AM. JUR. TRIALS 465 (2021).

[41] CAL. WELF. & INST. CODE § 361.5(a)(1) (West 2021).

[42] *See* Raymond C. O'Brien, *An Analysis of Realistic Due Process Rights of Children Versus Parents*, 26 CONN. L. REV. 1209, 1247–56 (1994).

[43] *In re* K.A.W., 133 S.W.3d 1, 9 (Mo. 2004) (certain conduct, such as rape, abandonment, incest, or murder, do not require inquiry about future harm to the child, termination is immediately warranted). *See, e.g.*, MO. ANN. STAT. § 211.447.2(3) (West 2018) (murder); *Id.* at 5(4) (rape); *Id.* at 11 (rape); *Id.* at 5(2)(c) (incest); *Id.* at 2(2) (abandonment).

increased."[44] In 2018, there were 435,000 children in foster care, but that number dropped slightly in 2019 to 424,000.[45] The vast majority of affected children are placed in nonrelative foster family homes, approximately 195,000 in 2017; another 140,000 were placed in relative (kinship) foster homes; another 25,000 were placed in group homes.[46] Racial characteristics of children in foster care are illustrative of the inordinate number of children of color in out-of-home placements, including foster care and group homes. In 2019, 23% of all children in foster care were Black or African American, 2% were American Indian or Alaska Native, and 21% were Hispanic.[47] More than half of all children in foster care were eventually reunified with parents, relatives, or a primary caregiver, but 20% remained in foster care placements for more than thirty months, some for more than five years.[48]

The provisions in Title IV-E of the Social Security Act enacted by Congress are partially to blame for the large number of children in out-of-home foster care placements. Title IV-E provides states with unlimited financial reimbursement for approved services, which includes foster care.[49] Thus, a state could receive unlimited reimbursement for approved services that provided a child with a safe environment until the cause for removal was rectified, or a permanent home was found. As a result, children could linger in foster care for lengthy periods of their lives while the state provided mediocre remedial services to the parents to correct the cause of abuse or neglect.[50]

To address the staggering number of children in out-of-home foster care placements, Congress enacted the Adoption and Safe Families Act of 1997 ("ASFA"), which limited the amount of time a child could remain in foster care while waiting for a parent to

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[44] U.S. DEP'T HEALTH & HUM. SERVS., TRENDS IN FOSTER CARE AND ADOPTION: FY 2010-FY 2019, 2 (2020).

[45] *Id.*

[46] Villalpando, *supra* note 11, at 283.

[47] CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., NO. 27, THE AFCARS REPORT 2 (2020).

[48] *Id.* at 3.

[49] CONG. RSCH. SERV., R42792, CHILD WELFARE: A DETAILED OVERVIEW OF PROGRAM ELIGIBILITY AND FUNDING FOR FOSTER CARE, ADOPTION ASSISTANCE AND KINSHIP GUARDIANSHIP ASSISTANCE UNDER TITLE IV-E OF THE SOCIAL SECURITY ACT 9 (2012).

[50] *See* Garcia, *supra* note 10, at 30–31.

comply with state parenting plans.[51] The 1997 legislation put pressure on the states, requiring them to choose qualified relative (kinship) foster homes, rather than nonrelative homes. For parents with children in nonrelative care, states were required to provide them with reasonable remedial services to reunify the family or satisfy conditions for termination of parental rights. If the parents did not cooperate sufficiently with these services within a specific period, their rights were terminated. Like the Family First legislation, adequate state-sponsored services—preventative and remedial—are crucial for parents seeking to retain custody. Because of ASFA, they are now faced with a time limit. If a child remains in nonrelative foster care for fifteen out of the most recent twenty-two months, the state may petition to terminate parental rights as long as the state can document its efforts to promote reunification through reasonable efforts.[52] The inadequacy of efforts due to a state's "limited resources"[53] falls far harder on the parents than on the state. If the state fails to provide services adequate to justify terminating the parent's rights, the child remains in foster care, mostly subsidized by the federal government. If the state can meet its burden of adequate services, the parent's right to the child is terminated. In either case, the child is separated from the parent. For a parent, often victimized by discriminatory profiling,[54] the state's failure to provide adequate services continues parent-child separation and may eventually precipitate termination of parental rights.

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[51] Adoption and Safe Families Act of 1997 (ASFA), Pub. L. No. 105-89, § 101, 111 Stat. 2115, 2116 (1997) (codified as amended at 42 U.S.C. § 1305). The Family First Prevention Services Act eliminates the fifteen months in foster home care limitation, replacing it with a services limitation. *See* Family First Prevention Services Act, Pub. L. No. 115-123, § 50721(a), 132 Stat. 245 (2018).

[52] *See* Jeanne M. Kaiser, *Finding a Reasonable Way to Enforce the Reasonable Efforts Requirement in Child Protection Cases*, 7 RUTGERS J. L. & PUB. POL'Y 100, 108–09 (2009).

[53] Villalpando, *supra* note 11, at 283.

[54] *See, e.g.*, *In re* Adoption of C.M., 414 S.W.3d 622, 647 (Mo. Ct. App. 2013) ("Mother's prior incarceration was not, in and of itself, a ground for termination of parental rights. Similarly, the fact Mother entered the U.S. illegally, is not well educated, and speaks Spanish as her primary language, cannot be grounds for termination.")

2. Family First Prevention Services Act

A new element was introduced in 2018 when Congress enacted the Family First legislation,[55] changing Title IV-E of the Social Security Act to provide for the following:

First, reimbursements. Federal reimbursement payments may be made to a state to provide services to families at "imminent risk" of having their children removed to foster care.[56] As a result, family in-home services are now available to families under Family First, whereas previously, these services could only be obtained if the child was removed from the custody of the parent. However, perhaps these services are not so unique. Data reveals that 1,332,254 children already received in-home services during fiscal year ("FY") 2017.[57] Nonrelative foster care is increasingly difficult to find because of the dwindling number of approved nonrelative foster parents. Also, group homes or congregate-care facilities are specifically excluded from Family First funding after two weeks, with limited exceptions.[58] Their exclusion, replaced with a "qualified residential treatment program," limits placement in group homes to no longer than two weeks, which will effectively eliminate groups homes that serve special needs youth. Among these are youth with severe behavioral challenges and youth involved in the juvenile justice system for whom group homes are less restrictive than locked detention centers.[59] This is a loss.

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[55] Bipartisan Budget Act of 2018, Pub. L. 115-123 (2018). For a summary of the Act and its individual components, see Children's Defense Fund, *Implementing the Family First Prevention Services Act: A Technical Guide for Agencies, Policymakers, and Other Stakeholders* (Feb. 18, 2020), https://www.childrensdefense.org/wp-content/uploads/2020/07/FFPSA-Guide.pdf [https://perma.cc/W5XY-U6D7].

[56] Bipartisan Budget Act of 2018, Pub. L. 115-123, §§ 50711 (e)(4)(A)(i), (13), 132 Stat. 232, 233 (2018).

[57] *Family First Act: A False Narrative, A Lack of Review, A Bad Law*, CHILD WELFARE MONITOR (Oct. 1, 2019), https://childwelfaremonitor.org/2019/10/01/family-first-act-a-false-narrative-a-lack-of-review-a-bad-law [https://perma.cc/79QK-GEUB].

[58] *See Therapeutic Group Homes: Needed Programs in Danger from Family First Act,* CHILD WELFARE MONITOR (Mar. 4, 2019), https://childwelfaremonitor.org/2019/03/04/therapeutic-group-homes-needed-programs-in-danger-from-family-first-act/ [https://perma.cc/V6G2-J7AE].

[59] *See, e.g.*, Sean Hughes, *The Family First Prevention Services Act: A Mixed Bag of Reform*, THE IMPRINT, (June 22, 2016, 3:00 AM), (citing the Transitional Housing Placement Program in California as an example of one group home that would lose funding because of the new legislation), https://imprintnews.org/analysis/family-first-prevention-services-act-mixed-bag-reform/19073 [https://perma.cc/PS23-S6SX].

While permitting the child to remain in the family home, thus avoiding the trauma of parent-child separation, states only qualify for services once the families have reached an imminent risk level of crisis justifying the removal of the child, which some argue fails to intervene early enough to qualify as sufficiently preventive.[60] Funding under Family First may pose a danger to children forced to find shelter in nonrelative foster homes because nonrelative foster care requires a qualifying look-back period that may disqualify certain parents. Because Family First funds do not have this look back requirement, children who are disqualified may be kept in dangerous homes so as to qualify for federal reimbursements.[61]

Federal funding may also be available if, instead of the family home, the child is placed with relatives, often described as kinship care.[62] It is assumed that living with a relative will be less traumatic for a child, but there is concern that in an effort to qualify for Family First funds, states may utilize non-licensed, non-supervised relatives, which could pose additional risk to children.[63] However, states may have few affordable options and lack of overall funding prompts another complaint about Family First. That is, "the bill was designed to be cost-neutral," and hence no effort is made to make additional funds available for child welfare.[64] To soften the blow for states forced to comply with Family First, Congress enacted the Family First Transition and Support Act in 2019[65] to ease the transition, but the leeway provided is short-lived.[66]

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[60] *Id.*

[61] *Id. See also* Frihart-Lusby, *supra* note 37, at 1094.

[62] For a description of the interconnection between the Kinship Navigator Program and Family First, see *Kinship Navigator Programs*, GRANDFAMILIES, http://www.grandfamilies.org/Resources/Kinship-Navigator-Programs [https://perma.cc/XB7T-RM8D] (last visited Aug. 1, 2021).

[63] *See, e.g.*, *Family First Act, supra* note 57 (citing *Will the New Foster Care Law Give Grandparents a Hand?*, THE PEW CHARITABLE TRUSTS (June 5, 2018), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/06/05/will-the-new-foster-care-law-give-grandparents-a-hand [https://perma.cc/RQR2-9CW3]).

[64] Hughes, *supra* note 59.

[65] Promoting Safe and Stable Families Program, 42 U.S.C. § 629 (2018). The statute, renamed to honor the memory of MaryLee Allen, is now called the MaryLee Allen Promoting Safe and Stable Families Program.

[66] *See* Bipartisan Budget Act of 2018, Pub. L. 115-123, § 50711, 132 Stat. 64, 232 (2018).

Starting in 2027, federal contributions will be made through the state's Federal Medical Assistance Percentage ("FMAP") programs.[67] However, even today, state Medicaid expenditures cover many mental health and substance abuse programs currently being provided. In addition to Medicaid, there are additional funding sources such as Title IV-B, TANF, Social Services Block Grants, and CAPTA funds.[68] An added benefit is that Medicaid programs do not count towards 50% of programs that must be well-supported to receive Family First funding.[69]

Second, parenting plans. Services provided under the state's parenting plan must be trauma-informed, meet certain evidence-based requirements, and be intended to address risk factors such as domestic violence, unsafe home conditions, substance abuse disorder, mental health care, and in-home parenting skills.[70] Family First does not list specific criteria for the plans but, at a minimum, the plans must specify why the placement was chosen, the measures taken to address the cause for removal, and a strategy for permanent child placement. A significant feature is that states are not obligated to find alternative permanent homes concurrently while the parents receive services under the parenting plan. Indeed, Family First halted federal adoption assistance for any

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[67] *Id.*

[68] For further discussion of these programs, *see infra* text accompanying notes 192-233.

[69] *Family First Act, supra* note 57. The 50% requirement was suspended temporarily under the Family First Transition Act 2020. *Id.*

[70] *See Implementing the Family First Prevention Services Act: A Technical Guide for Agencies, Policymakers, and Other Stakeholders,* CHILDREN'S DEFENSE FUND 20 (Feb. 18, 2020), https://www.childrensdefense.org/wp-content/uploads/2020/07/FFPSA-Guide.pdf [https://perma.cc/D4MS-8C2G], for listing criteria of what is evidence based:

> ● Book or Manual: The practice has a book, manual or other available writings that specify the components of the practice protocol and describe how to administer the practice. ● No Empirical Risk of Harm: There is no empirical basis suggesting that, compared to its likely benefits, the practice constitutes a risk of harm to those receiving it. Weight of Evidence Supports Benefits: If multiple outcome studies have been conducted, the overall weight of the evidence supports the benefits of the practice. ● Reliable and Valid Outcome Measures: Outcome measures are reliable and valid and are administrated consistently and accurately across all those receiving the practice. ● No Case Data for Severe or Frequent Risk of Harm: There is no case data suggesting a risk of harm that was probably caused by the treatment and that was severe or frequent.

child adopted prior to that child's second birthday.[71] However, states are obligated to submit a five-year evidence-based prevention plan that includes monitoring the safety of children while services are provided; adherence to the practice model is monitored to indicate if projected outcomes are achieved.[72] Eventually, starting in October 2021, to meet federal funding requirements of 50%, programs must meet strict standards of "well-supported," but currently there are very few programs meeting these criteria,[73] hence the 2019 legislation to delay the 50% requirement.

Third, time limits. There is a twelve-month limit on federal reimbursement for services. The program instructions clarify, though, that if children and families need services beyond twelve months and the need for additional services is documented in their parenting plan, they may receive continuing months of services. If a child returns home from a foster care placement, the child has access to a fifteen-month period of family reunification services.[74] These time limitations, coupled with what may be inadequate services, are barriers for parents with, for example, serious opioid addiction. The "high recidivist rate of opioid addiction, at 70%, renders the FFPSA's time limitation of twelve months of services grossly inadequate."[75] Yet, Family First is lauded as a significant modification to the Title IV-E program because it authorized open-ended matching funds to help pay for selected evidence-based mental health, substance abuse, in-home-parenting, and kinship navigator programs.[76]

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[71] Bipartisan Budget Act of 2018, Pub. L. 115-123, § 50781, 132 Stat. 64, 268 (2018).

[72] *Family First Prevention Services Act Fiscal Analysis: Guide and Tools*, ANNIE E. CASEY FOUNDATION 8–9 (June 20, 2020), https://assets.aecf.org/m/resourcedoc/aecf-familyfirstfiscalanalysis-2020.pdf [https://perma.cc/S635-LSEZ]. *See, e.g.*, COLORADO FAMILY FIRST., *supra* note 22, at 25–30 (describing its evaluation process).

[73] *See* Title IV-E Prevention Services: Clearing House, https://preventionservices.abtsites.com/program?combine_1=&prograting%5B1%5D=1 [https://perma.cc/4U6W-7DEM] (last visited Aug. 1, 2021). "Well-supported" means that at least two target outcomes in studies with separate samples in usual care settings demonstrate positive effects and at least one of these effects is maintained for twelve months after treatment ends.

[74] Bipartisan Budget Act of 2018, Pub. L. 115-123, § 50721, 132 Stat. 64, 245 (2018).

[75] Garcia, *supra* note 10, at 38.

[76] ELLIOT GRAHAM, TITLE IV-E WAIVER DEMONSTRATIONS: HISTORY, FINDING, AND IMPLICATIONS FOR CHILD WELFARE POLICY AND PRACTICE 3 (2021).

When Family First became operative, few states submitted five-year prevention programs.[77] Those that did laud the opportunity to keep children in their homes and avoid foster care placement. They also welcomed freedom from income-eligibility standards associated with Title IV-E foster care placements. However, they did not like the fact that state funds needed to be appropriated for: (1) evaluating current state services, (2) assessing the outcomes of these services, (3) increasing salaries for social service workers to counter their very high turnover rate, (4) upgrading outdated case management systems and training curriculum, and (5) implementing standards of evidence corresponding with federal standards.[78] To illustrate state concerns, Virginia's budget for 2021 included $125,977,900 in state funds and $143,524,447 from federal funds to support state child welfare efforts in the state.[79] This illustrates the significant state contribution.

To soften the blow, in December 2019, Congress passed the Further Consolidated Appropriations Act of 2020,[80] which includes the Family First Transition Act meant to support states and tribes as they seek to implement Family First. Specifically, the Transition Act temporarily: (1) suspends the evidence-based requirements for prevention programs, (2) suspends the requirement that 50% of program expenditures must be for the highest evidence tier of programs (well-supported), (3) provides an additional $2.75 million to support Title IV-E Prevention Services Clearinghouse to review and rate evidence-based programs, (4) grants $20 million in grants to develop kinship navigator programs, (5) provides $500 million to

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[77] As of June 7, 2021, the following states or cities submitted plans subsequently approved: Arkansas, District of Columbia, Kansas, Kentucky, Maryland, Nebraska, North Dakota, Oregon, Utah, Washington, and West Virginia. Additional states have submitted plans seeking approval: Alaska, Colorado, Hawaii, Illinois, Indiana, Maine, Missouri, Montana, Ohio, South Carolina, Tennessee, and Virginia. *Status of Submitted Title IV-E Prevention Program Five-Year Plans,* CHILDREN'S BUREAU, OFFICE OF ADMINISTRATION FOR CHILDREN & FAMILIES (Feb. 18, 2020), https://www.acf.hhs.gov/cb/data/status-submitted-title-iv-e-prevention-program-five-year-plans [https://perma.cc/N9K3-TL9T].

[78] Valerie L'Herrou, Cassie Cunningham & Salaam Bhatti, *Unallot a Lot: Virginia's Human Services Budgeting in the Time of Coronavirus*, 24 RICH. PUB. INT. L. REV. 149, 160–61 (2021).

[79] *Id.* at 163.

[80] Further Consolidated Appropriations Act of 2020, Pub. L. 116-94 (2020).

support states as they update their infrastructure and initiate new programs related to Family First, and (6) lessens any decrease in funds to states participating in Title IV-E Waiver Demonstration Projects.[81] Most of these benefits will expire at the end of 2021, but during fiscal years 2022 and 2023, the 50% requirement applies to both supported and well-supported programs, but then applies only to well-supported programs in 2024.

II. AN ILLUSTRATION: PREDICTIVE NEGLECT

The inadequacy of remedial services disproportionately affects poor parents, unmarried parents, parents never educated in beneficial parenting skills, and parents often afflicted with substance addiction and mental health issues prompting aggressive behavior. Statistically, a disproportionate number of these parents are Native American, African American, or Hispanic. Because predictive neglect assessments involve consideration of future conduct, the factual and legal contexts illustrate how adequate remedial services are essential to the retention of parental rights and also how conjecture may adversely impact parents of color.

A. The Factual Context

Child welfare and the risk factors that prompt neglect and abuse should not be viewed only in the context of statutes and fiscal year statistics. People are involved. These people reveal that each day in the United States 1,683 babies are born into poverty, and 773 of these babies are born into extreme poverty.[82] Likewise, and this fact must be repeatedly mentioned, one segment of the population is disproportionately affected: families of color. Furthermore, when children of color and their families become involved in the child welfare system, they experience worse outcomes than Caucasian children and their families, remaining in

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[81] Elizabeth Jordan & Amy McKlindon, *The Family First Transition Act Provides New Implementation Supports for States and Tribes,* CHILD TRENDS (Mar. 10, 2020) (Act renamed Title IV-B, Subpart 2 of the Social Security Act, the MaryLee Allen Promoting Safe and Stable Families Program).

[82] *New Report: The State of America's Children is Shameful,* CHILDREN'S DEFENSE FUND (Feb. 3, 2020), https://www.childrensdefense.org/2020/new-report-the-state-of-americas-children-is-shameful/ [https://perma.cc/ZGD4-6LN7].

the system longer, with lower rates of permanency, and their mental and physical health needs are poorly addressed.[83] Their plight is particularly applicable to predictive neglect, whereby a child is removed from the parent and then possibly terminated from that parent's custody because of anticipated future conduct. The subjective analysis involved in predictive neglect illustrates the perils of being poor, a family of color, and/or a victim of addiction or worsening mental health.

To illustrate, one case involved "a poor woman, dealing with domestic violence, who had trouble securing her own stable housing and employment."[84] The mother's children were removed from her custody and placed in a nonrelative foster home, where they lived for more than two years as she worked with social services to rectify her adverse home conditions. During these two years, the children bonded with their foster parents and were thriving in a stable home. Nonetheless, the mother consistently sought the return of her twin children. The state petitioned the court to terminate the mother's parental rights, and at the termination hearing, the court acknowledged "the long road ahead and the hardship non-termination could place on these two children in the future should Mother and the children not receive therapeutic support to repair the parent-child relationship."[85] The mother admitted to neglecting her children in the past, but facts revealed that after the children were removed, she participated in state-sponsored services and showed improvement in her behavior. The trial court granted the state's motion to terminate the mother's rights in her children, but on appeal, the appellate court noted the progress the mother made; declared the legal necessity of finding clear, cogent, and convincing evidence of a statutory ground for termination; and overturned the

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[83] Shanelle Dupree, *The 2020 Department for Children and Families Series: Babies in the River*, 89 J. KAN. B.A. 22, 23 (2020) (citing Elisa Minoff, *Entangled Roots: The Role of Race in Policies that Separate Families*, CENTER FOR THE STUDY OF SOCIAL POLICY (2018), https://cssp.org/wp-content/uploads/2018/11/CSSP-Entangled-Roots.pdf [https://perma.cc/5ALK-BH86]).

[84] *In re* J.L.D., 560 S.W.3d 906, 908 (Mo. Ct. App. 2018). *See also In re* C.J.G., 358 S.W.3d 549, 551 (Mo. Ct. App. 2012) (parent suffered from anger management, plus alcohol and drug abuse); *In re* T.L.B., 376 S.W.3d 1, 6 (Mo. Ct. App. 2011) (mother failed to cooperate with anger managements classes). Domestic violence appears in many of the cases. *See, e.g.*, *In re* D.D.C., 351 S.W.3d 722, 726 (Mo. Ct. App. 2011).

[85] *In re* J.L.D., 560 S.W.3d at 909.

trial court's order of termination.[86] The court concluded: "Though the trial court's findings regarding *past* abuse and neglect are supported by substantial evidence, we find that the court failed to make the necessary explicit findings regarding *future* harm."[87]

These facts illustrate the elements of predictive neglect petitions. Specifically, any allegations of parental unfitness justifying more than temporary involuntary removal of the child from the parent must be supported by at least clear and convincing evidence. Then, in conformity with a parenting plan proposed by the state, rehabilitative services are offered to the parent, which will gradually indicate whether future adverse parental conduct can be corrected.[88] Another factor is that federal legislation establishes time limits on a parent's cooperation with the parenting plan proposed by the state.[89] Yet, in all of these cases, sooner or later a court will be tasked with deciding if there is a credible link between the "parent's past conduct and . . . predicted future behavior and an explicit consideration of the likelihood of future harm to the child based on those past acts."[90] Requiring adequate remedial services as part of the parenting plan provided to the parent is the lynchpin upon which parental rights depend.

The 2018 Family First legislation allows states to permit the child at imminent risk to remain with the parent or a relative and avoid nonrelative foster care placement.[91] However, even if children remain within the home while the parent complies with the parenting plan, the issue for courts remains the same: whether a parent's past conduct can be remedied sufficiently to offset the probability of future (predictive) adverse behavior. The test depends upon a parent's cooperation with adequate remedial services. Qualifying as adequate is difficult because the parents and

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[86] *Id.*

[87] *Id.* at 913 (emphasis added).

[88] *See, e.g.*, *In re* Z.V.A., 835 S.E.2d 425, 430 (N.C. 2019) (parental rights were terminated when parents demonstrated that they were "not able to use any of the learned skills to communicate or deal with each other in a more positive and effective manner").

[89] *In re* K.A.W., 133 S.W.3d 1, 10 (Mo. 2004).

[90] *In re* E.D.C., 499 S.W.3d 766, 770 (Mo. Ct. App. 2016) (citing *In re* C.K., 221 S.W.3d 467, 474 (Mo. Ct. App. 2007)).

[91] Bipartisan Budget Act of 2018, Pub. L. 115-123, § 50711, 132 Stat. 232-44 (2018) (codified as amended at 42 U.S.C. § 671).

children involved are disproportionately parents of color, unmarried, poor, or a combination of all three. As a result, when predicting what may occur in the future, there is the added element of racial conjecture, profiling, intentional and unintentional stereotyping, any of which heightens the risk of parent-child custody removal and eventual termination of custody.

Subjectivity, conjecture, and speculation permeate the determination of child welfare. Best interest of the child is "a subjective assessment based on the totality of the circumstances."[92] Whenever a petition to terminate parental rights is submitted to any trial court, that court must make "a subjective assessment based on the totality of the circumstances."[93] Admittedly, in seeking objectivity, the state may list statutory factors to consider—Missouri lists seven—defining what constitutes the best interest of the child.[94] Even then, "[t]here is no requirement, statutory or otherwise, that all seven of these factors must be negated before termination can take place; likewise, there is no minimum number of negative factors necessary for termination."[95] In short, even though objectivity is desired in establishing a child's best interest, the process remains subjective and elusive when evaluating any list of statutory factors.

To illustrate the elusiveness of best interest, the facts of *In re I.G.P.* involved a boy who was one year old when he was removed from the custody of his mother because of "lack of supervision and

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[92] *In re* M.T.E.H., 468 S.W.3d 383, 397 (Mo. Ct. App. 2015) (citing *In re* C.A.M., 282 S.W.3d 398, 409 (Mo. Ct. App. 2009)).

[93] *In re* L.J.D., 352 S.W.3d 658, 662 (Mo. Ct. App. 2011).

[94] *See, e.g.*, MO. ANN. STAT. § 211.447.7 (West 2021) ("(1) The emotional ties to the birth parent; (2) The extent to which the parent has maintained regular visitation or other contact with the child; (3) The extent of payment by the parent for the cost of care and maintenance of the child when financially able to do so including the time that the child is in the custody of the division or other child-placing agency; (4) Whether additional services would be likely to bring about lasting parental adjustment enabling a return of the child to the parent within an ascertainable period of time; (5) The parent's disinterest in or lack of commitment to the child; (6) The conviction of the parent of a felony offense that the court finds is of such a nature that the child will be deprived of a stable home for a period of years; provided, however, that incarceration in and of itself shall not be grounds for termination of parental rights; (7) Deliberate acts of the parent or acts of another of which the parent knew or should have known that subjects the child to a substantial risk of physical or mental harm.").

[95] *In re* C.A.M., 282 S.W.3d 398, 409 (Mo. Ct. App. 2009).

unsafe shelter."[96] The child's siblings were removed from the custody of the parent earlier and shortly thereafter the mother's parental rights in them were terminated. The mother had a history of alcohol and chemical dependency, plus a record of mental health issues. On more than one occasion, she attempted to commit suicide, continued to resist rehabilitation services offered through the state's parenting plan,[97] and infrequently visited her son in foster care. Eventually, following protracted litigation when the child was six years old, the state filed a petition to terminate the mother's rights in the child.[98]

The state trial court terminated the mother's parental rights in the boy because of harmful conditions adversely affecting her child, resulting in the child being under the jurisdiction of the court for more than a year.[99] Furthermore, there was little likelihood that the conditions causing removal would improve sufficiently so that the child might be integrated into a stable and permanent home.[100] On appeal, the appellate court concurred with the findings and the holding of the trial court, concluding that "[m]other continues to engage in unhealthy relationships and substance abuse; these behaviors contribute to Mother's lack of an ability to provide a stable home for Child."[101]

After finding clear and convincing evidence supporting termination, the appellate court discussed the second prong of inquiry: whether it is in the best interest of the child to terminate the parent's rights. The court focused on the fact that the child needed permanency,[102] noting that the child was in out-of-home care for almost four years, more than half of the child's life.[103] The court concluded that "continuation of the parent-child relationship greatly diminished Child's prospects for early integration into a stable and permanent home."[104] This best interest inquiry

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[96] *In re* I.G.P., 375 S.W.3d 112, 116 (Mo. Ct. App. 2012).
[97] *Id.* at 118–19.
[98] *Id.* at 119.
[99] *Id.* at 130.
[100] *Id.* at 121–22.
[101] *Id.* at 130.
[102] *In re* I.G.P., 375 S.W.3d 112, 131 (Mo. Ct. App. 2012).
[103] *Id.* at 130.
[104] *Id.*

incorporated many of the statutory grounds for termination, but it remains a subjective undertaking.

In another illustration, on June 26, 2000, a single mother with three existing children gave birth to two additional children, twin girls.[105] She was poor and now faced with the daunting prospect of raising five children while trying to keep her job. She decided that she would provide the twins with a "better life" by surrendering them to adoptive parents, intending an open-adoption arrangement.[106] After consulting with adoption professionals, she opted for what is called an "open adoption," which would allow her to maintain contact with and provide support for the twins as they grew toward maturity while living in another parent's home.[107] Open adoption is one "in which the birth parents meet the adoptive parents, participate in the separation and placement process, relinquish all legal, moral and nurturing rights to the child, but retain the right to continue contact and knowledge of child's whereabouts and welfare."[108] Not every state permits open adoptions and the mother's state did not, so the mother sought to place the twins with adoptive parents in California, in part because that state permitted this. The mother visited the prospective parents for ten days, but ultimately concluded that it was not a good placement because the couple seemed reluctant to allow her access to the twin girls after her surrender.[109]

The mother then began a second search for suitable adoptive parents. While still in California, she invited another couple to visit her from Great Britain. The mother thought they would be ideal parents so together they all traveled to Arkansas to complete the adoption process, which the mother was advised was an advantageous state for open adoption.[110] After the mother falsely

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[105] *In re* K.A.W., 133 S.W.3d 1, 6 (Mo. 2004). *But see* Melissa Jonson-Reid, et al., *Repeat Reports Among Cases Reported for Child Neglect: A Scoping Review*, 92 CHILD ABUSE & NEGLECT 43, 62 (2019) ("[S]ome studies indicate single parent families had increased risk [of neglecting a child], many of those studies failed to [consider] other key variables like family size, income or availability of . . . support.").

[106] *In re* K.A.W., 133 S.W.3d at 6.

[107] *Id.*

[108] E. WAYNE CARP, FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION 198–99 (1998).

[109] *In re* K.A.W., 133 S.W.3d at 6.

[110] *Id.*

claimed Arkansas residency, an "Arkansas judge approved the adoption,"[111] and the couple took the twins home to Great Britain. Eventually, British officials determined that the couple was unfit, and the twins were taken into custody and transferred back to Missouri, where they were placed in the custody of the Missouri Division of Family Services.[112] Upon discovering that the mother was not a bona fide Arkansas resident, the Arkansas court set aside the adoption decree for lack of jurisdiction.[113]

When the mother discovered that the Arkansas adoption was annulled and her children were placed in a nonrelative foster care home, she at first thought that the Missouri foster parents with whom the children were placed should be allowed to adopt them. However, she quickly rejected this option and "strove to gain back custody of the twins instead."[114] She "resolved to rear the babies herself and rally the support of her family so that she could do it well."[115] In spite of her efforts to regain custody of her children, the Division of Family Services ("DFS") resisted, alleging that the mother committed severe and recurrent acts of emotional abuse toward the twins, acts that they concluded would continue in the future. [116] Specifically, DFS alleged that the mother placed the children with strangers in California, Arkansas, and Great Britain within the first few months of the children's lives and that such conduct would continue into the future.[117] The trial court agreed with DFS, holding that the mother's acts were sufficiently abusive to constitute clear and convincing evidence supporting termination.[118] Furthermore, the reasons for the mother's conduct had not dissipated, warranting concerns over the mother's recurrent behavior in the foreseeable future.

While the children were in state custody, consistent with state procedures, Missouri offered the mother services within the parameters of a parenting plan, intending that successful

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[111] *In re* K.A.W., 133 S.W.3d 1, 6 (Mo. 2004).
[112] *Id.*
[113] *Id.*
[114] *Id.* at 7.
[115] *Id.*
[116] *Id.* at 7–8.
[117] *In re* K.A.W., 133 S.W.3d 1, 7 (Mo. 2004).
[118] *Id.* at 12–13.

completion of which may result in reunification.[119] The proposed services required the mother to (1) take parenting classes, (2) visit the children in their foster home regularly, (3) provide financial support for the twins, (4) undergo a psychological examination, and (5) submit to drug screening.[120] The mother complied with all of the requirements of the parenting plan, but child protective services nonetheless filed another petition to terminate the mother's rights, alleging that in spite of the mother's cooperation with state services, "conditions of a potentially harmful nature continue to exist and will not be remedied at an early date . . . [for the twins'] early integration into a stable and permanent home."[121] The continuing poverty of the mother is most likely the condition to which child protective services refers.

Pertinent to the agency's petition, the trial court found that, (1) the mother's conduct placed stress on the twins, resulting in their experiencing Reactive Detachment Disorder in Partial Remission, which is a mental disorder; (2) that the mother was indecisive in providing for her children; (3) that there was an absence of parent-child emotional ties; (4) that the mother to date could not garner family support to assist with the health and welfare of her twins; and (5) that the mother "is unwilling or unable to provide 'The Twins' with the stability necessary for their overall welfare."[122] Based on these findings the trial court terminated the mother's parental rights, holding that there was clear and convincing evidence of specific statutory grounds and furthermore, that parental rights termination is in the best interest of the child.[123]

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[119] *Id.* Progress in complying with the terms of a parenting plan may result in a court's decision to postpone termination proceedings. *Id*. at 10. *See, e.g.*, MO. ANN. STAT. § 211.447.5(3)(a) (West 2021); *In re* T.A.L., 328 S.W.3d 238, 241 (Mo. Ct. App. 2010) (mother's parental rights not terminated because progress she made in cooperation with plan).

[120] *In re* K.A.W., 133 S.W.3d at 7. A parent's drug use and resulting harm to the child appear in many of the termination cases. *See, e.g.*, *In re* M.L.R., 249 S.W.3d 864, 868–69 (Mo. Ct. App. 2008).

[121] *In re* K.A.W., 133 S.W.3d at 8 (citing provisions of MO. ANN. STAT. § 211.447.4(3)).

[122] *Id.*

[123] *In re* K.A.W., 133 S.W.3d 1, 8 (Mo. 2004). *See* MO. ANN. STAT. § 211.447.6 (West 2021). *See also* MO. ANN. STAT. § 211.447.7 (West 2021) (listing factors to establish what is in the best interest of the child). Courts often address each factor in making a

The mother appealed the termination order of the trial court to the Missouri Court of Appeals, which transferred the case to the Missouri Supreme Court prior to making a disposition itself because "cases involving termination of parental rights and adoption be given priority."[124] The gist of the mother's appeal was that the trial court failed to make the necessary findings sufficiently "linked to predict future behavior."[125] In both the majority and dissenting opinions, the Missouri Supreme Court focused on the mother's predictive behavior. Specifically, the opinions addressed two questions: first, what is sufficient to meet the statutory requirements for termination,[126] and second, what level of proof is sufficient to predict that adverse behavior will continue for the reasonably foreseeable (predictable) future.[127] The majority opinion ruled in favor of the mother, rejecting termination of her rights, because there was insufficient evidence that her past conduct was predictive of future misconduct.[128]

Similar questions were raised in another state's judicial opinion. The Supreme Court of Connecticut addressed the termination of parental rights involving two children, one born in 2005 and one in 2006.[129] Both children were involuntarily removed from the custody of their parents a few days after birth based on allegations of predictive neglect, specifically that the children, if left in the custody of their parents, would be "denied proper care and attention physically, educationally, emotionally and morally."[130]

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determination that termination is in best interest of any child. *See, e.g.*, *In re* D.D.C., 351 S.W.3d 722, 733–34 (Mo. Ct. App. 2011).

[124] *In re* K.A.W., 133 S.W.3d at 5, n.3 (citing MO. ANN. STAT. § 453.001.1, MO. CONST. art. V, § 10, and MO. SUP. CT. R. 83.01, 83.02).

[125] *Id.* at 9–10, n.6 (citing 32 AM. JUR. PROOF OF FACTS 3D *Parental Rights* § 6 (2003) ("[I]t is inappropriate to terminate a parent's parental rights on the basis of neglect that happened in the remote past and no longer exists.")).

[126] MO. ANN. STAT. § 211.447.4 (West 2021).

[127] *In re* K.A.W., 133 S.W.3d at 20–21. The dissent focuses on the trial court's conclusion that because the mother demonstrated "time and again" her "inability to make appropriate decisions" regarding the care of her children that this pattern of behavior will change in the foreseeable future. *Id.* at 31 (Price, J., dissenting).

[128] *Id.* at 11.

[129] *See In re* Joseph W., 46 A.3d 59 (Conn. 2012) (remanding to trial court to establish appropriate standard of proof for determining neglect under the doctrine of predictive neglect).

[130] *In re* Joseph W., 79 A.3d 155, 159 (Conn. Super. Ct. 2013) (citing *In re* Joseph W., 46 A.3d 59, 68 (Conn. 2012)).

The mother had a long history of mental health issues, precipitating dangerous parenting decisions; the father simply refused to take responsibility for the care of his children.[131] In this Connecticut case, despite providing the mother with psychiatric services, the mother failed to avail herself of—or benefit from—said services. Likewise, father repeatedly failed to recognize the mother's mental health issues and how they negatively impacted her ability to care for their children, demonstrating an inability to care for the children independent of the mother.[132]

A lengthy judicial process ensued. In 2007, child protective services petitioned to terminate the parents' rights in both children on the grounds that the parents failed to "rehabilitate," and the court granted the petition for termination in 2008.[133] The parents appealed, and the state's appellate court affirmed the decision of the trial court, prompting the parents to appeal to the state's highest court to reverse. In 2011, the Connecticut Supreme Court reversed the order of termination and remanded the case for a new trial.[134] On remand, the trial court again ruled that the children were neglected and likely to remain so and approved termination of the parents' rights. Upon appeal in 2012, however, the state's highest court reversed the trial court and remanded for yet another hearing.[135] Finally, in 2013 a trial court again ordered termination of parental rights. In a lengthy and detailed opinion, the trial court held that the parents "failed to achieve such a degree of rehabilitation as to encourage belief that within a reasonable period they could resume roles as parents."[136] It is not that services were not offered. Rather, it is that both parents refused to acknowledge any value and need for mental health treatment or, in mother's case, medical treatment. "The parents never accepted that the recommended programs or treatment were worthwhile. They

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[131] For a description of the mother's diagnosis, history of services provided, and the father's neglect, see *id.* at 163–220.

[132] *Id.* at 222.

[133] *Id.* at 160.

[134] *Id.* (citing *In re* Joseph W., 21 A.3d 723, 735 (Conn. 2011)).

[135] *In re* Joseph W., 46 A.3d 59, 59 (Conn. 2012) (holding that the potential risk of neglect standard was an inappropriate standard of proof of predictive neglect and holding it be replaced with a finding that remaining in a parent's custody would more likely than not be injurious to the well-being of the child).

[136] *In re* Joseph W., 79 A.3d 155, 155 (Conn. Super. Ct. 2013).

consistently refused to accept advice and suggestions regarding their parenting skills and made no progress in addressing the child protection concerns."[137]

Although the Missouri and the Connecticut decisions both involve recurrent high-risk patterns—poverty, mental health issues, poor parenting skills, substance abuse, and conduct sufficient to meet the state's definition of predictive neglect—there are distinctive elements. In Missouri, the mother in *In re K.A.W.*, unlike the Connecticut parents in *In re Joseph W.*, cooperated with state services offered under the state's parenting plan within a reasonable period of time and her twins were restored to her custody. Both sets of parents exhibited conduct adverse to the best interest of their children, both confronted termination of their parental rights, and both argued that the proof was inadequate to permit so extreme an outcome as termination. Yet what distinguished the Missouri mother is that services provided to her were apparently adequate and most importantly, she complied with them, thereby demonstrating her awareness of the problem and her complicity in working towards a future free from child neglect. Her affliction was primarily poverty augmented with poor parenting choices.

The Connecticut parents did not cooperate, thereby indicating that neglect would continue into the predictive future. Their neglect of their children resulted from mental health issues, poor parenting skills undoubtedly learned from their own childhoods, and their steadfast refusal to cooperate or be compliant with state caseworkers. These cases are the most difficult, as is illustrated by the lengthy judicial process prior to eventually terminating parental rights. These cases challenge government officials to ask what constitutes adequate remedial services. Are any services adequate? Is compliance the key, though the underlying conditions of poverty and/or mental health causing poor parenting skills remain untreated? How may federal funding initiatives prompt states to develop innovative remedial services that address these factual issues?

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[137] *Id.* at 235.

B. The Legal Context

Once a complaint is made to state authorities alleging the neglect or abuse of a child, what often becomes a lengthy legal process commences. Until recently, a verified complaint resulted in the automatic temporary removal of the child from the parent's home. Today, even if the child is permitted to remain in the custody of the parent or a relative, that parent is then entitled to a statutorily required investigation and social study at least fifteen days prior to a dispositional hearing.[138] Then, if the reported adverse conditions are verified, the child becomes "dependent" and a parenting plan is created. As a result of the 2018 Family First legislation, children may remain, if feasible, with their parents or a relative during which the parenting plan provides "mental health and substance abuse prevention and treatment services, [and] in-home parent skill-based programs."[139] The legislation fosters programs such as Child First, which is a program that strengthens the parent-child relationship and increases the social-emotional well-being of both child and caregiver. In addition, clinical teams promote self-regulation and executive function capacity by mentoring caregivers on how to focus their attention, plan, organize, and problem solve.[140] "The care coordinator works to immediately stabilize the family and connects family members to community-based services to decrease stressors and promote healthy development, as identified in the plan of care."[141]

Parental conduct precipitating state intervention may automatically warrant immediate termination of parental rights, but most conduct is more nebulous. "Poor conduct or character flaws are not relevant unless they could actually result in future harm to the child."[142] As observed by many courts, "[e]ven where the parent-child relationship is 'marginal,' it is usually in the best

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[138] *See, e.g.*, *In re* C.G., 212 S.W.3d 218, 221 (Mo. Ct. App. 2007).

[139] Bipartisan Budget Act of 2018, Pub. L. No. 115-123, § 50702, 132 Stat. 232 (2018). For an array of services and programs recommended to the states, see CHILDREN'S BUREAU, CAPACITY BUILDING CENTER FOR STATES, U.S. DEP'T HEALTH & HUM. SERVS., A DATA-DRIVEN APPROACH TO SERVICE ARRAY GUIDE (2019).

[140] *Child First,* TITLE IV-E PREVENTION SERVICES: CLEARINGHOUSE (2021), https://preventionservices.abtsites.com/programs/276/show [https://perma.cc/KY5R-XPDJ].

[141] *Id.*

[142] *In re* K.A.W., 133 S.W.3d 1, 11 (Mo. 2004).

interests of the child to remain at home and still benefit from a family environment."[143] This perception that a child is better off at home, even if the home is marginal, is grounded in the fundamental right of a parent to the custody of his or her child. "The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents . . . ."[144] Therefore, unless parental conduct is clearly and convincingly severe, such as rape, incest, or murder, the trial court must, prior to any termination order, ask if the parent's conduct is "severe enough to constitute abuse and neglect and whether it provides an indication of the likelihood of future harm to the [child]."[145] That is, "there must be a finding connecting . . . harm to the child and clear, cogent and convincing evidence to support it."[146]

If the parent's conduct is sufficiently harmful, more than marginal, the state must provide adequate and reasonable remedial services, as well as a parenting plan to assist the parent in correcting the misconduct. Failure to cooperate with these services builds upon the misconduct itself and may be considered in any subsequent petition to terminate parental rights based on predictive recurrent behavior. The analysis includes "evidence [that] supports the trial court's conclusion that [a parent's] failure to acknowledge her role in failing to protect her children from sexual abuse made reunification extremely unlikely in a manner consistent with the children's well-being."[147] The parent's past misconduct, taken together with the parent's ongoing failure to cooperate with current state reunification efforts, permits a court to conclude that neglect or abuse will continue into the foreseeable future. Eventually, this analysis permits termination of parental rights based on predictive recurrent behavior.

Past parental misconduct resulting in a child being termed a dependent is the starting point, but only insofar as it provides

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[143] *In re* Juv. Appeal (83-CD), 455 A.2d 1313, 1319 (Conn. 1983).

[144] Santosky v. Kramer, 455 U.S. 745, 753 (1982). *See, e.g.*, *In re* S.M.H., 160 S.W.3d 355, 372 (Mo. 2005) ("[A]lthough Father may not be a model parent and has in the past made some bad choices and exhibited some poor behaviors, he will be able to knowingly provide S.M.H. the necessary care, custody, and control. This is all that is required.").

[145] *In re* K.A.W., 133 S.W.3d at 12.

[146] *In re* K.M.A.-B., 493 S.W.3d 457, 475 (Mo. Ct. App. 2016).

[147] J.S. v. Juv. Officer (*In re* J.S.), 477 S.W.3d 719, 726 (Mo. Ct. App. 2015).

evidence predictive of future harm. To be convincing, at a minimum, there must be some "explicit consideration of whether the past acts provide an indication of . . . future harm."[148] These past acts must include not only ones prompting the state to name the child a dependent, but progressing up to and until there may be a subsequent petition submitted to terminate parental rights.[149] During this period, evidence of the parent's willingness to cooperate with state services may be gleaned from the level of cooperation with the operative state parenting plan.[150] Undoubtedly, the parent's conduct throughout this period, both adverse behavior and cooperation with the parenting plan, contributes to an assessment of future recurrent abuse. Any assessment must establish a continuum. "[A] trial court cannot support a termination by merely incorporating earlier findings . . . ."[151]

The sufficiency of the evidence is what lengthens the legal process, especially when any state termination statute focuses on future recurrent behavior. Two Missouri statutes are illustrative of future recurrent harm to a child sufficient to result in termination:

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[148] *In re* K.A.W., 133 S.W.3d 1, 10 (Mo. 2004) (citing to *In re* L.G., 764 S.W.2d 89, 95 (Mo. 1989)).

[149] *Id.* (citing to *In re* T.A.S., 32 S.W.3d 804, 812 (Mo. Ct. App. 2000)).

[150] *See, e.g.*, *In re* B.C.K., 103 S.W.3d 319, 328–29 (Mo. Ct. App. 2003) (The manner in which the parent cooperates with the parenting plan will indicate the parent's future efforts to care for the child).

[151] *In re* K.A.W., 133 S.W.3d at 10.

> The child has been under the jurisdiction of the juvenile court for a period of one year, and the court finds that the conditions which led to the assumption of jurisdiction still persist, or conditions of a potentially harmful nature continue to exist, *that there is little likelihood that those conditions will be remedied at an early date so that the child can be returned to the parent in the near future, or the continuation of the parent-child relationship greatly diminishes the child's prospects for early integration into a stable and permanent home.*[152]
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> * * *
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> The parent is unfit to be a party to the parent and child relationship because of a consistent pattern of committing a specific abuse including, but not limited to, specific conditions directly relating to the parent and child relationship which are determined by the court to be of a duration or nature that *renders the parent unable for the reasonably foreseeable future to care appropriately for the ongoing physical, mental, or emotional needs of the child.*[153]

The lengthy legal process is compounded by the fact that the Constitution of the United States does not require the appointment of counsel for indigent parents in civil termination proceedings.[154] Terminating parental rights, though, requires at least clear and convincing evidence, commensurate with the fundamental right of a parent to the custody of that parent's child.[155] Often, parents stumble through the legal maze, which contributes to the lack of sufficient evidence to terminate parental rights. The Missouri Supreme Court formulates the clear and convincing test as whenever the existing evidence "instantly tilts the scales in favor of termination when weighed against the evidence in opposition and

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[152] MO. ANN. STAT. § 211.447.5(3) (West 2021) (emphasis added).

[153] *Id.* § 211.447.5(5)(a) (emphasis added).

[154] *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 31–32 (1981). However, states must afford the parents Due Process protections. *Id.* at 33–34. *See generally* Patricia C. Kussmann, Annotation, *Right of Indigent Parent to Appointed Counsel in Proceeding for Involuntary Termination of Parental Rights*, 92 A.L.R. 5th 379 (2001) (analyzing collected cases regarding a court's appointment of counsel in a parental rights termination proceeding).

[155] Santosky v. Kramer, 455 U.S. 745, 769 (1982).

the finder of fact is left with the abiding conviction that the evidence is true."[156]

The process is further compounded by the reality that parents confronting termination are most often "poor, uneducated, or members of minority groups [and thus] often vulnerable to judgements based on cultural or class bias."[157] Seeking to minimize unwarranted conjecture, often fueled by cultural bias, courts require recorded factual conclusions detailing clear and convincing evidence that the alleged conduct was of such a nature to warrant predictive concerns.[158] Failure to adequately record sufficient evidence was the basis on which the *In re K.A.W.* majority reversed the trial court's order of termination.[159] The state's highest court's majority opinion did not agree or disagree with the trial judge's conclusion. Rather, it relied upon the lack of a complete factual recording of the facts upon which the termination order was based. Included within this evidence must be concrete instances of alleged parental misconduct, recorded as severe enough to harm the child, a chronological record of the mother's post-removal conduct, and a specific description as to why the trial court concluded the mother's conduct was indicative of predictive recurrent abuse. Sufficiency of the evidence is indicated in the court's admonition that "the abuse must be of such a duration and nature that the trial court determines that the parent will not remedy the problem and so it renders the parent unfit for the reasonably foreseeable future."[160]

The *In re K.A.W.* decision is illustrative of what is often a lingering legal process. The Missouri trial court held that by placing the children in multiple placements immediately after their birth in 2000, the mother's conduct constituted "severe and recurrent acts of emotional abuse."[161] Later, however, the appellate court reversed, holding that the trial court did not provide sufficient

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[156] *In re* K.A.W., 133 S.W.3d 1, 12 (Mo. 2004).

[157] Santosky, 455 U.S. at 763.

[158] *See In re* K.A.W., 133 S.W.3d at 15. The appellate court held the trial court did not clearly and convincingly established proof of a lack of family support, or that the children suffered from a major mental disorder, or that there was no bonding between the children and their mother. *Id.* at 14–16.

[159] *Id.* at 21.

[160] *Id.* at 20 (citing *In re* P.C., 62 S.W.3d 600, 606 (Mo. Ct. App. 2001)).

[161] *Id.* at 13. Additional acts of abuse are cited by the dissent, all derived from the facts discovered by the trial court. *Id.* at 23–30 (William, J., dissenting).

evidence of harm to the children, or that the mother's conduct towards her children when placed in foster care was sufficient to indicate a likelihood of predictive recurrent harm to the children if they were returned to her custody. Sufficiency—its presence or lack thereof—is garnered from the parent's compliance with the legal process, rather than with adequate remedial services. The factual and legal process took four years from the time of the children's birth in 2000 to the final ruling in favor of their mother in 2004.

Similarly, in the Connecticut decision of *In re Joseph*, the dependent child was born in 2005 but litigation pertaining to termination of the parents' rights did not cease until 2013.[162] Throughout this eight-year period, the legal process evolved from removal of the child from the parents when he was three days old to petitions for termination of parental rights, court-ordered termination, and appeals.[163] In finally affirming the order of termination of parental rights, the Connecticut Superior Court opined that, "[t]hese two little boys have remained in the limbo of foster care all of their lives, about one-third of their childhoods. Their need for stability and continuity of care far outweighs the extremely questionable benefit of resuming a connection to two recalcitrant parents they no longer know."[164]

The cost of the legal process, the emotional toll taken on all participants, and the vagaries of litigation are inadequate remedies sufficient to protect child welfare. It is far more reasonable, fair, and productive to promote state efforts to provide innovative remedial services that may incrementally prove adequate.

III. PARENTING PLANS

A. The Process

Severe parental misconduct is necessary to remove a child from the custody of that child's parents for more than a brief period

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[162] *See In re* Joseph W., 79 A.3d 155, 157 (Conn. Super. Ct. 2013).

[163] *Id.* at 159–62.

[164] *Id.* at 256 (considering the Connecticut Supreme Court has noted that "time is of the essence" given the "psychological effects of prolonged termination proceedings on young children").

of time.[165] Only a small proportion of misconduct is sufficient to then terminate parental rights.[166] Once in state custody, the child becomes a "dependent" and is placed temporarily in either kinship care (with a relative) or state foster care (close to 400,000 children are in foster care).[167] Parents are then offered "such services as the State deems necessary for the safe return of the child to the child's home."[168] For example, when a parent's children were removed from the parent's custody because of credible allegations of sexual abuse, the state provided "numerous services to [the parent] over a span of several years, including Intensive In–Home Services, a safety plan regarding the supervision of the children, referrals to individual therapy for [the parent] and the children, a parent aid, and contact with the children as therapeutically recommended."[169] These services, and similar ones, are offered by state agencies to rectify the conditions causing the removal of the child.

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[165] *See, e.g.*, *In re* Juv. Appeal (83-CD), 455 A.2d 1313, 1315–16 (Conn. 1983) (holding that a child may be temporarily removed from the parent's custody for a period of 96 hours if there is probable cause). As the party "seeking a change in custody," the state "must prove by a fair preponderance of the evidence that custody should be taken from the parent and vested in the commissioner on a temporary basis." *Id.* at 1323.

[166] *See, e.g.*, *In re* B.C.K., 103 S.W.3d 319, 328 (Mo. Ct. App. 2003) (holding that mother's misconduct did not meet the level of clear and convincing evidence necessary to terminate parental rights).

[167] *About the Children*, ADOPTUSKIDS, https://www.adoptuskids.org/meet-the-children/children-in-foster-care/about-the-children#:~:text=According%20to%20the%20most%20recent,care%20in%20the%20United%20States.&text=More%20than%20half%20of%20the,many%20by%20their%20foster%20parents [https://perma.cc/VYX3-PJW2] (last visited Feb. 20, 2022). For an excellent description of the distinction between kinship care and foster care, see Josh Gupta-Kagan, *America's Hidden Foster Care System*, 72 STAN. L. REV. 841 (2020).

[168] Adoption and Safe Families Act, 42 U.S.C. § 675(E)(iii) (1997).

[169] *In re* J.S. v. Juv. Officer, 477 S.W.3d 719, 725 (Mo. Ct. App. 2015). *See also In re* I.G.P., 375 S.W.3d 112, 125 (Mo. Ct. App. 2012) (state services consisted of "in-home services, family-centered services, dual-diagnosis residential treatment, inpatient substance abuse treatment, outpatient substance abuse treatment, individual therapy, medication management, the "Parents as Teachers" program, weekly visitation, supervised visitation, transportation to visits, AA/NA meetings, random drug testing, psychological evaluation, and parenting assessments"); *In re* J.D.P., 406 S.W.3d 81, 82 (Mo. Ct. App. 2013) (state services required "(1) the obtainment and maintenance of financial stability or regular employment; (2) the obtainment and maintenance of appropriate housing; (3) submission to drug testing; (4) enrollment in and successful completion of an approved substance abuse assessment; (5) attendance at no less than two meetings per week of a twelve-step program; (6) enrollment in and successful completion of parenting skills training; (7) submission to psychological and parenting evaluations; and (8) visitation with [the child] at mutually convenient times").

Parental cooperation with state rehabilitative services may establish that there is "little likelihood that [the conduct] will be remedied at an early date so that the child can be returned to the parent" or that "the continuation of the parent-child relationship greatly diminishes the child's prospect for early integration into a stable and permanent home."[170] Likewise, "[t]he inability to follow through or make progress in meeting the terms of the plan is indicative of [a parent's] current and future inability to care for [the] [c]hild."[171] The rehabilitative period during which services are rendered is significant in predicting whether or not there will be adverse recurrent behavior. At a minimum, "a parent's efforts to comply with a treatment plan is highly relevant to predicting future behavior."[172]

Irrefutably, parental cooperation with state parenting plans is part of a continuum of conduct sufficiently predictive of future events. "Isolated abusive acts or conditions may not support termination when considered individually, but if they form a consistent pattern, are recurrent or are repeated, they can, when considered in combination, rise to the level of abuse and support termination."[173] Illustrative of a parent's inability or refusal to cooperate with state reunification efforts is the following factual scenario:

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[170] MO. ANN. STAT. § 211.47.5(3) (West 2021).

[171] *In re* I.G.P., 375 S.W.3d 112, 125 (Mo. Ct. App. 2012). For an illustration of services offered and the parent's failure to cooperate with the services, see *In re* L.J.D., 352 S.W.3d 658, 672–74 (Mo. Ct. App. 2011).

[172] *In re* Q.A.H., 426 S.W.3d 7, 15 (Mo. 2014) (parent remained in sexually violent relationship and refused to act on recommendations made by psychiatrists).

[173] *In re* S.R.H., 589 S.W.3d 62, 70 (Mo. Ct. App. 2019).

> Mother has not cooperated in receiving offered services. Mother has failed to follow up on community service referrals. Mother has gone for consistent periods of time without being under a psychiatrist's care, over a year during this case, and has not consistently taken her medication. Mother never provided contact information for a health provider that she was seeing or medications she was taking during that time. [Social worker] noted that for a period of at least nine months during the case, Mother did not participate in individual counseling. Mother was given referrals for housing but there was a significant period of time during this case that she was either homeless or was not notifying the Children's Division where she was residing. She was provided opportunities for visitation with Daughter. However, there was a significant period of time where Mother either did not call to confirm a visit, did not show up for visits, or left no contact information to arrange visits.[174]

The primary test for any parenting plan is to demonstrate "whether the lack of compliance in any regard demonstrates that a dangerous condition has been left uncorrected and will not be remedied in the near future."[175] Regardless, whether the child is removed or remains with the parent after a credible allegation of abuse or neglect, and prior to an order terminating parental rights, a court must make written findings regarding the timeliness, nature, and extent of services offered to the parent and the child.[176] Again, the goal of any parenting plan is to indicate whether adverse parental conduct will affect the child in the future.[177]

All too often, the focus is not on rectifying the adverse conduct reported, but on the parent's obedience in complying with the plan. Instead, in evaluating parenting plan compliance the focus must be upon the adverse conduct itself, the treatment plan's effectiveness in treatment, and then upon the parent's cooperation to lessen the likelihood of "the presence of a harmful condition presently or in the future."[178] In other words, has the parent demonstrated progress in

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[174] *In re* S.M.F., 393 S.W.3d 635, 640 (Mo. Ct. App. 2013).

[175] *In re* S.R.H., 589 S.W.3d at 72.

[176] CONN. GEN. STAT. ANN. § 17a-112(k) (West 2019).

[177] *See, e.g., In re* M.T.E.H., 468 S.W.3d 383, 398 (Mo. Ct. App. 2015) (holding that parent's conduct during the termination trial contributed to termination as being in the best interest of the child).

[178] *In re* K.M.A.-B., 493 S.W.3d 457, 475 (Mo. Ct. App. 2016).

addressing alcohol or drug abuse, violence, gainful employment, or the presence in the home of dangerous companions? Throughout the evaluation, focus should be upon whether a parent willingly cooperates to "adequately address . . . substance abuse and mental health issues," exhibits a willingness to "participate in a long-term residential substance abuse treatment program," and "demonstrated . . . commitment" to themselves and the child, thereby reducing "a substantial risk of physical and mental harm if the relationship continued."[179] In this regard, a "[m]other's lack of effort to comply and her ultimate failure to succeed in her treatment plan are 'highly relevant evidence' for predicting her future parental behavior and 'cannot be irrelevant.'"[180] Behavior must be evaluated in accordance with treatment of the adverse behavior, not on the parent's cooperation with the caseworker.

The danger of an improper focus on obedience rather than treatment is illustrated in the *In re C.A.L.* decision.[181] The facts involved a single parent who gave birth to her third child. The parent took the child home after birth but soon after, the child was hospitalized for pneumonia and severe loss of weight. Notified by hospital authorities, the child's condition prompted the state to take temporary custody of the child because the child appeared to be "failing to thrive" in the parent's care.[182] The child was placed in foster care in 2001 and remained there while mother was ordered to comply with state services, the parenting plan.[183] The mother consistently failed to cooperate with the provisions of the parenting plan and the trial court heard testimony up to and including 2005. Undoubtedly, the parent was not obedient. Throughout nearly four years, the child remained in the same foster care placement. The parent's disobedience was noted by the trial court, in that the

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[179] *In re* I.G.P., 375 S.W.3d 112, 132 (Mo. Ct. App. 2012).

[180] *In re* G.C., 443 S.W.3d 738, 748 (Mo. Ct. App. 2014).

[181] 228 S.W.3d 66, 76 (Mo. Ct. App. 2007).

[182] *Id.* at 69.

[183] *Id.* at 69–70 (parent's treatment plan specified as: "[1] provide and maintain a stable place of residence; [2] inform the Children's Division of any changes in address and household composition; [3] sign releases of information forms; [4] [visit child protection agency] a minimum of two times per month; [5] be gainfully employed or have lawful means of steady income; [6] attend parenting classes; [7] cooperate in obtaining a psychological evaluation and follow any recommendations; [8] attend and participate in individual and/or family counseling as recommended by the Children's Division; and [9] attend and participate in all scheduled medical appointments").

parent "was not following the treatment plan as prescribed by the Children's Division, and had gotten into verbal and physical altercations with a worker."[184] Eventually, the state submitted a petition to terminated the parent's rights due to "the length of time and the bonding the child has with the foster parents, and the length of time the child has not been with the mother."[185] The trial court held that the mother's parental rights should be terminated.

On appeal, the appellate court overturned the trial court's termination decision. Overall, the appellate court rejected the focus of the trial court, which was upon the "[m]other's general lack of cooperation with the Children's Division."[186] Instead, on appeal the court focused on the mother's "improvement"[187] and the fact that the mother "exhibited a real concern" for the child.[188] The court concluded that while it is true that the child has been in foster care for four years, "this finding is not relevant in supporting grounds for termination. This finding is only appropriate if we reach the best interest analysis."[189] Cooperation with authority versus progress with services offered is the choice, the trial court opted for the former and the appellate court the latter.

The decision offers an insight into the significance of parental cooperation with state authorities. If focus centers on cooperation with the state agency, there may be a different outcome than if focus is on treatment of the parent's condition. In this case, there was severe antagonism between the agency and the parent and one of the consequences of this was that the child remained outside of the parent's custody for a significant period of time. During this time, the child bonded with the foster parents and they with the child. This bonding precipitated the agency's conclusion that the best interest of the child is served by keeping the child with the foster parents.[190] However, such a conclusion is impermissible. Because of the parent's Due Process rights, the best interest of the child is presumed to be in the custody of the parent and must be

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[184] *Id.* at 68.
[185] *Id.* at 68–69.
[186] *Id.* at 74.
[187] *In re* C.A.L., 228 S.W.3d 66, 75 (Mo. Ct. App. 2007).
[188] *Id.* at 76.
[189] *Id.* at 75.
[190] *Id.*

rebutted to reach a best interest of the child analysis.[191] It is constitutionally impermissible to begin any child custody determination involving a non-parent by starting with what is in the best interest of the child. In this case, the focus of the agency was upon obedience, which resulted in the child remaining with the foster parents. If the focus is instead upon progress with treatment of the adverse condition, the parent's failure to rectify the adverse condition may occasion a best interest analysis and possible termination.

B. Adequate Services

Cooperation with adequate state rehabilitative services is pivotal when refuting the dependency of a child. In some cases, the state is not obligated to provide reunification services when there is clear and convincing evidence of severe adverse parental conduct.[192] In addition, states need only provide what is adequate or reasonable under the circumstances, not everything possible.[193] Throughout the rehabilitative process, the "goal of offering prevention services is to reduce the number of children and youth entering or reentering foster care."[194] This goal may be attained through preventative services, designed to prevent any misconduct, or through remedial services, which seek to correct the adverse behavior.

1. Constitutive Services

Parenting plans proposed by states may include extensive preventative and remedial services such as psychiatric care, nutrition counseling, anger management classes, employment

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[191] *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 58 (2000).

[192] *See, e.g.*, CAL. WELF. & INST. CODE § 361.5(b) (West 2022) (listing seventeen instances, such as incest or rape, when services are not provided).

[193] *See, e.g.*, *In re* Unique R., 156 A.3d 1, 13 (Conn. App. Ct. 2017); Watley v. Dep't of Child. & Fams., 991 F.3d 418, 427 (2d Cir. 2021) (a determination of a state's highest court that reasonable services were offered to parents is entitled to Full Faith and Credit).

[194] ANNIE E. CASEY FOUNDATION, FAMILY FIRST PREVENTION SERVICES ACT FISCAL ANALYSIS: GUIDE AND TOOLS 2 (2020), https://assets.aecf.org/m/resourcedoc/aecf-familyfirstfiscalanalysis-2020.pdf [https://perma.cc/7HF9-4PQ6].

services, and drug/alcohol cessation services.[195] At its 2019 legislative summit, the National Conference of State Legislatures discussed an array of suggested federal prevention services and corresponding level of review, including: (1) Parent-Child Interaction Therapy (well supported), (2) Trauma Focused-Cognitive Behavioral Therapy (promising), (3) Multisystemic Therapy (well supported), (4) Functional Family Therapy (well supported), (5) Substance Abuse Treatment (well supported), (6) Multisystemic Therapy for Child Abuse and Neglect (no data), (7) Families Facing the Future (supported), (8) Methadone Maintenance Therapy (promising), (9) Parenting Intensive Skill Building (well supported), (10) Healthy Families America (well supported), and (11) Parents as Teachers (well supported).[196] Also, the National Child Abuse and Neglect Data Systems ("NCANDS") collects data on 26 types of services, funded through federal programs like the Child Abuse Prevention and Treatment Act ("CAPTA"), the Community-Based Child Abuse Prevention Grants, the Promoting Safe and Stable Families, or the Social Services Block Grants (SSBG).

In general, the U.S. Department of Health and Human Services, Children's Bureau, classifies services as either preventive or postresponsive.[197] Section 1130 of the Social Security Act authorizes the U.S. Department of Health and Human Services to grant waivers to states so that they may support and implement alternative child welfare services that seem promising.[198] Illustrative of the success of these programs is Arkansas' Differential Response, which resulted in significantly fewer instances of recidivism or removal of the child from the parent's home.[199] Likewise, families participating in a New York program

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[195] *See, e.g.*, *In re* A.L.M., 354 S.W.3d 645, 648–50 (Mo. Ct. App. 2011) (describing an array of sponsored services). *See also* TITLE IV-E PREVENTION SERVICES CLEARINGHOUSE, https://preventionservices.abtsites.com/program [https://perma.cc/8R6M-RJDG], which lists rated services.

[196] National Conference of State Legislatures, *2019 Legislative Summit* 26 (2019), https://www.ncsl.org/meetings-training/legislative-summit-19/schedule/agenda.aspx [https://perma.cc/2NN3-GJ2D].

[197] CHILD MALTREATMENT 2019, *supra* note 3, at 77. During 2019, 1.9 million children received prevention services and 1.3 million children received post response services. *Id.* at xii.

[198] *See* GRAHAM, *supra* note 76, at 4.

[199] *Id.* at 26.

designed to lower caseloads resulted in a "statistically significant positive effect on permanency outcomes."[200] Although "foster care maintenance and administrative costs will likely remain the largest category of Title IV-E expenditures for some time,"[201] the success of waiver programs demonstrates that more adequate child welfare services can be developed. "[W]aivers made possible a substantial expansion of the range of programs and services implement by child welfare jurisdictions at both the state and local levels."[202] Of course, the dilemma is that these nascent programs do not initially meet the rating requirements imposed by federal legislation, such as being well-supported. As Family First illustrates, this negatively impacts funding.

The significance of Family First is not that Title IV-E funds may be used while children remain in their homes rather than in foster care, but whether more states will develop innovative remedial services to support in-home child welfare.[203] Child welfare innovation—not in-home placement—is the challenge of Family First. Colorado, for example, spent $9.7 million in 2019 state appropriations to extend programs initiated through waivers.[204] Across the board, we know what works from analyzing data gathered from other certified programs and waivers granted to states since 1995. Specifically, we know these programs work: (1) "active efforts by caseworkers to engage service providers and families," thereby increasing "their involvement in case planning and decision-making"; (2) use of data to support case planning; (3) use of support teams to facilitate service coordination and communications; (4) timely access to support; (5) community-based prevention programs; (6) statewide common intervention strategy for domestic violence, family group intervention, and family support services; (7) attentiveness to vulnerability of children and adults; (8) continuous research and web-based tutorials; and (9) using well-trained, friendly, knowledgeable, understanding, and nonjudgmental caseworkers and front-line service providers.[205]

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[200] *Id.* at 35.

[201] *Id.* at 44.

[202] *Id. See e.g.*, COLORADO FAMILY FIRST, *supra* note 22, at 4–5 (discussing Colorado's Title IV-E Waiver Demonstration Project).

[203] GRAHAM, *supra* note 76, at 44-45.

[204] COLORADO FAMILY FIRST, *supra* note 22, at 4.

[205] GRAHAM, *supra* note 76, at 21.

2. State Resources

Services to promote child welfare are not restricted to Title IV-E funding; there are additional state and federal prevention and postresponse programs.[206] In addition, states utilize community based organizations, such as Colorado's Collaborative Management Program,[207] which utilizes many segments of community support to address treatment of domestic violence, drug and alcohol abuse, mental health issues, and perennial court involvement; Colorado's Partnership for Thriving Families is working with housing experts to address "housing security" for families at risk.[208] Even a casual survey of services offered to parents and children reveals a broad array of services available to those who know how to access them. During 2019, 1.9 million children received prevention services, while 1.3 million children received post responsive services.[209]

By the middle of 2021, three years after the passage of Family First, and approaching the end of Family First Transition Act applicability, fewer than half of the states have obtained "approved" Title IV-E plans fully in accord with Family First requirements.[210] A few of these approved states, Kentucky for example, touted that it was a leader in its implementation.[211] Other states, such as Virginia, which submitted a plan for approval, illustrate the

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[206] *See, e.g.*, Title I of the Child Abuse Prevention and Treatment Act (CAPTA) 42 U.S.C.A. § 5106(a) (West 2019) (provides grants to states to fund programs for prenatal drug exposure, training child protective services workers, and supporting citizen review panels). *See also* Title IV-B, Subpart 2, Promoting Safe and Stable Families (PSSF), 42 U.S.C.A. § 629 (West 2018) (provides grants to states to render services that address family support in efforts to provide permanency for children); Title XX of the Social Security Act, Social Services Block Grants (SSBG), 42 U.S.C.A. § 1397(a)-(i) (West 2010) (provides grants to states to fund social services to reduce dependency and help individuals who are unable to care for themselves to remain at home or find a suitable institution).

[207] *See* COLORADO FAMILY FIRST, *supra* note 22, at 5–6.

[208] *Id.* at 6.

[209] CHILD MALTREATMENT 2019, *supra* note 3, at xii (2021).

[210] *See Status of Submitted Title IV-E Prevention Program Five-Year Plans*, CHILDREN'S BUREAU, OFFICE OF THE ADMINISTRATION FOR CHILDREN AND FAMILIES (Feb. 18, 2020), https://www.acf.hhs.gov/cb/data/status-submitted-title-iv-e-prevention-program-five-year-plans [https://perma.cc/N9K3-TL9T].

[211] *See Kentucky Joins Jurisdictions Leading Implementation of the Family First Prevention Services Act*, CHAPIN HALL AT THE UNIV. OF CHICAGO (Apr. 22, 2020), https://www.chapinhall.org/news/kentucky-joins-jurisdictions-leading-implementation-of-the-family-first-prevention-services-act/ [https://perma.cc/K4HL-7ZF3].

difficulty states confront when seeking approval. First, local government and private agencies contracting with the state must review existing services to determine if they can comply with Family First's exacting standards.[212] Second, each state must spend its own money to acquire approval. For example, in Virginia the Governor included several million dollars in his state budget proposal to pay for prevention services yet to be approved by the federal clearinghouse, plus to pay for a state evaluation team to assess outcomes for provided services. The governor's budget included $18 million to increase salaries for caseworkers from a current starting salary of $28,828.[213] Sadly, the entry-level caseworker positions have an average turnover rate of 42%, with higher turnover rates in rural parts of the state and it is hoped that higher salaries may foster retention.[214] Note too, though, that these same caseworkers complain about outdated training and poor case management systems. In response, the state appropriated $1.9 million over the course of two years to create and implement a new training academy. However, state budgets were impacted by the Coronavirus pandemic, which prompted hiring freezes and an increasing number of vacant positions.[215] Overall, states are "subject to available general fund appropriations" to supplement whatever they receive from the federal subsidies, or to qualify for federal subsidies.[216]

Arkansas is another example of how states must spend money to get money. When Arkansas submitted its draft Title IV-E prevention program, which was subsequently approved, its draft proposal illustrated the issues confronted by states seeking to manage better child welfare.[217] First, state expenditures are required to meet its goals, specifically hiring of needed administrators and additional caseworkers to lessen caseloads and

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[212] L'Herrou et al., *supra* note 78, at 160.

[213] *Id.* at 161.

[214] *Id.*

[215] *Id.* at 162.

[216] 21 FRANK K. MCGUANE & KATHLEEN A. HOGAN, COLORADO FAMILY LAW AND PRACTICE HANDBOOK § 19-1-102(1.9) (2020-2021 ed.).

[217] *Arkansas Title IV-E Prevention Program Five Year Plan: 2020-2024,* FAMILY FIRST ACT, 3–4 (Aug. 2019), https://familyfirstact.org/sites/default/files/AR%27s%20Five%20Year%20Title%20IV-E%20Prevention%20Plan.pdf [https://perma.cc/4X3U-VDWA].

better interaction with parents. The need for better salaries, lower turnover for caseworkers, and better training is a common element throughout all the states.[218] Second, Arkansas, for example, developed innovative programs, such as Team Decision Making, Baby and Me, Intensive Home Services, SafeCare, and Nurturing the Families of Arkansas.[219] Because of the high number of infant deaths in the state, the state launched a program for pregnant women called Special Supplemental Nutrition Program for Women, Infants, and Children, which is designed to introduce mothers to scheduling, stress relief, baby crying, and home safety.[220] In addition, they pursued waiver requests to receive federal funds for programs that they considered promising but not yet approved under federal guidelines.[221] All of these programs required the state to expend its own resources and assign personnel to management.

Third, throughout the states, the most common risk factors are both perennial and seem insurmountable. Domestic violence and drug abuse are the most prevalent factors,[222] but alcohol is also a risk factor, as is physical or mental disability. Poverty, defined as the inability to provide sufficient minimum needs such as housing or food assistance, accompanies most risk factors. Recall the poverty of the single mother illustrated in the Missouri case discussed *supra*, *In re K.A.W.*[223] The mother was single with three existing children and then she gave birth to twins. Her inability to provide for herself and five children prompted her actions and eventually her involuntary separation from her two most recent children. The state provided her with a parenting plan and subsequently documented: (1) the mother's progress in compliance; (2) the success or failure of state agencies tasked with providing her aid; (3) evidence of the parent's mental ability necessary to provide the child with care, custody and control;[224] and (4) whether the

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[218] *See, e.g.*, *id.* at 30–32 (emphasizing the importance of well-supported caseworkers in improving the success of the child welfare system by increasing caseworker retention).

[219] *Id.* at 4–5.

[220] *Id.* at 4.

[221] *Id.* at 28.

[222] CHILD MALTREATMENT 2019, *supra* note 3, at 23 (2021).

[223] *See supra* notes 105–28 and accompanying text.

[224] For the standard of mental deficiency, see *In re* T.L.B., 376 S.W.3d 1, 11-12 (Mo. Ct. App. 2011) (specifying that the condition must be documented with sufficient evidence that there is no reasonable likelihood that condition will improve, and the

parent can overcome any chemical dependency that prevents the parent from providing care for the child.[225] Did any of these compliance tests adequately address the true cause of the mother's adverse conduct, poverty of the family? Other than return to the halcyon days of Aid to Families with Dependent Children,[226] how may a state incorporate the reality of earning income into a single parent raising five children?

The issue is how to provide services sufficient to address the most common forms of child welfare risk. "It remains unclear how one would select the correct program for a given population . . . . A mismatch between the program and the population at risk or the resources available for implementation, may result in null or even negative outcomes."[227] Implicitly, studies suggest that child mistreatment is a complex long-term "issue rather than an acute and simple event,"[228] implying that identified family needs are not being met in an appropriate fashion.[229] Also, "[r]isk factors can be difficult to accurately assess and measure, and therefore may go undetected among many children and caregivers."[230] Faced with insurmountable complexity, state agencies gauge success by inappropriate standards of compliance, or obedience, rather than truly rectifying the conditions causing removal of the child.[231]

For example, the mother in *In re K.A.W.* was the victim of poverty, while the mother in *In re Joseph* W. was afflicted with mental health issues; the father failed to safely parent the children, and both parents failed to comply with the state parenting plan offered to them to correct these deficiencies.[232] The mother in the

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condition renders the parent unable to knowingly provide child with care, comfort, and control).

[225] MO. ANN. STAT. § 211.447.5(2)(b) (West 2021). *See*, *e.g.*, *In re* S.T.C., 165 S.W.3d 505 (Mo. Ct. App. 2005) (holding that there was insufficient evidence to terminate parental rights of mother with chemical dependency problem).

[226] For a description of the program, see Susan W. Blank & Barbara B. Blum, *A Brief History of Work Expectations for Welfare Mothers*, 7 FUTURE OF CHILDREN 28 (1997).

[227] Jonson-Reid, et al., *supra* note 105, at 63.

[228] Kim & Drake, *supra* note 33, at 1182.

[229] David Solomon et al., *Cumulative Risk Hypothesis: Predicting and Preventing Child Maltreatment Recidivism*, 58 CHILD ABUSE & NEGLECT 80, 86–87 (2016) (suggesting that to prevent incident recurrence, states need to provide additional services and involvement for longer periods of time).

[230] CHILD MALTREATMENT 2019, *supra* note 3, at 23.

[231] *See supra* notes 172–88 and accompanying text.

[232] *In re* Joseph W., 79 A.3d 155, 233 (Conn. Super. Ct. 2016).

former case, *In re K.A.W.*, successfully obtained the return of her children, while the parents in the later case, *In re Joseph W.,* did not. Why? A notable distinction between the two cases is that the mother in the former case was compliant. The trial court acknowledges that the "[m]other has been exceptionally compliant with the parenting or social service plan."[233] The two parents in the latter case were not compliant. They consistently demonstrated that they were "unwilling or unable to benefit from reunification efforts,"[234] hence their parental rights were terminated. Obedience to state agencies is an easier test to evaluate, the harder test is evaluating the progress made by the services offered to correct the adverse behavior.

It is reasonable to conclude that—faced with state budget realities; overwhelming instances of abuse and neglect; and a continuing spectrum of domestic violence, substance abuse, mental illness, and the consequences of poverty—state caseworkers and courts should focus on a parent's compliance with what is offered, rather than what best works for the reunification of parent and child. If compliance/obedience is the default test, it is reasonable to conclude that parents so often victimized by stereotypes and conjecture—that is, parents of color—will be further stigmatized by the quandaries surrounding predictive neglect determinations, negative stereotype casting, and the most adverse consequences of state budget difficulties.

CONCLUSION

The Family First Prevention Services Act of 2018 is advantageous to promoting child welfare in that it makes federal funds available to states while the child remains safely with parents or family, eliminates the AFDC lookback requirement when this occurs, and further incentivizes states to explore adequate remedial services to better assure child welfare. All are welcome advantages, but first, the focus of federal support must be

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[233] *In re* K.A.W., 133 S.W.3d 1, 18 (Mo. 2004).

[234] *In re* Joseph W., 79 A.3d at 232. *See also* State v. Jalexus S. (*In re* A'Mauri L.), No. A-1-CA-37966, 2020 WL 3970209, at *2 (N.M. Ct. App. Jul. 9, 2020) (mother missed seven out of sixteen scheduled sessions).

to develop more adequate remedial services to address the insatiable ravages of abuse and neglect factors such as poverty, domestic violence, mental illness, and substance abuse. Since the 1990s, Section 1130 of the Social Security Act has permitted states and tribal jurisdictions to apply for Title IV-E waivers to garner federal funds so as to discover new services to promote safety, permanency, and well-being of children. "A variety of demonstrations were implemented by 23 jurisdictions between 1996 and 2006, and by 27 jurisdictions between 2012 and 2019."[235]

Second, adequate remedial services must incentivize workers of "multiple stakeholders" to contribute to a "long game" approach to child welfare.[236] That is, such services must coordinate community involvement in identifying vulnerable families, marshal early domestic violence intervention, support greater decision making in families, recognize that congregate care is essential to meet individual needs, and better coordinate access to family services. If Family First incentivizes states to recruit, train, and support professional caseworkers, it will make a major difference. The large percentage of caseworkers who depart from community services after brief service is the first place to start to create adequate community involvement.

Third, Family First is not truly preventative because its provisions do not become applicable until there is imminent risk of harm to a child. However, its enactment underscores the need for more inclusive, better coordinated, and adequately funded community-based preventative services. This is particularly crucial to communities of color, inordinately represented among the 3,476,000 children who received child protective services investigations in 2019. These parents may benefit most from Family First's payment for services to treat mental health, substance abuse, and development of parenting skills, but more is needed. Overall, the impact of Family First upon adequate child welfare services may be that it motivates states to provide more services that are truly preventative, to eliminate the lookback

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[235] GRAHAM, *supra* note 76, at 1.

[236] Children's Defense Fund, *Implementing the Family First Prevention Services Act: A Technical Guide for Agencies, Policymakers, and Other Stakeholders,* 5 (Feb. 18 2020), https://www.childrensdefense.org/wp-content/uploads/2020/07/FFPSA-Guide.pdf [https://perma.cc/D4MS-8C2G].

entitlement requirement for all children at risk, to recognize the contribution of a significant portion of congregate care facilities, and to incentivize states to develop a better array of adequate remedial services.