

Out of the Shadows: The Hidden Foster Care System in Texas

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This Note builds on the burgeoning studies of hidden foster care across the nation and explores how this informal system works in Texas. Specifically, this Note relies on the work of Professor Gupta-Kagan from the University of South Carolina School of Law in understanding how hidden foster care can be especially problematic in Texas, which has one of the largest populations of children in kinship care. Recognizing there are also benefits to keeping children with family, this Note does not advocate prohibiting voluntary removals completely. Rather, this Note highlights the constitutional problems with this mechanism of removing children and explains how courts should treat voluntary safety plans with an eye towards ensuring their voluntariness. Then, this Note discusses how hidden foster care disadvantages kinship caregivers because of the lack of resources that are otherwise available to licensed foster parents. Further, recent changes in Texas’s child welfare law have made it more difficult to remove children from their home and accentuate concerns over using informal removals to avoid demonstrating their conformity with statutory requirements. The latter half of this Note explores solutions to the problems of hidden foster care and characterizes these solutions as retroactive or proactive. The retroactive solutions discussed draw from existing judicial practices in one Texas county that may keep hidden foster care families intact. The proactive solutions are relatively new to the discussion of hidden foster care, as they critique recent legislative bills and explain how Texas can use its newest infrastructure under the Family Preservation Pilot Program to provide court oversight over informal removals. To the extent that hidden foster care remains an extant and widespread practice in this state, these solutions are integral to ensuring the rights of parents and children to remain together.

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Introduction

The etiological myth of the stork is often used to supplant an honest answer to the uncomfortable question, “where do babies come from?” The story goes that a white, long-beaked bird flies across the sky with a baby in a cloth parcel dangling from its beak and one mission on its mind—find the baby a loving home. The falsity and outrageous character of this story is apparent on its face, but if used to describe how some families are made in Texas, it is not entirely off-base. Aside from its stated mission of protecting children from abuse, neglect, and exploitation,¹ the Department of Family and Protective Services (DFPS) also assumes a stork-like function of creating families. But unlike the families in the myth who receive their children with gratitude and excitement, some Texan families are reluctant to agree to take in a child until Child Protective Services (CPS) confronts them with a threat: either care for the child or the child will enter foster care.

That was the case for one Texas couple who took one-year-old Sophie into their home.² Sophie’s mom struggled with addiction and went in and out of rehab.³ The couple, while not related to Sophie’s mom, had a long history with her and tried to help her, to no avail.⁴ They had enrolled her in rehab, and when that did not work, they offered her and Sophie shelter—until Sophie’s mom resumed her addiction.⁵ When CPS entered the scene, they told the couple that if they did not agree to take Sophie in while her mom reentered rehab, Sophie would go into foster care.⁶ The couple agreed to take

1. *Our Mission, Vision, and Values*, TEX. DEP’T OF FAM. & PROTECTIVE SERVS., https://www.dfps.state.tx.us/About_DFPS/mission.asp [https://perma.cc/DX5S-6WKR].

2. Roxanna Asgarian, *Hidden Foster Care: All of the Responsibility, None of the Resources*, THE APPEAL (Dec. 21, 2020), <https://theappeal.org/hidden-foster-care/> [https://perma.cc/FHB4-HX2N].

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

Sophie in for the second time, believing the arrangement was temporary and that they were doing Sophie justice by offering her a loving home—the only sound home she had ever experienced.⁷ After three years, the almost-retired couple found themselves caring for a four-year-old with no financial support from the state, no custody rights, and no services for Sophie.⁸ CPS had exited the picture and told the couple that, essentially, Sophie “was [their] responsibility now,” despite the couple having no legal rights.⁹ This was a private matter, and if the couple gave Sophie up, she would be placed in the system and they would never see her again.¹⁰ This story, reported by *The Appeal* in 2020, is all too familiar for many other Texas families. It’s the story of hidden foster care.

This Note explains the problems of hidden foster care in Texas and how they might be rectified retroactively and proactively. Part I explains how hidden foster care operates in Texas and provides a statistical breakdown of what is known about the size of hidden foster care in the state. Then, lest the impression be had that hidden foster is inherently wrong, Part II explains the benefits hidden foster care offers families who first encounter CPS. Part III then offers an in-depth explanation of the serious problems that an unregulated hidden foster care system poses for families and kinship caregivers. First, there are clear issues with due process when safety plans that divert children to hidden foster care lack the necessary voluntariness that would render them innocuous. If safety plans are not voluntary, they are akin to the state removing children without following proper legal procedures. Second, prolonged stays in hidden foster care become a financial burden for kinship caregivers, who are not eligible to receive the same support and resources that licensed foster care parents receive. This places financial pressures on already-struggling minorities, who are often the ones agreeing to take in children. Lastly, the heightened standard of neglect—which makes it harder to remove children from the home by requiring that removal only occur if a child has been placed in “immediate danger” as opposed to a “substantial risk” of danger—makes it such that CPS may be incentivized to use hidden foster care when the agency feels that it cannot substantiate a petition to remove the child in formal proceedings.

Finally, Part IV of this Note discusses solutions to the problems of hidden foster care and characterizes them as either retroactive or proactive solutions. The retroactive-solution subpart explains how Bexar County in Texas has alleviated some of the pressures that kinship caregivers face in hidden foster care. The proactive-solution subpart explains and critiques a

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

recent Texas bill aiming to regulate hidden foster care. This Note concludes with a discussion of Texas's new Family Preservation Services Pilot Program, which aims to keep children who are candidates for foster care at home or with kinship caregivers while the family receives services. This Note explains how this program can be used to provide court oversight for informal removals, in hopes that this will restrict their practice while ensuring necessary support for those kinship caregivers who agree to take on this noble responsibility.

I. What Is Hidden Foster Care?

In the nationally esteemed article *America's Hidden Foster Care System*, Professor Gupta-Kagan coined the term “hidden foster care” to describe the informal system in which CPS changes the composition of a family by removing a child from their home without initiating a change in legal custody.¹¹ Ordinarily, when someone reports alleged abuse or neglect through Texas's hotline, the allegations are assessed for whether they meet the statutory definition of abuse or neglect.¹² If they do meet the statutory definition of abuse or neglect, an investigation ensues to determine if the allegations are well-founded and if there is reason to believe that abuse or neglect did occur in the child's home.¹³ Provided that CPS determines each of these things in the positive, the agency may file a petition to the court and ask for permission to remove the child.¹⁴ In Texas, as in other states, there are pre-petition avenues that CPS might take to avoid placing kids in formal foster care.¹⁵ One of these avenues is the use of the safety plan.¹⁶ A safety plan is a tool used during the investigation stage to address safety risks that place a child in immediate danger.¹⁷ It constitutes an agreement between the family and CPS that the family will take certain precautions to ameliorate the

11. Josh Gupta-Kagan, *America's Hidden Foster Care System*, 72 STAN. L. REV. 841, 848 (2020).

12. April C. Wilson, Alaina E. Flannigan, Sophie Phillips & Dimple Patel, *Understanding Texas' Child Protection Services System*, TEXPROTECTS 1, 25 (Oct. 2014), https://www.theotx.org/wp-content/uploads/2016/02/How_cps_works.pdf [<https://perma.cc/GNY9-UNXC>].

13. *Id.* at 25–26.

14. *Id.* at 26, 28; TEX. FAM. CODE ANN. § 262.001(a) (West 2022).

15. TEX. DEP'T OF FAM. & PROTECTIVE SERVS., TEXAS PRACTICE GUIDE FOR CHILD PROTECTIVE SERVICES ATTORNEYS, SECTION 2: BEFORE FILING SUIT 2 (2013) [hereinafter BEFORE FILING SUIT], https://www.dfps.state.tx.us/Child_Protection/Attorneys_Guide/documents/Section_2_Before_Filing_Suit/Before_Filing_Suit.pdf [<https://perma.cc/3KGL-VS2U>]; see also *Alternative Response: Keeping Children Safe by Engaging Families*, MD. DEP'T OF HUM. SERVS., <https://dhs.maryland.gov/child-protective-services/alternative-response/> [<https://perma.cc/V69M-LZ66>] (discussing Alternative Response support in Maryland).

16. BEFORE FILING SUIT, *supra* note 15, at 3.

17. *Id.*; TEX. DEP'T OF FAM. & PROTECTIVE SERVS., SAFETY PLAN (FORM P-201-2604) 1 (Nov. 2021) [hereinafter SAFETY PLAN], <http://www.dfps.state.tx.us/application/Forms/showFile.aspx?NAME=P-201-2604.docx> [<https://perma.cc/8FZ3-YSQB>].

danger to the child.¹⁸ Safety plans become a mechanism for hidden foster care when the agreement between CPS and the family requires that the family agree to temporarily place the endangered child in the home of a kinship caregiver, such as a family member or fictive kin,¹⁹ effecting a temporary, out-of-home placement known as a Parental Child Safety Placement (PCSP).²⁰

PCSPs may also be used while the family is receiving services as part of a Family Based Safety Services (FBSS) program.²¹ Families are given the option to voluntarily participate in FBSS when, at the end of an investigation, the investigator ascertains safety risks to the child and determines that the risks can be neutralized if the family successfully completes services.²² These services are intended to build on the family's strengths and reduce the risks to the child that might later manifest as child abuse or neglect.²³ Once DFPS determines that the family is able to safely care for the child, the FBSS case will close, as will the PCSP.²⁴

The Texas Family Code defines PCSPs as temporary out-of-home placements made pursuant to a written agreement with CPS that ensure the child's safety during an investigation by the department or while the family is receiving services.²⁵ PCSPs are appropriate when the danger to the child can be neutralized in a short timeframe.²⁶ Thus, PCSPs are not intended to last beyond sixty days per CPS policy,²⁷ but according to the Texas Family Code they may be extended beyond that.²⁸ In spite of their temporary design, PCSPs have become permanent for children removed pursuant to an agreement with CPS in far too many cases. Importantly, the safety plans that parents agree to are not legally binding, but failure to comply with a safety plan while a child is with a PCSP can have dire consequences for the family

18. See BEFORE FILING SUIT, *supra* note 15, at 3 (listing precautions such as placing the child outside the home, suspending visitations, and submitting to drug tests).

19. Gupta-Kagan, *supra* note 11, at 848. "Fictive kin" denotes people with whom the child has a close relationship even if not by blood. *Id.* at 851 n.41.

20. BEFORE FILING SUIT, *supra* note 15, at 4.

21. Wilson et al., *supra* note 12, at 27.

22. *Id.* at 9–10.

23. *Id.* at 11.

24. *Id.* at 12.

25. TEX. FAM. CODE ANN. § 264.901(2)(A)–(B) (West 2022).

26. TEX. DEP'T OF FAM. & PROTECTIVE SERVS., PARENTAL CHILD SAFETY PLACEMENT (PCSP) RESOURCE GUIDE 1 (2018), http://www.dfps.state.tx.us/handbooks/cps/Resource_Guides/PCSP_Resource_Guide.pdf [<https://perma.cc/2D6P-7H2P>].

27. *Id.*

28. See FAM. § 264.902(a)(4) (allowing PCSPs to be extended to a "subsequent date as provided under department policy" and not explicitly prohibiting this date from extending the PCSP beyond sixty days).

who agreed to place the child in the PCSP.²⁹ The violation may trigger entry into formal foster care and, ultimately, may be invoked in a trial for the termination of parental rights as part of a “best interest” argument, whereby CPS argues that the best interest of the child is not served by returning the child home to a parent who failed to follow a safety plan.³⁰ Thus, for a parent who enters into these agreements, keeping the child in a PCSP while completing a safety plan to CPS’s satisfaction is the only way to avoid the consequences of the formal foster system.

This informal way of initiating parent–child separations is nationally ubiquitous and highly controversial. Because states are not required to track the number of children who enter the hidden foster care system, as they are required to track data on formal foster care, the precise number of children in hidden foster care is unknown.³¹ But research suggests that the hidden foster care system closely tracks the formal foster care system in size.³² In 2014, Texas reported that PCSPs were used in 34,000 cases.³³ That same year, 30,406 children entered the formal foster care system.³⁴ Further, the 2014 data suggests that the likelihood of a PCSP becoming a permanent placement for the child is high: only 12,920 of the 34,000 children who were voluntarily removed by CPS’s intervention were reunified with their parents.³⁵ Thus, approximately 60% of the children in hidden foster care in 2014 remained with their PCSP or otherwise remained outside of their parent’s care.³⁶ As of 2020, the number of children placed in PCSPs had declined from 34,000 to about 12,000.³⁷ For the past five years, more than 1,000 PCSPs have been closed each year with the child still remaining in the care of the kinship caregiver or fictive kin.³⁸ While the current size of the

29. See BEFORE FILING SUIT, *supra* note 15, at 4 (“Violation of a safety plan is not a basis for removal, but it may contribute to show an immediate danger to the physical health or safety of a child to support a removal.”).

30. *E.g., id.* at 4 n.9 (citing *In re J.M.*, No. 2-08-259-CV, 2009 WL 112679, at *8 (Tex. App.—Fort Worth Jan. 15, 2009, no pet.) (per curiam) (mem. op.), as an example where a parent’s violation of a safety plan resulted in the removal of the child).

31. Gupta-Kagan, *supra* note 11, at 855.

32. *Id.* at 856.

33. TEX. CHILD’S. COMM’N, TEX. SUP. CT., PARENTAL CHILD SAFETY PLACEMENTS: SUPREME COURT OF TEXAS CHILDREN’S COMMISSION ROUND TABLE REPORT ON PARENTAL CHILD SAFETY PLACEMENTS (PCSPS) 3 (2015) [hereinafter PCSP ROUND TABLE REPORT], <http://texaschildrenscommission.gov/media/1152/pcsp-round-table-report-final.pdf> [<https://perma.cc/H5AS-EGXF>].

34. *Children in Foster Care (Age 17 and Under) in Texas*, KIDS COUNT DATA CTR., <https://datacenter.kidscount.org/data/tables/3061-children-in-foster-care-0-17> [<https://perma.cc/Q25E-M474>].

35. PCSP ROUND TABLE REPORT, *supra* note 33, at 13.

36. *Id.* This approximate figure is inclusive of PCSPs that began in 2013 but terminated in 2014, and PCSPs that began within less than sixty days from the end of 2014.

37. Asgarian, *supra* note 2.

38. *Id.*

Texas hidden foster care system is unknown, increasing legislative efforts to avoid removing children to the formal system has made it possible that the practice of informal removals in Texas will continue to affect the lives of many children.

II. Benefits of Hidden Foster Care

The term “hidden foster care” is often used in a pejorative sense, but as Professor Gupta-Kagan points out in his article, these pre-petition arrangements are sometimes well-intentioned efforts to prevent more children from entering formal foster care.³⁹ Studies conclusively establish that removing a child from their home is traumatic, and kinship care mitigates the harm that comes with removing children from their homes.⁴⁰ For example, because relatives are more willing than unrelated foster parents to take in larger sibling groups, kinship care mitigates instability by allowing children to maintain their bonds with their siblings.⁴¹ Kinship caregivers are also more likely to keep the children enrolled at their home school, allowing children to maintain friendships and connections to their community.⁴² Other positive factors of kinship care, as opposed to unrelated foster care, include improvements in a child’s behavior and mental health outcomes, preservation of their cultural identities, and improvements in a child’s overall well-being.⁴³

In Texas, the problems of foster care are especially pronounced, making hidden foster care an appealing alternative for families. For a start, the lack of licensed foster homes has led to many children living in motels or CPS offices.⁴⁴ Moreover, the caseworker turnover rate has been the subject of litigation in Texas since 2015 when a U.S. district court judge declared that the Texas foster care system exposes children to unreasonable risks of harm.⁴⁵ The sheer volume of foster care cases in Texas results in high caseloads and caseworker turnover rates and correlates to increased numbers of children without placements who—according to allegations in a 2015 foster care case—are left with no supervision and are more likely to be

39. Gupta-Kagan, *supra* note 11, at 872.

40. Heidi Redlich Epstein, *Kinship Care Is Better for Children and Families*, A.B.A. (July 1, 2017), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-36/july-aug-2017/kinship-care-is-better-for-children-and-families/ [https://perma.cc/GX86-VX77].

41. *Id.*

42. *Id.*

43. *Id.*

44. *Texas Officials Point at Pandemic and Caseworker Turnover in Staggering Foster Child Statistic*, ABC13 HOUS. (Dec. 9, 2021), <https://abc13.com/foster-kids-cps-texas dfps/11316311/> [https://perma.cc/7ZBW-WRRT].

45. *See id.* (stating that the federal judge “ruled in 2015 that foster children in Texas ‘almost uniformly leave state custody more damaged than when they entered’”).

exposed to physical and sexual abuse.⁴⁶ Given the strains on the formal foster care system, children in hidden foster care have better prospects of finding a loving and sustainable home.

III. Problems with Hidden Foster Care

CPS's use of safety plans to effect changes in a family's living arrangement, even if temporarily, poses many problems. First, it deprives many parents of due process by coercing them into agreements that may keep them at the mercy of CPS for a prolonged period of time, lest they lose their child to the formal foster care system. While in theory, safety plans that involve the removal of a child from the home are "voluntary," they can be the result of coercive practices by CPS.⁴⁷ Further, bypassing the formal procedure for removal means that there is no court oversight and thus no way to ensure that CPS is working actively towards the goal of reunification, leaving the child in a state of nonlegal limbo. Second, kinship caregivers often receive very little to no support to sustain the children they take in, making hidden foster care an unsustainable long-term solution for many families. Minority families, who make up most families in the Texas child welfare system, are disproportionately affected by the financial pressures that hidden foster care causes kinship caregivers. Finally, in Texas, the legislature has made changes to child welfare law that makes it more difficult for CPS to remove children from the home. While the heightened standard for removing children from their home may be a positive change to protect children from entering the child welfare system, the lack of regulation in hidden foster care opens the door to CPS defaulting to a safety plan and PCSPs when CPS agents are apprehensive that they may not be able to justify a removal in court.

A. Due Process Problems

The lack of regulation in hidden foster care allows CPS to tread on the due process rights of parents. The U.S. Constitution protects natural parents' rights to the "care, custody, and management" of their children.⁴⁸ The Supreme Court of the United States recognizes a right to family integrity under the Fourteenth Amendment, which is understood to mean the right to

46. *Id.*; see also *id.* (discussing a lawsuit alleging abuse in foster care).

47. *Behind Enemy Lines: What Is CPS Telling Their Lawyers?*, SCHREIER + HOUSEWIRTH FAM. L. (April 28, 2011), <https://lawtolife.com/behind-enemy-lines-what-is-cps-telling-their-lawyers/> [<https://perma.cc/2ZNV-BXF2>]. One family law firm in Texas has said, "The suggestion by the State of Texas that a Safety Plan is 'voluntary' is shameful and false." *Id.*

48. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); see *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (noting parents' rights to the "custody, care, and nurture" of their children (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944))).

maintain the integrity of the family unit.⁴⁹ The Fifth Circuit has characterized this right as “the right of the family to remain together without the coercive interference of the awesome power of the state.”⁵⁰ Thus, before a child is removed from their home—even temporarily—and their parents are stripped of their interest in the care, custody, and management of their children, parents must be afforded adequate procedural due process.⁵¹

The procedures required to satisfy due process when a state seizes a child from their parents’ custody are equivalent to the procedures required to satisfy the Fourth Amendment: the state needs either a warrant or an excuse corroborated by exigent circumstances. In *Gates v. Texas Department of Protective & Regulatory Services*,⁵² the Fifth Circuit held that the government may not seize a child from their home without a court order, parental consent, or exigent circumstances.⁵³ The court explained that exigent circumstances exist when “based on the totality of the circumstances, there is reasonable cause to believe that the child is in imminent danger of physical or sexual abuse if he remains in his home.”⁵⁴ In turn, whether a child is in “imminent danger” is determined by “consider[ing] all of the facts and circumstances.”⁵⁵ The exigent circumstance threshold is a high one, and the inquiry of whether it has been met requires that CPS agents consider the following factors: the time to obtain a court order, the strength of the evidence corroborating the allegations of abuse, the flight risk of the parent, the possibility of less extreme solutions to the problem, and any harm to the child that removal might cause.⁵⁶ If the factors weigh against removal without a court order, CPS can only rely on parental consent to have the alleged child victim placed elsewhere.⁵⁷ Otherwise, CPS would have to petition a court to remove the child.⁵⁸

The *Gates* case confirmed that CPS’s removal of children from their home implicates serious due process issues that require state agents to

49. *Stanley*, 405 U.S. at 651.

50. *Hodorowski v. Ray*, 844 F.2d 1210, 1216 (5th Cir. 1988) (internal quotation marks omitted) (quoting *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977)).

51. *Gates v. Tex. Dep’t of Protective & Regul. Servs.*, 537 F.3d 404, 434 (5th Cir. 2008); see also *Marks v. Hudson*, 933 F.3d 481, 486 (5th Cir. 2019) (“Fourth Amendment procedures and standards apply to social workers’ investigations. Process that satisfies Fourth Amendment standards is adequate to protect parents’ Fourteenth Amendment liberty interest in their child’s custody.” (internal citation omitted) (first citing *Wernecke v. Garcia*, 591 F.3d 386, 399–400 (5th Cir. 2009); and then citing *Gates*, 537 F.3d at 435)).

52. 537 F.3d 404 (5th Cir. 2008).

53. *Id.* at 429.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. See *id.* (explaining that without parental consent or exigent circumstances, state child welfare workers must obtain a court order to seize children from their parents).

carefully weigh the state's interests in keeping children safe from immediate harm against the right to family integrity. Following *Gates*, a 2008 internal CPS memo discussed whether and how CPS's practices in Texas needed to change to conform to the Fifth Circuit's requirements.⁵⁹ The memo advised CPS personnel of the exigent circumstances standard and explained that the current practice of using voluntary placements or a safety plan is consistent with the Fifth Circuit's factor requiring consideration of less extreme solutions.⁶⁰ The memo further iterated that in any case, "[p]arents can always agree to having their children removed from their care by authorizing a voluntary placement of the children."⁶¹ Voluntary placements—that is, PCSPs—are thus a way to remove children without initiating formal removal procedures.⁶² The fact that these are *voluntary* placements, secured by parental consent, effectively removes the onus on the state to ensure that parents are afforded counsel or that there is court oversight of a family's progress and efforts towards reunification.

1. *The Fifth Circuit's Silence.*—The 2008 CPS memo summarily disposes of any further discussion regarding voluntary placements (i.e., PCSPs), instead categorizing these arrangements as conforming to the Fifth Circuit's requirement of obtaining "parental consent" in the absence of a court order or exigent circumstances. But the word "voluntary" is doing a lot of heavy lifting to pass constitutional due process muster: if the arrangements were actually involuntary, then they would be state-sanctioned removals and would implicate the due process issues outlined above. Therefore, to remain within constitutional boundaries, PCSP agreements made pursuant to a safety plan must be truly voluntary and not a result of the "coercive interference of the awesome power of the state."⁶³

59. Memorandum from Carey Cockerell, CPS Comm'r & Joyce James, CPS Assistant Comm'r, through Gerry Williams, CPS Gen. Couns. to All CPS Personnel 1 (Aug. 22, 2008), <https://www.dfps.texas.gov/handbooks/CPS/documents/Legal%20Advisory%20RE%20Gates%20Case.doc>. [<https://perma.cc/5C6M-P2LL>].

60. *Id.* at 2–5.

61. *Id.* at 6. After this memo was issued, CPS implemented a high number of safety plans in Texas, reaching nearly a total of 12,000 in 2011. Wendy McElroy, *An Unfamiliar Definition of "Voluntary"*, THE FUTURE OF FREEDOM FOUND. (June 27, 2012), <https://www.fff.org/explore-freedom/article/an-unfamiliar-definition-of-voluntary/> [<https://perma.cc/3XYN-63JX>]. During that same year, 1,031 safety plans were signed in April alone. *Id.*

62. See TEX. DEP'T OF FAM. & PROTECTIVE SERVS., VOLUNTARY CAREGIVER MANUAL 1 (2015) [hereinafter VOLUNTARY CAREGIVER MANUAL], https://www.dfps.state.tx.us/Child_Protection/State_Care/documents/Voluntary_Caregiver_Manual-ENG.pdf [<https://perma.cc/KKH8-J9FK>] (defining voluntary caregivers' roles in the PCSP process and distinguishing PCSP from CPS custody).

63. *Hodorowski v. Ray*, 844 F.2d 1210, 1216 (5th Cir. 1988) (internal quotation marks omitted) (quoting *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977)).

“Voluntary” is not defined in section 264.901 of the Texas Family Code, which defines “Parental child safety placement,”⁶⁴ or anywhere else in the Family Code. Neither the Fifth Circuit nor Texas state courts have broached the subject, but in *Ruiz v. Texas Department of Protective & Regulatory Services*⁶⁵ a federal district court in Texas confronted the closely related question of whether the voluntary placement of a child with a family member pursuant to a safety plan is equivalent to the state taking exclusive custody of that child, which would open the door to possible violations of the right to family integrity.⁶⁶ Relying on the Supreme Court’s decision in *DeShaney v. Winnebago County Department of Social Services*,⁶⁷ the court found that voluntary plans for a child’s possession within a family are not equivalent to a state’s exclusive custody of that child.⁶⁸

This holding follows from the *DeShaney* rule that states do not create a “special relationship” with an individual unless the state has acquired exclusive custody of that individual, irrespective of whether the state at one point had temporary custody that has since ended.⁶⁹ In the *DeShaney* case, Winnebago County Department of Social Services (DSS) workers surmised that a child was at risk of abuse from his father but did not remove the child because they felt that they had insufficient corroborating evidence.⁷⁰ Nonetheless, DSS workers took precautions to protect the child by enrolling the child in a preschool program, providing the father with counseling services, and entering into an agreement with the father that he would voluntarily cooperate in this process.⁷¹ In spite of these steps, the abuse towards the child only escalated until the child fell into a life-threatening coma as a result of a series of traumatic head injuries and was left with permanent brain damage.⁷² The mother sued DSS, alleging that its minimal involvement in the case was insufficient and that the caseworkers should have done more to protect the child by removing him from the father’s reach.⁷³ The Supreme Court rejected that argument, holding that special relationships are not born out of the state’s offer to help an individual whose

64. TEX. FAM. CODE ANN. § 264.901(2) (West 2022).

65. 984 F. Supp. 2d 657 (S.D. Tex. 2013).

66. *Id.* at 674.

67. 489 U.S. 189 (1989).

68. *Ruiz*, 984 F. Supp. 2d at 674.

69. *DeShaney*, 489 U.S. at 197–201.

70. *Id.* at 192.

71. *Id.*

72. *Id.* at 192–93.

73. *See id.* at 193 (recounting the mother’s allegation that state social workers had failed to intervene to protect the child against “a risk of violence at his father’s hands of which they knew or should have known”).

parents continue to possess custody of him.⁷⁴ That is, even though DSS disturbed the father's possession of the child enough to recommend safety protocols, it had no further obligation to protect the child while he was still in the custody of his father.⁷⁵ The Court rejected analogies to case law involving an affirmative act by the state that restricted a person's liberty and thereby imposed due process duties.⁷⁶ Thus, the *DeShaney* Court considered and rejected the possibility of the state forming a special relationship by exercising some control over the child before DSS petitions a court for custody but after the state has intervened in the parent's unhindered possession of their child.⁷⁷ The *Ruiz* court echoed this reasoning, suggesting that voluntary placements are not equivalent to a state's affirmative act that infringes on parents' liberties.⁷⁸

Ultimately, both *DeShaney* and *Ruiz* demonstrate that at least some courts in the Fifth Circuit would understand PCSPs to be voluntary in every sense of the word: they do not involve the state forcefully restricting parents' liberties in the possession of their child in a manner that constitutes the state taking exclusive custody of the child or creating a special relationship with the child. In the absence of the Fifth Circuit's guidance on what "voluntary" actually means in implementing safety plans that require removal of the child from the home, it is necessary to look to other contexts in which courts unpack voluntary agreements with government actors.

2. *The Plea-Bargaining Analogy.*—Case law on the voluntariness of safety plans is scarce, but some circuits have found that they are voluntary insofar as they provide parents an option in lieu of removal in cases where CPS has a legal basis for removing a child from the home. In *Dupuy v. Samuels*,⁷⁹ the Seventh Circuit demarcated coercive uses of safety plans and truly voluntary safety plans by analogizing the practice to the use of plea

74. *See id.* at 201 (holding that the state did not have the duties required in a special relationship because it had returned the child to his father).

75. *See id.* (holding that the state had no constitutional duty to protect the child even though it previously had temporary custody).

76. *See id.* at 200 (stating that "it is the State's affirmative act of restraining the individual's freedom . . . which is the 'deprivation of liberty' triggering the protections of the Due Process Clause").

77. *See id.* at 201 (determining that the state did not have a constitutional duty to protect the child merely because it had once had custody over him). This juncture was referred to in the *Ruiz* case as the "investigation gap"—i.e., "the gap between a parent's undisturbed possession and the state's exclusive possession in the form of foster care—that time during which the state is investigating and seeking a mutually beneficial solution . . . without going so far as to take exclusive possession of the child." *Ruiz v. Tex. Dep't of Protective & Regul. Servs.*, 984 F. Supp. 2d 657, 669 (S.D. Tex. 2013).

78. *See Ruiz*, 984 F. Supp. 2d at 674 (examining the *DeShaney* analysis to determine that there was no basis to treat voluntary placements in the same way as exclusive custody).

79. 465 F.3d 757 (7th Cir. 2006).

bargains.⁸⁰ Like safety plans, plea bargains can be rejected by defendants.⁸¹ Thus, both safety plans and plea bargains impose no obligation on any party: the state cannot force a person to accept either.⁸² That a person is possibly made worse off as a result of denying an offer to accept a plea bargain or a safety plan is just a risk implicit in engaging in such negotiations⁸³ rather than a tactic to create the illusion of a false choice. As such, there can be no constitutional violation for a mere offer to give a person more options than they otherwise would have had—either agree to a safety plan or face the risk of having your child removed from the home.⁸⁴

On the other hand, coercion (or duress, as the Seventh Circuit put it) occurs when state actors use illegal means to obtain agreements from offerees.⁸⁵ The *Dupuy* court illustrated this in the context of plea bargains: if an innocent defendant is given a plea offer by a prosecutor who knows of her innocence, and the defendant, pressured by the uncertainties of the justice system, accepts a guilty plea, the plea bargain could be said to have resulted from the duress from the prosecutor.⁸⁶ In applying pressure the prosecutor had no right to apply, the prosecutor illegally obtained an agreement.⁸⁷ Safety plans are different, according to the court, in that they offer a benefit to parents whom CPS suspects are endangering their children: “it is not duress to offer someone a benefit you have every right to refuse to confer, in exchange for suitable consideration.”⁸⁸ But without any suspicion of child endangerment, if CPS nonetheless threatens removal unless a safety plan is signed, then CPS could be said to have illegitimately obtained parents’ agreement to a safety plan.⁸⁹ Therefore, the dispositive factor in determining whether threats of removal are coercive is whether CPS has a right to threaten removal of children.⁹⁰

80. *Id.* at 761–63. The court also analogized safety plans to civil settlement offers. *Id.* at 761. I focus on the example of plea bargains to emphasize that in both criminal cases and CPS cases, more fundamental and intangible liberty interests are at stake—the right to be free from restraint in the case of plea bargains and the right to family integrity in the case of safety plans.

81. *Id.* at 761.

82. *Id.*

83. *Id.*

84. *See id.* at 762 (analogizing safety plans to civil settlement offers to determine that the implicit threat of litigation underlying a settlement offer does not infringe on any of the other party’s rights).

85. *Id.*

86. *Id.* at 762–63 (citing *United State v. Spilmon*, 454 F.3d 657, 658–59 (7th Cir. 2006)).

87. *Id.* at 763 (citing *Spilmon*, 454 F.3d at 659).

88. *Id.* (quoting *Spilmon*, 454 F.3d at 659).

89. *See id.* (emphasizing the difference between the case at hand and a different case that involved a state agency inappropriately threatening removal, noting that the case “nicely illustrates the line between a lawful threat and duress”).

90. *See id.* (determining that the plaintiffs had shown no evidence of the state’s improper or unlawful coercion).

Professor Gupta-Kagan points to a number of reasons why the Seventh Circuit's analogy to plea bargains is faulty. For one, plea bargains occur once a defendant has been formally charged with an offense, whereas safety plans are introduced without a petition to the court for removal of a child.⁹¹ Further, defendants have access to counsel when negotiating plea bargains,⁹² but CPS and parents may negotiate safety plans without the benefit of counsel.⁹³ Without counsel, safety plans are created and signed without guidance as to how allegations might be substantiated (or might fail to be substantiated) in court.⁹⁴ Moreover, when a criminal defendant agrees to plead guilty, the court converses with the defendant to ascertain whether the defendant's decision to accept a plea was truly voluntary or whether the defendant was induced to accept a plea by illegitimate threats.⁹⁵ That is not the case with safety plans.⁹⁶

The Seventh Circuit's faulty analogy to plea bargaining underscores the importance of treating the pre-petition stage of a CPS case with the same care and vigilance towards protecting a defendant's rights as is warranted in criminal cases. Like the Seventh Circuit, the Fifth Circuit has held that plea bargains that threaten prosecution of third parties are coercive when prosecutors have no probable cause to bring charges against those parties.⁹⁷ Along the same line of reasoning, safety plans are coercive when CPS agents threaten to place children in foster care⁹⁸ if CPS has no legal basis for removing the children. And without counsel, parents are in no position to ascertain whether safety plans are being offered based on a legally actionable reason—that is, a child has been placed in immediate danger. Further, the Fifth Circuit also recognizes that a plea of guilty will not be deemed voluntary if the defendant did not receive “real notice of the true nature of the charge against him.”⁹⁹ A defendant who does not understand the nature

91. Gupta-Kagan, *supra* note 11, at 863.

92. *Id.* It is a violation of Texas's ethics code for prosecutors to negotiate a plea bargain with an unrepresented defendant. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.09, *reprinted in* TEX. GOV'T CODE ANN., TIT. 2, SUBTIT. G, APP. A (TEX. STATE BAR R. ART. X, § 9). Given the gravity of the right to family integrity, CPS workers should similarly be prohibited from negotiating PCSP agreements without first ensuring that parents have access to counsel.

93. Gupta-Kagan, *supra* note 11, at 863–64.

94. *Id.*

95. *Id.* at 864.

96. *Id.*

97. *See* United States v. Diaz, 733 F.2d 371, 375 (5th Cir. 1984) (stating that the guilty plea was not rendered involuntary by a threat to charge defendant's family members because prosecutor had probable cause to indict them).

98. In Texas, the safety plan form contains language that threatens to place a child in foster care, increase the number of services the parent needs to complete, or have a court order that the parent complete the services. SAFETY PLAN, *supra* note 17, at 2.

99. *Diaz*, 733 F.2d at 374 (internal quotation marks omitted) (quoting Marshall v. Lonberger, 459 U.S. 422, 436 (1983)).

of the charges against him cannot be said to have received such notice.¹⁰⁰ Likewise, an unrepresented parent who is approached with an offer to sign a safety plan to temporarily remove a child from their home may not fully understand the danger to the child that has spurred the offer to sign a safety plan, the details of the safety plan, or whether or not the services required of them to complete are warranted by the allegations against them. The power imbalance between CPS agents and unrepresented parents makes negotiating a safety plan a difficult and unfair task for parents to do alone. Ultimately, it is precisely because there are so many material differences between plea bargaining and safety plans that the Texas legislature ought to be proactive in protecting families' rights to family integrity.

3. *The Lack of Court Oversight.*—One of the benefits of formal foster care not afforded to families in hidden foster care is the statutory timeline that requires a child be reunited with her family within one year (provided that there is no six-month extension), unless the court has commenced a trial on the merits of the separation.¹⁰¹ During the period that the child remains in foster care, there are also statutory hearings that allow the court to gauge a case's progress and address a child's ongoing needs.¹⁰² In Texas, there are at least four hearings that occur before the one-year dismissal deadline.¹⁰³ The first of those, the adversary hearing, gives parents an opportunity to challenge CPS's request for temporary custody of their child, known as temporary managing conservatorship (TMC).¹⁰⁴ When CPS has met its statutory burden, it obtains TMC of a child.¹⁰⁵ CPS meets its statutory burden if the court finds that the parents' acts or omissions endangered the child and that keeping the child in the home is contrary to the child's welfare.¹⁰⁶ Further, CPS must show that an urgent need for protection warranted the removal and that CPS made reasonable efforts to avoid removing the child.¹⁰⁷ Lastly, a court will grant TMC if CPS made reasonable efforts to enable the child to return home but continuing danger in the child's home made this infeasible.¹⁰⁸ If CPS fails to meet this statutory burden, the court will order the return of the child to the parents.¹⁰⁹ In hidden foster care, CPS evades its obligation to substantiate its belief that the child ought to be removed from the home.

100. *Id.*

101. TEX. FAM. CODE ANN. § 263.401(a)–(b) (West 2022).

102. Texas RioGrande Legal Aid—Austin Office, *CPS Timeline*, TEXASLAWHELP.ORG (Dec. 29, 2021), <https://texaslawhelp.org/article/cps-timeline> [<https://perma.cc/5J4B-GPXG>].

103. *Id.*

104. *Id.*

105. TEX. FAM. CODE ANN. § 262.201(g) (West 2022).

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

Moreover, in hidden foster care, parents and their children lose legal checks that gauge how much progress is being made in a case. The other pre-dismissal statutory hearings—the initial permanency hearing, status hearing, and subsequent permanency hearing—are all intended to help the court ascertain the status of the child and review CPS’s efforts to achieve permanency for the child.¹¹⁰ The court will determine the parties’ compliance with the service plan and make decisions about whether there is a continuing need for the child to remain in foster care.¹¹¹ There is no such review in hidden foster care. CPS is not held accountable for its efforts, or lack thereof, to terminate a PCSP and return the child to the home. The lack of court oversight makes it possible for CPS to extend a safety plan well beyond sixty days, accomplishing a much larger deprivation of parental rights (and of the child’s rights) than is imagined by the Texas Family Code and CPS policy. Indeed, Bexar County has reported cases where CPS had a safety plan and PCSP in place for three years before CPS filed a petition to remove the child.¹¹² The safety plan currently used by Texas CPS agents reads that a plan will terminate when a parent is “notified as such by [the] caseworker, or DFPS is no longer investigating or providing services to [the] family.”¹¹³ The lack of statutory regulation and court oversight leaves parents subject to the will of CPS until the department is satisfied that the child can return home.

B. *Resource Discrepancies*

The burdens of hidden foster care do not just fall on the parents and children who are the subject of safety plans; they also affect the kinship caregivers who assume the responsibility of caring for the child. Programs like Temporary Assistance to Needy Families (TANF) are available to help kinship caregivers maintain informal placements, but the monthly support that this program provides pales in comparison to the support that licensed foster parents receive to care for children in the formal foster care system. As of March 2021, Texas paid kinship caregivers caring for children formally placed in foster care “a maximum of \$406 per month for up to one year, plus a \$500 annual stipend for a maximum three years” or until the child turns eighteen.¹¹⁴ Meanwhile, TANF provides kinship caregivers in PCSPs with minimal monthly support, typically ranging from \$100 to \$300, but it varies

110. Texas RioGrande Legal Aid—Austin Office, *supra* note 102.

111. *Id.*

112. *See, e.g.*, Asgarian, *supra* note 2 (reporting a Bexar County court administrator’s reaction to a case where the children had been placed with their grandmother for three years on a safety plan prior to the request for removal).

113. SAFETY PLAN, *supra* note 17, at 2.

114. Sara Tiano, *Texas Lawmaker Wants to Give Relative Caregivers a Raise*, THE IMPRINT (Mar. 17, 2021, 7:00 PM), <https://imprintnews.org/child-welfare-2/texas-lawmaker-wants-to-give-kin-caregivers-a-raise/52701> [<https://perma.cc/MN8E-DU9D>].

based on income and household size.¹¹⁵ The payment discrepancies may make hidden foster care a cheaper alternative for the state than formal foster care, but it creates a difficult financial situation for kinship caregivers.

These financial pressures that families take on to support their relatives add to the larger systemic problem of foster care in Texas. Texas has long been criticized for its racialized foster care system,¹¹⁶ but ironically, preservation efforts, like safety planning, also lead to racialized implications. Children of minority backgrounds are overrepresented in Texas foster care demographics,¹¹⁷ and in a state where more than 75% of the victims of child maltreatment are victims of neglect only, sometimes poverty related,¹¹⁸ minority families who agree to take on a child in a PCSP are likely also struggling financially.¹¹⁹ Unlike formal placements who receive a kinship worker who can help them navigate the system and locate community resources, informal kinship placements do not receive any state personnel to guide them and must look for those resources on their own.¹²⁰ And certain benefits, like the Earned Income Tax Credit, are only available to kinship caregivers who have been living with the child for a period that surpasses sixty days.¹²¹ Thus, hidden foster care often places financial strains on minority families who would otherwise receive greater state and federal assistance had the child been formally removed into foster care.

115. *CASA Deep Dive: Kinship Care*, TEX. CASA (Sept. 23, 2019), <https://texascasa.org/2019/09/23/casa-deep-dive-kinship-care/> [<https://perma.cc/KP2N-79CM>].

116. See generally Ashika Sethi, *What You Should Know About Disproportionality*, CASA OF TRAVIS CNTY, INC. (Oct. 26, 2021), https://www.casatravis.org/what_you_should_know_about_disproportionality [<https://perma.cc/F96X-99AE>] (noting the overrepresentation of minority children in the Travis County child welfare system, despite the fact that “[r]ates of child abuse are not higher for children of color when compared to white children,” and attributing this discrepancy to implicit racial bias in child welfare professionals’ decision-making).

117. See PATRICK LEUNG, TEX. DEP’T OF FAM. & PROTECTIVE SERVS., *DEVELOPING AND SUSTAINING A KINSHIP NAVIGATOR PROGRAM IN TEXAS* 14 fig.3 (2019), http://www.dfps.state.tx.us/About_DFPS/Reports_and_Presentations/CPS/documents/2019/2019-02-15-Kinship_Navigator_Program.pdf [<https://perma.cc/TUZZ-7G2Y>] (reporting that in 2015, 47% of children living in kinship care households were Hispanic and 21% were African-American).

118. NIKKI PRESSLEY, TEX. PUB. POL’Y FOUND., *PUNISHED FOR BEING POOR: THE RELATIONSHIP BETWEEN POVERTY AND NEGLECT IN TEXAS* 3 (2020), <https://www.texaspolicy.com/wp-content/uploads/2020/06/2020-06-CFC-Pressley-Neglect-Poverty-Perspective.pdf> [<https://perma.cc/PU9E-L35N>].

119. See LEUNG, *supra* note 117, at 14 fig.3 (providing that in 2015, 47% of Hispanic children and 26% of African-American children living in kinship care were living in households below 150% of the federal poverty line).

120. *CASA Deep Dive: Kinship Care*, *supra* note 115.

121. See VOLUNTARY CAREGIVER MANUAL, *supra* note 62, at 7 (stating that the Earned Income Tax Credit benefit becomes available to those who have lived with a child for more than six months).

C. *Problems with Texas's Amended Statute*

A recent change to the Texas Family Code has made it more difficult for CPS to place children in foster care and leaves open the possibility of increased uses of PCSPs and safety plans. Before the eighty-seventh legislative session, “child neglect” was defined as including any act or omission that exposes a child to “a *substantial risk*” of physical or mental harm.¹²² The definition included a laundry list of acts or omissions that would pose a substantial risk of harm, like failing to provide medical care; failing to provide food, shelter, or clothing; or leaving a child in a situation that exposes them to sexual abuse.¹²³ After the passage of H.B. 567, the definition of “neglect” denotes an act or omission by a person responsible for a child’s care, custody, or welfare that “evidence[es] the person’s blatant disregard for the consequences of the act or failure to act that . . . creates an *immediate danger* to the child’s physical health or safety.”¹²⁴ The laundry list of acts or omissions remains the same, except that the “immediate danger” standard replaces the “substantial risk” standard.¹²⁵ This new heightened standard requires CPS to show that the removal of the child can be corroborated by evidence that the child is in immediate danger of being harmed, not just that there are substantial risks that the child will be harmed in the future.¹²⁶ The Texas legislature recognized that looser definitions of neglect might lead to investigators confounding situations of poverty with those of maltreatment and therefore sought to keep more children at home with their families by making it harder for CPS to remove them.¹²⁷

Whatever the intent behind the change in the law, tightening the definition of neglect to prevent poverty-related removals may nonetheless lead to informal removals via safety plans. Because informal removals do not need to be substantiated in court, safety plans can be used to address the more nebulous cases that might involve risks to children that were previously recognized as justifiable grounds for removal but that do not now meet the amended statutory definition of neglect. The lack of regulation at the safety-planning stage of CPS cases makes informal removals an attractive solution to a difficult removal threshold. Thus, while changing the law to prevent more children from entering foster care due to poverty appears just, in the

122. TEX. FAM. CODE ANN. § 261.001(4) (West 2017) (emphasis added), *amended by* TEX. FAM. CODE ANN. § 261.001(4) (West 2021).

123. *Id.*

124. TEX. FAM. CODE ANN. § 261.001(4) (West 2021) (emphasis added).

125. *Compare id.* (“immediate danger”), *with* TEX. FAM. CODE ANN. § 261.001(4) (West 2017) (“substantial risk”) (amended 2021).

126. *See* The Imprint Staff Reports, *New Texas Law Makes It Harder to Remove Kids from Parental Home*, THE IMPRINT (June 8, 2021, 1:04 PM), <https://imprintnews.org/news-briefs/new-texas-law-makes-it-harder-to-remove-kids-from-parental-home/55820> [<https://perma.cc/KT3B-RZLY>] (explaining the change in the law).

127. *Id.*

absence of proper regulation of hidden foster care, it does not altogether prevent poverty-related parent–child separations.

IV. Solutions

Most scholarship on the topic of hidden foster care has supported its regulation rather than its abolishment. As Professor Gupta-Kagan notes, hidden foster care is not, in and of itself, an objectionable idea.¹²⁸ Kinship caregivers and parents might prefer a system with less CPS involvement, and the harm to children caused by the formal system is mitigated when they are placed with close family members or family friends who keep the children tied to their culture and community.¹²⁹ But without regulation, hidden foster care can serve to end-run due process checks and shortchange kinship caregivers from receiving necessary resources and support. This Part explores how some counties attempt to address hidden foster care retroactively and critiques existing proposals in Texas to proactively regulate its practice while also proposing a way to ensure court oversight for informal removals.

A. *Retroactive Solutions: Bexar County, Texas*

Bexar County, where San Antonio sits, has formalized a system that helps families subject to safety plans successfully navigate kinship care. In San Antonio, an increasing number of children have lived or are currently living with a kinship caregiver as a result of CPS intervention.¹³⁰ In an article published in *The Appeal*, Bexar County Judge Peter Sakai commented that many families subject to safety plans come to court because a long-term PCSP has broken down.¹³¹ As the number of these kinds of cases rose, the Bexar County Children’s Court devised a family preservation docket to help kinship caregivers provide for the children in their care.¹³² Attorneys working the cases on this docket are paid a flat fee to file custody orders for kinship caregivers.¹³³ These orders change the parents’ conservatorship status to possessory conservatorship, allowing for visitation, while the kinship placement becomes the primary caretaker and principal decisionmaker for the physical, mental, and educational needs of the child.¹³⁴ The court also

128. Gupta-Kagan, *supra* note 11, at 872–73.

129. *See id.* (noting that parents may prefer hidden foster care for various reasons, including fear that children will be placed with a stranger); Epstein, *supra* note 40 (exploring the benefits of kinship care, including preservation of community ties).

130. Asgarian, *supra* note 2.

131. *Id.*

132. *Id.*

133. *Id.*

134. E-mail from Barbara Schafer, Child.’s Ct. Div. & Programs Admin., Bexar Cnty. Early Childhood Ct., to author (Apr. 18, 2022, 11:25 AM) (on file with the author).

helps the families locate family resources in the community, collaborates with community partners and nonprofits, and links families to federally funded support, like Medicaid and TANF.¹³⁵ Given the sizeable population of children in kinship care in Texas, this Bexar County solution is a promising way to help families access resources and gain visibility in court, which is otherwise absent in hidden foster care. Indeed, without any help from the Texas legislature, it might be the only way that the judiciary can place reins on the hidden foster care system.

Nonetheless, the hard pill to swallow with respect to Bexar County's solution is that parental rights are effectively terminated by this point—after a long period of time in hidden foster care with no court intervention. When asked if children subject to this solution ever return to their parents, the Bexar County court administrator said she did not know and that the court had not had it happen before.¹³⁶ Furthermore, a child does not have access to an attorney *ad litem* or guardian *ad litem*, both of whom are present in a formal CPS case to help advocate for the child's interests, until the court encounters a family to grant a custody order.¹³⁷ While the Bexar County solution might help kinship caregivers permanently care for the children in their homes, there should be some discomfort about the fact that families have been legally changed without sufficient due process.

B. *Proactive Solutions: Recent Legislation*

The Bexar County solution to hidden foster care is retroactive: it does not seek to regulate the practice at the outset but instead acknowledges it and attempts to rectify some of the problems that families face when they agree to a PCSP as part of their safety plan. A recent bill in Texas purports to regulate hidden foster care *ex ante* by providing counsel to parents receiving services while their child is in a PCSP, setting a statutory time limit on PCSPs that terminate these arrangements at thirty days, and requiring that DFPS track the number of children diverted to hidden foster care. Moreover, Texas has introduced the Family Preservation Services Pilot Program that aims to keep children who are candidates for foster care at home with their families

135. *See id.* (stating that the purpose of the family preservation docket is to help families connect to source like Medicaid); *see also Addressing Hidden Foster Care*, THE WHITLEY L. FIRM (Jan. 12, 2021), <https://www.whitleylawfirm.com/addressing-hidden-foster-care/> [<https://perma.cc/WN6V-RG6Z>] (explaining that families are able to receive Medicaid and TANF once they have formal custody orders); *see generally* INGRID FRIESE PETTY, THE KRONKOSKY FOUNDATION STORY: CREATING PROFOUND GOOD THROUGH COMMUNITY PHILANTHROPY 125–26 (2021) (discussing the family preservation docket and how courts connect families to resources).

136. E-mail from Barbara Schafer, *supra* note 134.

137. *Compare* TEX. FAM. CODE ANN. § 262.405(a) (West 2022) (mandating the appointment of an attorney *ad litem* in certain suits filed by CPS), *with id.* § 107.021 (permitting discretionary appointment of a guardian *ad litem* or attorney *ad litem* in suits filed by a party other than a governmental entity).

while the family participates in preservation services. With minor revisions, this program has the potential to substantially restrict hidden foster care by preventing parent–child separations.

I. H.B. 2680.—Fortunately, after Professor Gupta-Kagan’s article gained traction across the nation, many states, including Texas, proposed legislation that aims to regulate hidden foster care.¹³⁸ House Bill 2680 sets out three amendments to the Texas Family Code to ameliorate many of the concerns outlined in this Note.¹³⁹ The first amendment is to section 264.203 of the Texas Family Code, and it requires that a court advise a parent whose child has been placed in a PCSP that they have a right to an attorney and that one can be appointed to them before the court orders that the parent participate in any services.¹⁴⁰ This amendment allows parents the opportunity to consult attorneys in the early stages of CPS intervention, which in turn allows counsel to evaluate whether an agreement to a PCSP was voluntary and legally justified and whether the services required of the parent are sensible given the allegations and evidence against them.

Regrettably, under this amendment, parents would only have a right to counsel if a request for the completion of services comes before a court.¹⁴¹ This may not always be the case in hidden foster care, as parents’ ability to voluntarily participate in Family Based Safety Services would obviate the need for court orders.¹⁴² Having access to counsel in situations where a parent voluntarily agrees to participate in FBSS without a court order can serve as an important check on CPS, with counsel ensuring that the path to reunification is feasible and reasonable for the parents. Thus, a better proposal would have been to require that DFPS advise parents of their right to counsel whenever CPS introduces a PCSP agreement and to amend safety-plan agreements themselves to include language that a parent has a right to access counsel. Further, if a child is placed in a PCSP, the child should also

138. In 2020, Missouri passed legislation that places a ninety-day limit on hidden foster care arrangements and requires the child welfare agency to “develop a written case plan with an exit strategy.” Sara Tiano, *Texas Lawmaker Commits to Restricting and Tracking Hidden Foster Care*, THE IMPRINT (Aug. 4, 2021, 9:36 AM), <https://imprintnews.org/law-policy/texas-lawmaker-restricting-tracking-hidden-foster-care/57488> [<https://perma.cc/Y8TZ-7PLK>]. The same legislation also requires the agency to inform parents in writing of their right to terminate a placement. *Id.* In California, a bill was introduced to require child abuse investigations in most cases involving the transferred custody of a child with the goal to reduce entries into hidden foster care. *Id.*

139. Tex. H.B. 2680, 87th Leg., R.S. (2021).

140. *Id.*

141. *See id.* (“[B]efore the court may order a parent . . . to participate in services, the court shall advise any person who is not represented by an attorney of [the right to counsel].”).

142. Legal Aid of Northwest Texas & Family Helpline at Texas Legal Services Center, *Child Protective Services Article 3 of 7: Family Based Safety Services Phase*, TEXASLAWHELP.ORG, <https://texaslawhelp.org/article/child-protective-services-article-3-of-7-family-based-safety-services-phase> [<https://perma.cc/6WTA-8DL4>] (Apr. 20, 2022).

have access to an attorney *ad litem* to represent the child's interests in remaining with the caregiver.¹⁴³

Second, H.B. 2680 amends section 264.902 of the Texas Family Code to require that PCSPs terminate after 30 days, ensuring the reunification of a child to a parent's home.¹⁴⁴ But this thirty-day cap on PCSPs is not empirically founded. The authors of H.B. 2680 have given no explanation as to why PCSPs should terminate at day thirty as opposed to any other day. But perhaps this time cap was intended to stop the degeneration of PCSPs before they break down completely. According to a study done by the Children's Commission, PCSPs tend to break down by day sixty.¹⁴⁵

Nonetheless, if Texas plans on relying on kinship caregivers to care for children while parents participate in preservation services,¹⁴⁶ a time limit that caps automatically at thirty days is unrealistic. According to one Houston family law attorney, the services prescribed by a safety plan are typically not capable of being completed in thirty days, hence the need for constant extensions.¹⁴⁷ Further, a family preservation services plan made pursuant to the Family Preservation Services Pilot Program ends after 180 days.¹⁴⁸ Provided that the kinship caregiver is financially able to care for the child, time limits ought to be negotiated on a case-by-case basis with parents' attorneys and the child's attorney *ad litem* involved, and with due regard to the kinship caregiver's desire to end a PCSP. Lastly, Texas should involve the courts if CPS is unwilling to end a PCSP when parents have completed their end of an agreement.

Finally, H.B. 2680 requires that DFPS report the number of children it diverts to PCSPs.¹⁴⁹ Currently, states are generally not required to report the number of children in hidden foster care.¹⁵⁰ Professor Gupta-Kagan explained that with the passage of the federal Family First Prevention Services Act (FFPSA), which provides federal funds for prevention services to keep children out of foster care, states are incentivized to divert children

143. Notwithstanding the bill's limitations, Professor Gupta-Kagan has commented that Texas's bill to provide counsel to parents at this early juncture in the timeline of CPS cases is one of the more powerful changes that can be made to regulate hidden foster care. Tiano, *supra* note 138.

144. Tex. H.B. 2680.

145. Supreme Court of Texas Permanent Judicial Commission for Children, Youth and Families, *Parental Child Safety Placements Roundtable*, CHILD.'S COMM'N 25 (Aug. 23, 2015), <http://texassupremecourtcommission.gov/media/1153/mccown-pcsp.pdf> [https://perma.cc/SZU9-N8DD].

146. *See infra* section IV(B)(2).

147. Dennis M. Slate, *HELP! CPS Wants Me to Sign a Child Safety and Evaluation Plan.*, SLATE & ASSOCS. (Feb. 16, 2012), <https://www.houstonepsattorney.com/blog/2012/february/help-cps-wants-me-to-sign-a-child-safety-and-eva/> [https://perma.cc/4NHJ-D3F7].

148. TEX. FAM. CODE ANN. § 262.408(d) (West 2022).

149. Tex. H.B. 2680.

150. Gupta-Kagan, *supra* note 11, at 855.

away from formal foster care even if states can accomplish that goal by still achieving parent–child separations.¹⁵¹ Under the Act, states must track the number of foster care candidates that were successfully kept out of foster care, but this includes children who are living in hidden foster care.¹⁵² Thus, states are not required to distinguish the number of children who were still removed from home and placed with kin as a result of CPS intervention.¹⁵³ So long as children are kept from the formal system, whether through hidden foster care or by remaining with their parents, states can give the illusion to federal overseers that prevention efforts are working without telling the whole story.¹⁵⁴ Requiring DFPS to additionally track the number of children it diverts to hidden foster care will help Texas address prevention efforts more comprehensively by also focusing on parent–child separations.

2. *Family Preservation Services Pilot Program.*—In response to the federal FFPSA, Texas created the Family Preservation Services Pilot Program to realize the objectives of FFPSA by keeping families intact and providing prevention services instead of defaulting to removal.¹⁵⁵ The Pilot Program provides that DFPS may dispose of an investigation and instead provide services to the family of a child who is a “candidate for foster care.”¹⁵⁶ The Texas Family Code defines “candidate for foster care” as a child who is at “imminent risk” of being placed into foster care “but for whom a court of competent jurisdiction has issued an order allowing the child to remain safely in the child’s home *or in a kinship placement.*”¹⁵⁷ The program therefore envisions that kinship caregivers in the hidden foster care system will help shelter children who are candidates for foster care.¹⁵⁸

The passage of the FFPSA underscores the need for Texas to provide kinship caregivers with the necessary support through kinship navigator programs that can help caregivers fulfill their caregiving roles. Kinship navigator programs are important support systems for kinship caregivers, as

151. *Id.* at 894.

152. *Id.* at 896.

153. *See id.* (explaining that “Congress explicitly included” children that were placed with a kin caregiver “as children to be counted as *not* entering foster care, and Congress did not require states to report the number of foster care candidates who were successfully kept with their parents” (footnote omitted)).

154. *Id.*

155. Andrew C. Brown, *HB 3041, Implementing the Family First Prevention Services Act*, TEX. PUB. POL’Y FOUND. (May 12, 2021), <https://www.texaspolicy.com/wp-content/uploads/2021/05/2021-05-12-T-Brown-GFP-HB-3041-Family-First-Preventions-Svcs-Act.pdf> [<https://perma.cc/6PBB-BP4P>] (testimony submitted to the Texas Senate Health and Human Services Committee). The program is currently only set to be implemented in one urban and one rural jurisdiction. TEX. FAM. CODE ANN. § 262.402(a) (West 2022).

156. FAM. § 262.402(a).

157. *Id.* § 262.401(1) (emphasis added).

158. *See* Gupta-Kagan, *supra* note 11, at 894 (stating the same about the federal FFPSA).

they provide a “one-stop shop[]” for kinship families, supplying them with information, referrals, and community support.¹⁵⁹ Under the federal FFPSA, states can receive federal reimbursement for up to 50% of the expense of providing kinship navigator programs that meet evidence-based requirements.¹⁶⁰ Efforts to create a kinship program in Texas that is consistent with federal requirements have been underway since 2019.¹⁶¹ But as of 2021, no state, including Texas, has had a kinship navigator program approved by the federal government qualify for reimbursement, rendering the FFPSA funds futile for states.¹⁶²

Fortunately, Texas’s Family Preservation Services Pilot Program adds court oversight to preservation efforts, which is missing in hidden foster care. This kind of program makes it difficult to justify a hidden foster care system that avoids court oversight altogether, when prevention services can be rendered *after* a court’s finding that a child is safe to remain at home.¹⁶³ Moreover, in rendering an order for services, a court need only find “sufficient evidence to satisfy a person of ordinary prudence and caution” that a child is at *substantial risk* of abuse and neglect,¹⁶⁴ a lower standard than the current “imminent risk” standard for removing children into foster care. While this lower standard makes it easier to order preservation services for more families, it also means more kinship caregivers will be enlisted to care for children.

Given that under the Family Preservation Services Pilot Program, a court must hold a hearing for the parties¹⁶⁵ and render an order compelling participation in services,¹⁶⁶ the court is conveniently positioned to also ensure that parent–child separations via PCSPs are only occurring when warranted by circumstances demonstrating an immediate danger to the child. Additionally, kinship caregivers ought to not be kept out of the conversation at these hearings: they should be advised of their rights to end PCSPs and be given referrals to kinship workers and community resources to help them care for a child while the parents participate in court-ordered services. This

159. John Kelly, *Family First Act: Where Things Stand as It Takes Effect*, THE IMPRINT (Sept. 14, 2021, 6:12 AM), <https://imprintnews.org/youth-services-insider/family-first-act-where-things-stand-takes-effect/58660> [<https://perma.cc/3E59-LZVE>].

160. LEUNG, *supra* note 117, at i.

161. *See generally id.* (addressing “options to implement and sustain a Kinship Navigator Program (KNP) in the state of Texas”).

162. *See Kelly, supra* note 159 (discussing how no kinship navigator program has met the requirement for federal funding that it be “evidence-based”).

163. *See* TEX. FAM. CODE ANN. § 262.401, .402(a) (West 2022) (stating that prevention services can be provided to a “child who is a candidate for foster care,” which is a child for whom a court has issued an order allowing the child to remain at home or in a kinship placement).

164. *Id.* § 262.406(a).

165. *Id.* § 262.404(f).

166. *Id.* § 262.403(a).

way, court oversight under the Family Preservation Services Pilot Program enables courts to keep an eye on parent–child separations and to provide support for kinship caregivers. If Texas can create a qualified kinship navigator program and have courts oversee the propriety of PCSPs under this program, Texas can support kinship caregivers while meaningfully restricting hidden foster care.

Conclusion

The need to support kinship families has never been more apparent than it is now, with growing efforts in Texas to keep families together through stricter statutory standards of removal and expanded provision of preservation services. Hidden foster care has become a serious problem nationally, and states are now recognizing the due process concerns that safety plans pose for parents who lack access to counsel at the pre-petition stage of a CPS case. Further, the lack of resources and court oversight in hidden foster care leaves kinship caregivers with no help to fulfill their caregiving roles.

This Note has explored and critiqued solutions for regulating hidden foster care, including the retroactive Bexar County solution, which provides custody orders for families in legal limbo, and the proactive H.B. 2680 solution, which requires time limits, the reporting of data, and the provision of counsel for families participating in services. Finally, this Note explained areas of improvement for Texas’s Family Preservation Services Pilot Program, which would allow for meaningful regulation of hidden foster care and a better support system for kinship caregivers.