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Timely Permanency or Unnecessary Removal?

Tips for Advocates for Children Who Spend Less Than 30 Days in Foster Care

by Christopher Church, Monique Mitchell and Vivek Sankaran

Removal and placement in foster care is child welfare's most severe intervention, contemplated as "a last resort rather than the first."¹ Federal law, with an overarching goal of preventing unnecessary removals, bolsters this principle by requiring juvenile and family courts to carefully oversee the removal of children to foster care. Expansive research reminds the field that removal, while often necessary, is not a benign intervention.² Physically, legally, and emotionally separating children from their parent(s) can traumatize children in lasting ways.

Yet review of federal data concerning children in foster care reveal a troubling narrative: each year, tens of thousands of children are removed and placed in foster care for less than 30 days. Most of these children return to the same home from which they were removed. This article discusses the experiences of these children and highlights strategies to promote a healthy child welfare system that removes children from their families only when absolutely necessary.

Removal: What the Law Requires

Constitutional, federal, and state laws require juvenile and family court judges to serve as important checks on the state's power to remove children from their parents.

- *Constitutional case law* only permits *ex parte* removals if there is an imminent risk of substantial harm to the child.
- *Federal law* in most cases only authorizes removal upon a judicial finding that remaining in the home would be contrary to the welfare of the child and that the agency has made reasonable efforts to prevent the need to remove the child.

- *State laws* in most jurisdictions require that courts only permit removals where there is a finding that a child would be in a substantial and immediate risk of harm.

To fulfill these important legal duties to protect the constitutional rights of children and families, judges must vet removal petitions *prior* to the physical separation of the child and her caretakers whenever possible. As even the federal government has recognized, when a "child is returned after services have been delivered, *or even immediately*, the state has reunified the family, not prevented a removal."³

How Removal Harms Children

The goal of preventing unnecessary removals is grounded in our nation's recognition that children and families have a right to remain together, absent exceptional circumstances. The importance of preventing unnecessary removals is also bolstered by research showing the "debilitating effects" children experience upon being removed from their families and homes and placed into foster care, usually into environments and with people with whom they are unfamiliar.⁴ Simply put, removal can harm children. Even when children are removed from a dangerous environment, they can still suffer from loss and ambiguity.⁵

To promote a healthy child welfare system, children must be removed and placed in foster care only when absolutely necessary. This approach must thoughtfully balance a family's fundamental rights against the state's important interest in protecting children from abuse and neglect. It must also recognize that while removal may be necessary in some cases, it carries significant risks to the child in all

cases. The system must recognize that "removal has a profound effect on the child and family . . . that cannot be undone."⁶ Federal data, however, call into question whether our system follows such an approach.

What the Data Reveal

Each year, about 10% of children removed—or nearly 25,000 children—are placed in foster care only to be discharged within 30 days of their removal.⁷ There are states where as many as 1 out of every 3 children removed are discharged within 30 days of their removal.

During their brief stays in foster care, most of the children are placed in unfamiliar environments—like a foster home or a group home—with unfamiliar caretakers.⁸ These experiences can result in placement context ambiguity (i.e., a lack of clarity about the context of the foster care placement) and relationship ambiguity (i.e., a lack of clarity about the people with whom they will be placed).⁹ After their brief stays in care, nearly all these children are returned to their families.¹⁰

These data raise many questions. Presumably, the juvenile and family courts carefully vetted these removal petitions. As contemplated by Congress, a judge made a "meticulous and impartial"¹¹ ruling that it would be contrary to the welfare of the child to remain in the home, and that no reasonable effort could have been made to remediate the safety threat. Yet within a few days or weeks of removal, whatever safety threat existed was remedied, or whatever alternative to removal that did not exist presumably became available. While the system minimized the child's stay in foster care—a laudable goal—it still inflicted harm on these children by removing them. This comes with a cost not only

to parents and children's legal rights, but also to children's well-being. Systems must ask themselves in these cases whether this harm was preventable.

Practitioners must closely examine the data to better understand the experiences of these children. In many jurisdictions, short stayers are immediately placed with and ultimately discharged to relatives. In others, they are placed in shelters for a matter of days before being returned to their original caretakers. A solution that holds any promise must be carefully tailored to the nature of the problem.

Beyond Data to Solutions

Practitioners should closely examine the removal process in their jurisdictions to determine whether they have a "short-stayer" problem. Steps to take:

- Examine data to determine how many children agencies remove from their homes, only to discharge them within 30 days of removal.
- Evaluate local and state practices to determine why this problem is occurring and what might be causing it.
 - Are community dynamics or cultural biases favoring removal over a more risky family preservation practice?
 - Is the late appointment of attorneys perpetuating an unchecked removal process?
 - Are judges personally reviewing and vetting removal petitions, or has that responsibility been delegated to other court staff?
 - Are attorneys poorly trained and not paying as much attention to cases at the outset?
 - Is an educational component needed to help stakeholders understand the trauma and loss children experience whenever they are removed to foster care?
- Examine the legal and statutory removal framework, which can

differ significantly across geographies.

- Ensure accountability of removal decisions through the appellate courts as long as statute or court rule provides immediate access.

Only by undertaking this close introspection will states be able to go beyond the data to determine whether and why short foster care stays are happening. Once identified, advocates can focus on and what can be done to prevent children from unnecessarily being harmed.

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Endnotes

1. 126 Cong. Rec. 6942 (1980).
2. See generally Sankaran & Church. "Easy Come, Easy Go: The Plight of Children who Spend Less Than Thirty Days in Foster Care." *University of Pennsylvania Journal of Law and Social Change* 19, 2016, 207, 210-213.
3. Title IV-E Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews, 65 Fed. Reg. 4020, 4052 (Jan. 25, 2000) (to be codified at 45 C.F.R. pts. 1355, 1356, 1357) (emphasis added).
4. Mitchell, Monique & Leon Kuczynski. "Does Anyone Know What is Going On? Examining Children's Lived Experience of the Transition Into Foster Care." *Child and Youth Services Review* 32, 2010, 437, 442-43; Mitchell, Monique. *The Neglected Transition: Building a Relational Home for Children Entering Foster Care*. Oxford: Oxford University Press, 2016.
5. Mitchell, Monique. *The Neglected Transition: Building a Relational Home for*

Children Entering Foster Care, Oxford: Oxford University Press, 2016.

6. Title IV-E Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews, 65 Fed.

Reg. 4051, 4052 (Jan. 25, 2000) (to be codified at 45 C.F.R. pts. 1355, 1356, 1357).

7. 2016 Federal Fiscal Year Adoption and Foster Care Analysis and Reporting System. Data used in this publication were made available by the National Data Archive on Child Abuse and Neglect (NDACAN), Cornell University, Ithaca NY; and have been used with permission. Data from the AFCARS are originally collected by the state's child welfare agency pursuant to federal reporting requirements. Authors have analyzed data and analyses are on file with them. Neither the collector of the original data, the funder, the Archive, Cornell University, or its agents or employees bear any responsibility for the analyses or interpretations presented here.

8. Ibid. During the most recent reporting period, 73% of children spending less than thirty days in foster care were placed in an unfamiliar place, such as a non-relative foster care placement (53%), institution (11.4%), or group home (9%).

9. Mitchell, Monique. *The Neglected Transition: Building a Relational Home for Children Entering Foster Care*. Oxford: Oxford University Press, 2016.

10. During the most recent reporting period, 76% of children spending less than 30 days in foster care were returned to the same home from which they were removed, and 16% were discharged to the custody of a relative.

11. Mark Hardin. "Ten Years Later: Implementation of P.L. 96-272 by the Courts." In *The Adoption Assistance and Child Welfare Act of 1980 (Public Law 96-272): Ten Years Later*, 1990, 51, 52.