
5-4-2020

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FOSTER TO ADOPT: PIPELINE TO FAILURE AND THE NEED FOR CONCURRENT PLANNING REFORM

*Maggie Wong Cockayne**

Hundreds of thousands of families are seeking to adopt children, some of which are roped into fostering children in the hopes of adoption. The term foster to adopt (“fost-adopt”) conjures up the belief, “if I foster long enough, I will get to keep and adopt this child.” Many of these children, who are forced down the fost-adopt pipeline, become adopted and emotionally scarred with all legal ties to their first family severed. This is not how foster care is supposed to work. Fost-adopt is a misnomer that has been incorrectly used to describe concurrent planning. Concurrent planning is an effort to place foster children with foster parents that supports both reunification with their parents and adoption if reunification is not possible. The federal government started off with the goal and acknowledgment that family preservation is paramount but was somehow led astray with an alternate goal of adoption. The detraction from family preservation and reunification to adoption hurts families and children.

This Note will first review the history of child welfare policy and legislation from the 1700s until the most recent passing of Family First Prevention Services Act of 2018. Second, this Note will highlight three problems with the concurrent planning system: sabotage, foster home shortage, and the pitfalls of adoption. Third, this Note will thoroughly analyze these three problems. Fourth, this Note will propose possible solutions to improve the fost-adopt system by discussing the benefits to using sequential planning, rather than immediate concurrent planning, while emphasizing the importance of empathy and contact between foster parents and first family parents.

* B.S. Political Science, Santa Clara University; J.D. Santa Clara University. This Note is inspired by all the parents who have successfully reunified with their children and all the foster parents, social workers and dependency attorneys who actively support reunification. I would like to thank my good friends Braeden Sullivan and Elisa Medina for their insight and support on this topic. As is the tradition among those who write about adoption, I wish to note my place in the adoption triad: I am an adoptive parent of a child from foster care. Last but not least, I want to thank my husband Chad and my children Cora and Daniel for loving and fostering children alongside me.

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I. INTRODUCTION

Hundreds of thousands of families seek to adopt children,¹ some of whom are roped into fostering children in the hopes of adoption.² The term foster to adopt (“fost-adopt”) conjures up the belief, “if I foster long enough, I can permanently adopt this child.” This belief may lead to adoption but is unfair to many of the children who are severed from their first parents³ unnecessarily through adoption. Such children are forced

1. Jo Jones, *Adoption Experiences of Women and Men and Demand for Children to Adopt by Women 18-44 Years of Age in the United States, 2002*, VITAL AND HEALTH STAT., Aug. 2008, at 8.

2. Joan R. Rycraft & Guillermina Benavides, *Concurrent Planning: In Whose Interest?*, in ADOPTION FACTBOOK V: THE MOST COMPREHENSIVE SOURCE FOR ADOPTION STATISTICS NATIONWIDE 259 (Elisa A. Rosman et al. eds., 2011) (a 2004 study found that a majority of foster parents became concurrent foster parents to increase their chances of adoption). See Makayla Robinson, *6 Foster Children Benefits*, ADOPTIONBENEFITS.COM (Jan. 16, 2018), <https://adoptionbenefits.com/6-foster-children-benefits/> (describing the benefits from adopting from foster care).

3. Once a child is adopted, I will use the term “first family,” “first mom,” “first dad,” or “first parent” to describe the first parents the child had before adoption. Even children adopted at birth had a first mother and a first father that gave the child life. There is currently

down the foster-adopt pipeline and emotionally scarred with all legal ties to their first family severed. This is not how foster care is supposed to work. Foster-adopt is a misnomer that has been incorrectly used to describe concurrent planning. Concurrent planning is an effort to place foster children with foster parents that supports *both* reunification with their parents and adoption if reunification *is not possible*. This Note will show how concurrent planning requires extraordinary effort on the part of all the players: lawmakers, child welfare agencies, first parents, and foster parents.

Child welfare is governed by individual states, but the federal government imposes national guidelines that states must follow to qualify for federal funding. The federal government's goal, acknowledging family preservation, has somehow been led astray with an alternate goal of adoption. The detraction from family preservation and reunification to adoption hurts families and children.

This Note will first review the history of child welfare policy and legislation from the 1700s until the most recent passing of Family First Prevention Services Act of 2018. Second, this Note will end with a short summary of the child dependency legal system in California. Third, this Note will highlight three problems with the concurrent planning system: sabotage, foster home shortage, and the pitfalls of adoption. Fourth, the three problems will be analyzed thoroughly. Lastly, the proposal section will discuss possible solutions to the above mentioned problems by bringing back sequential planning, instead of immediate concurrent planning, with an emphasis on empathy and contact between foster parents and parents.

II. BACKGROUND

A. Brief History of Child Welfare in the United States: Pre-1980

Starting in the 1700s, families that could not care for their children often indentured their children to wealthier families.⁴ The children lived

a shift of terminology from "biological parent" or "birth parent" to "first parent." "[T]he use of the term *first-mom* implies that the biological mother is more than simply a genetic connection to the adoptee." Angela Tucker, *Birth-mother vs. First-mother? A Shift in Adoption Terminology*, THE ADOPTED LIFE (Apr. 19, 2017), <http://www.theadoptedlife.com/angela-blog/2017/4/19/birth-mother-vs-first-mother-the-shift-in-adoption-terminology>. First parents of foster children that have not been adopted will be simply referred as parents.

4. DIANE F. REED & KATE KARPILOW, UNDERSTANDING THE CHILD WELFARE SYSTEM IN CALIFORNIA: A PRIMER FOR SERVICE PROVIDERS AND POLICYMAKERS 4 (June 2009), <http://www.phi.org/uploads/application/files/h31ef4xly0mtt9oa4lsv07oko48r6kg19g6fisd62qmymwbs5.pdf>.

with the wealthier family in exchange for free labor.⁵ Then in the mid-1800s, private religious and charitable organizations started involuntarily removing children from their “contaminating surroundings” due to poverty, ultimately placing them in orphanages.⁶ By the end of the 19th century, reformers felt that orphanages had oppressive atmospheres and the rigid discipline did not cultivate good character or individualism.⁷

In the early 1900s, child welfare started to draw national political attention. In 1909, President Theodore Roosevelt hosted a national conference on child welfare.⁸ Participants endorsed natural family preservation or “approximation of family life” if the former could not be achieved.⁹ As a result, states developed “mothers’ pensions” that enabled single mothers to stay home with their children and not work.¹⁰ However, the subsidies came with conditions such as going to church, taking cooking classes, and not using tobacco.¹¹ Children who could not stay with their family of origin were placed in either a surrogate family home or a cottage-like group home that was designed to be more home-like than the former institutionalized orphanages.¹² Juvenile courts took over responsibility of child welfare at the same time the country was dealing with the Depression.¹³

During the New Deal era, the federal government began funding child welfare services with the Social Security Act of 1935.¹⁴ With this additional funding, states were able to establish child welfare agencies and develop programs such as foster care reimbursements.¹⁵ Child welfare was essentially general welfare in the form of subsidies to families who were low-income or fostered children and remained that way until the passage of the Adoption Assistance and Child Welfare Act of 1980.¹⁶

5. Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 439 (1983).

6. *Id.* at 435-36. Organizations often attributed poverty as a result of “moral defects.” See also DeLeith Duke Gossett, *The Client: How States Are Profiting from the Child’s Right to Protection*, 48 U. MEM. L. REV. 754, 766 (2018).

7. Libby Adler, *The Meanings of Permanence: A Critical Analysis of the Adoption and Safe Families Act of 1997*, 38 HARV. J. LEGIS. 1, 14 (2001).

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 15.

12. *Id.* at 16.

13. Gossett, *supra* note 6, at 769.

14. *Id.* at 769-70.

15. See *id.* at 770, 786.

16. *Id.* at 769, 775. See also Deborah Sanders, *Toward Creating a Policy of Permanence for America’s Disposable Children: The Evolution of Federal Foster Care Funding Statutes from 1961 to Present*, 29 J. LEGIS. 51, 58 (2003) (noting the federal government’s emphasis

In 1962, Dr. C. Henry Kempe published an article, *The Battered-Child Syndrome*, in the Journal of the American Medical Association, drawing national attention to the fact that actual physical child abuse was sometimes covered up as “accidents.”¹⁷ As a result of Dr. Kempe’s work, along with cases of extreme physical child abuse, Congress overwhelmingly passed the Child Abuse Prevention and Treatment Act (“CAPTA”).¹⁸ CAPTA pushed states to mandate professionals (such as physicians and teachers) to report, investigate, and treat child abuse, as a condition for receiving federal funding.¹⁹ As a result, child abuse reports and removals exploded.²⁰ Child abuse reports went from 10,000 in 1967 to 670,000 in 1976.²¹ At this point, child welfare was still a system of mere financial assistance, with no exit plan such as reunification services.²² By 1977, there were over half a million children languishing in the foster care system (often referred to as “foster care drift”) as a result of mandated reporting and no real strategy to move children out of foster care.²³

B. Child Welfare As A Service: 1980-1997

In an effort to decrease the number of children in foster care, Congress passed the Adoption Assistance and Child Welfare Act of 1980 (“1980 Act”), promoting removal prevention and early family reunification.²⁴ The 1980 Act also provided a fail-safe alternative by recognizing and incentivizing adoption with financial assistance in cases where children could not reunify with their family.²⁵ Although the 1980 Act removed some of the financial barriers to families that wanted to adopt with adoption assistance, family reunification was still the priority and there was no real push for states to terminate parental rights in order to have children available for adoption.²⁶ The 1980 Act mandated that states make “reasonable efforts” both to limit child removal and to

was still on fixing social and economic inequities and imbalances by funding assistance for needy families and foster families caring for children of incapacitated parents in 1961).

17. See Gossett, *supra* note 6, at 771-72.

18. Adler, *supra* note 7, at 17-18.

19. Gossett, *supra* note 6, at 772 n.103.

20. *Id.*

21. *Id.* at 772 n.104 (citing Adler, *supra* note 7, at 18).

22. Sanders, *supra* note 16, at 56-57, 61-62; REED & KARPILOW, *supra* note 4, at 15. Reunification services consist of programs, such as substance abuse or parenting classes, to help parents get their children back. *Id.*

23. See Gossett, *supra* note 6, at 772 n.105, 73-74 (quoting PATRICK A. CURTIS, *THE CARE CRISIS: TRANSLATING RESEARCH INTO POLICY AND PRACTICE 5* (1999)).

24. Sanders, *supra* note 16, at 57, 64-65.

25. *Id.* at 65-66.

26. *Id.* at 67.

reunify if removal was necessary.²⁷ Many caseworkers were reluctant to terminate parental rights because they saw termination as a failure on their part.²⁸ As a result, the number of children in foster care remained above half a million.²⁹

The combination of increased social acceptance of unwed mothers and the increased availability of abortion and contraception “dried up the supply of traditionally adoptable children.”³⁰ Hopeful adoptive parents and private adoption organizations heavily lobbied to free up more children for adoption by arguing the “reasonable efforts” requirement protected bad parents and was the primary barrier to adoption.³¹ Further sparked by high profile cases, where children died or suffered severe injuries in abusive homes despite reports to child welfare officials, Congress passed the Adoption and Safe Families Act of 1997 (“ASFA”).³²

C. Reunification Timelines, Adoption Bonuses and Concurrent Planning: The Adoption and Safe Families Act of 1997

Proponents of ASFA heavily promoted adoption under the guise of “permanency,” moving away from the prior goal of reunification.³³ The promotion of adoption worked, reaching all the way to the United States President. President Clinton signed an initiative “to double the number of children adopted from foster care within five years.”³⁴ To meet this goal, ASFA required states to move for termination of parental rights once the child spent fifteen out of twenty-two months in foster care, absent an exception.³⁵ A move for termination was required in cases with “aggravated circumstances,” such as torture or felony assault.³⁶ States

27. Gossett, *supra* note 6, at 776.

28. Sanders, *supra* note 16, at 67.

29. *Id.* at 777.

30. Garrison, *supra* note 5, at 443 (internal citation omitted).

31. Hilary Baldwin, *Termination of Parental Rights: Statistical Study and Proposed Solutions; Legislative Reform*, 28 J. LEGIS. 239, 256 (2002); H. Elenore Wade, *Preserving the Families of Homeless and Housing-Insecure Parents*, 86 GEO. WASH. L. REV. 871, 889 (2018).

32. Gossett, *supra* note 6, at 778-81, 778 n.140. One of the high-profile cases occurred in 1995 when a child by the name of Elisa Izquierdo was murdered by her schizophrenic mother after she reunified, despite the mother’s plea not to reunify. *Id.* at n.140.

33. *Id.* at 779-80.

34. *Id.* at 780 (internal citation omitted).

35. Catherine J. Ross, *The Tyranny of Time: Vulnerable Children, “Bad” Mothers, and Statutory Deadlines in Parental Termination Proceedings*, 11 VA. J. SOC. POL’Y & L. 176, 196 & n.91 (2004). ASFA had three exceptions: when (1) child is in kinship (relative) foster care; (2) state can demonstrate a “compelling reason” why a petition would not be in the child’s best interest; or (3) state has failed to provide services in the case plan necessary for the child’s safe return to home. *Id.* at n.91.

36. *Id.* at 196.

also received incentives ranging from \$4,000 to \$6,000 per adoption.³⁷ In addition, states received substantial bonuses for increasing the overall number of children adopted from foster care.³⁸ In 1999, the federal government awarded thirty-five states with \$20 million in adoption bonuses.³⁹ In 2003, Florida alone received \$3.5 million in adoption bonuses.⁴⁰

In a further effort to hasten adoption finalizations, ASFA endorsed concurrent planning.⁴¹ Concurrent planning replaced “sequential planning,” which required the child welfare agencies to exhaust efforts to reunify before considering other permanency plans, such as adoption.⁴² Under concurrent planning, agencies have to make reasonable efforts towards reunification and find a permanent home to prepare for failed reunification efforts at the same time.⁴³ Under sequential planning, reunification efforts generally lasted six to eighteen months.⁴⁴ If reunification efforts failed, finding a permanent home could take another several months to years, prolonging the child’s stay in foster care.⁴⁵ In concurrent planning, a permanent home would already be in place when parental rights were terminated, therefore the child could be adopted right away.⁴⁶

D. Criticisms of ASFA

ASFA has been criticized for the rigid timelines, adoption bonuses, and concurrent planning. One of the main criticisms is that the fifteen-month timeline runs counter to the realities of substance abuse treatment.⁴⁷ In 1999, the U.S. Department of Health and Human Services found between one-third and two-thirds of child welfare cases were

37. See Sanders, *supra* note 16, at 74 n.134.

38. William Wesley Patton & Amy M. Pellman, *The Reality of Concurrent Planning: Juggling Multiple Family Plans Expeditiously Without Sufficient Resources*, 9 U.C. DAVIS J. JUV. L. & POL’Y 171, 175 (2005).

39. Gossett, *supra* note 6, at 785.

40. Patton & Pellman, *supra* note 38, at 175.

41. See 42 U.S.C. § 671(a)(15)(F) (“[R]easonable efforts to place a child for adoption or with a legal guardian . . . may be made concurrently with reasonable efforts . . .” to preserve and reunify families.).

42. Gossett, *supra* note 6, at 782.

43. Sanders, *supra* note 16, at 75.

44. Amy D’Andrade et al., *Concurrent Planning in Public Child Welfare Agencies: Oxymoron or Work in Progress?*, 28 CHILD. & YOUTH SERVS. REV. 78, 79 (2006).

45. *Id.*

46. Sanders, *supra* note 16, at 75.

47. Ruth McRoy, *Expedited Permanency: Implications for African-American Children and Families*, 12 VA. J. SOC. POL’Y & L. 475, 486 (2005). Ross, *supra* note 35, at 176, 196 & n.91.

affected by substance use.⁴⁸ In 2012, around 31% of foster children were removed for parental alcohol or drug use nationwide.⁴⁹ In several states that percentage was above 60%.⁵⁰ In 2018, a West Virginia official told Congress that substance abuse affects 85% of child welfare cases in their state.⁵¹ Although recovering from substance abuse can be a lifelong process, adequate treatment itself typically takes at least twenty-four months, including the time associated with relapses.⁵² Other obstacles include inadequate or lack of available substance abuse treatment services.⁵³ In 2002, a U.S. government survey revealed that thirty-nine out of forty-six states lacked sufficient drug treatment programs.⁵⁴ In California, the substance abuse problem in child welfare families was 67% in 2003, but only 31% of agencies had the capacity to provide treatment.⁵⁵ In addition to recovery, families need adequate housing, employment, and parenting skills, all of which also take time.⁵⁶

ASFA does not provide a comparable incentive or bonus program for successful reunifications.⁵⁷ As a result of the financial incentives, Texas now initiates petitions to terminate parental rights of all known and unknown parents at the very beginning of child welfare cases, nearly 100% of the time.⁵⁸ By 2015, Texas collected \$84 million, 15% of all state adoption incentives.⁵⁹ However, Brandon Logan from the Texas Policy Institute argued:

The blanket practice of filing petitions to terminate is almost uniformly contrary to the stated intent of [Department of Family and

48. Child Welfare Info. Gateway, *Parental Substance Use and the Child Welfare System*, U.S. DEP'T HEALTH & HUM. SERVS., CHILD. BUREAU 2 (Oct. 2014), <https://www.childwelfare.gov/pubPDFs/parentalsubabuse.pdf>.

49. *Id.*

50. *Id.* at 3.

51. Taylor Stuck, *Legislation allows for more measures to keep kids out of foster care*, THE HERALD-DISPATCH, Sept. 30, 2018, https://www.herald-dispatch.com/news/legislation-allows-for-more-measures-to-keep-kids-out-of/article_b06b8f42-bf7f-56ee-ae2-dfc3604f0b2c.html.

52. McRoy, *supra* note 47, at 479.

53. Mary O'Flynn, *The Adoption and Safe Families Act of 1997: Changing Child Welfare Policy Without Addressing Parental Substance Abuse*, 16 J. CONTEMP. HEALTH L. & POL'Y 243, 260 (1999).

54. Ross, *supra* note 35, at 211-12.

55. Patton & Pellman, *supra* note 38, at 180.

56. Ross, *supra* note 35, at 199.

57. Adrienne Whitt-Woosley & Ginny Sprang, *When Rights Collide: A Critique of the Adoption and Safe Families Act from a Justice Perspective*, 93 CHILD WELFARE 111, 124-25 (2014).

58. See Christie Renick, *Bigger in Texas: Number of Adoptions, and Parents Who Lose Their Rights*, CHRON. SOC. CHANGE (May 23, 2018), <https://chronicleofsocialchange.org/featured/bigger-in-texas-adoptions-and-parents-who-lose-their-rights/30990>.

59. *Id.*

Protective Services] (DFPS) and to the best interests of children . . . It places parental rights at legal risk with little or no evidence to substantiate termination. It also prevents parents from fully engaging in rehabilitative services, because their genuine need for such services is used as evidence to terminate their rights.⁶⁰

Once a child is adopted, the state continues to make payments to the adoptive parents, but it costs 40% less than foster care that requires case management services.⁶¹ In a cost-benefit analysis, it is easy for agencies to turn their focus to adoption and expend less resources towards reunification efforts.⁶²

Critics also argue that ASFA over-emphasizes adoption at the expense of family reunification. Without extra funding or added resources, concurrent planning takes resources and efforts away from reunification when there is the added task of pursuing adoption plans.⁶³ Caseworkers have a limited amount of time that will need to be divided between the goal of permanency and reunification, with the former as the focus under ASFA.⁶⁴ In 1999, a study in Santa Clara and San Mateo, California, revealed that only 5% of concurrent planning cases resulted in reunification, while 46% of non-concurrent cases reunified.⁶⁵

The most controversial of the criticisms that is not so easily reduced to a cost-benefit analysis is the conflict of interest that arises from concurrent planning. Experts often praise concurrent planning, but, it is premised on the hopeful adoptive family supporting reunification and interaction with the parents.⁶⁶ The difficulty of supporting reunification, while hoping for adoption at the same time, is often acknowledged by proponents of concurrent planning but never fully addressed.⁶⁷ Some

60. *Id.*

61. Brittany Lercara, *The Adoption and Safe Families Act: Proposing a "Best Efforts" Standard to Eliminate the Ultimate Obstacle for Family Reunification*, 54 FAM. CT. REV. 657, 662 (2016).

62. See Sanders, *supra* note 16, at 75.

63. *Id.*

64. Baldwin, *supra* note 31, at 295-96.

65. Carolyn Lipp, *Fostering Uncertainty?: A Critique of Concurrent Planning in the Child Welfare System*, 52 FAM. L.Q. 221, 239 (2018).

66. See Eva J. Klain et al., *Healthy Beginnings, Healthy Futures: A Judge's Guide*, A.B.A. CENT. ON CHILD. & L. 101 (2009) ("Because the lines of communication and interaction are much more open [in concurrent planning], parents can be more involved in the daily lives of their infants and can learn from more seasoned foster parents."). *Id.*

67. See *id.* at 109 (noting that issues of caregiver support of reunification or lack thereof can be addressed at review hearings but offering no advice on what to do if the caregiver does not support reunification). See also Susan Brooks, *Concurrent Planning—Existing Challenges and New Possibilities*, REACHING OUT CHILD WELFARE PRACT. J. (N. Calif. Training Acad., Davis, Calif.), Spring/Summer 2009, at 11 (advising agencies to "[a]cknowledge that foster/adoptive parents are taking on the role of 'Plan B' and still support parental visitation.

social work experts see concurrent planning as two inherently competing goals—reunification and adoption—putting states, foster families and agency workers in a “schizophrenic position.”⁶⁸ The conflicting roles inherent in the title of “concurrent foster families” also make it difficult to recruit families that are willing to subject themselves to the emotional toll of an extended period of uncertainty regarding reunification or adoption.⁶⁹ Linda Katz, who helped develop concurrent planning, acknowledges that the foster parents’ “role is inevitably painful but necessary for the child’s well-being.”⁷⁰ Even when concurrent foster families do sign up for the position, they could end up not supporting or even sabotaging reunification.⁷¹

E. Family First Prevention Services Act of 2018

Various criticisms of ASFA finally led to the passing of the Family First Prevention Services Act (“Family First”) in 2018.⁷² Primarily as an effort to get rid of congregate care, Family First contains sweeping reforms that seek to increase family preservation.⁷³ First, preventing removal is encouraged and funded.⁷⁴ Second, the fifteen-month timeline is eliminated.⁷⁵

Advocates for Family First argued that the federal government never did enough to prevent children from needing foster care in the first place.⁷⁶ Advocates argued the funding scheme did the opposite, instead providing a “perverse incentive” to tear families apart.⁷⁷ Senator Ron Wyden argued, “federal policy shouldn’t create an incentive to rip these families apart . . . [i]t should create incentives to keep families together.”⁷⁸ Professor Naomi Cahn found that the federal government spent less than five percent of its child protective services budget on

This is not easy. Encourage foster/adoptive parents to become more involved in parent-child visits to promote more supportive relationships with biological parents.”) *Id.*

68. See Sanders, *supra* note 16, at 75.

69. Lipp, *supra* note 65, at 237. The term foster/adoptive home, as opposed to concurrent home, eliminates the dual nature of the position in name and falsely connotes a linear progression. Arguably it is much easier to recruit hopeful adoptive parents with adoption as the incentive as opposed to reunification.

70. *Id.* at 236 (internal quotation marks omitted) (internal citation omitted).

71. See *infra* Part IV.A.

72. See generally Daniel Heimpel, *Inside Game: The Key Players Behind Washington’s Biggest Foster Care Reform in Decades*, CHRON. SOC. CHANGE (Mar. 7, 2018), <https://chronicleofsocialchange.org/featured/inside-game-how-foster-care-changed-forever/30118>.

73. *Id.*

74. *Id.*

75. Stuck, *supra* note 51.

76. See Heimpel, *supra* note 72.

77. *Id.*

78. *Id.* (internal quotation marks omitted).

family preservation, while the remaining ninety-five percent was spent on foster care.⁷⁹ Laura Barno, Director for the Division of Children and Adult Services at West Virginia Department of Health and Human Resources, explains that under ASFA, “West Virginia only receives federal funding if Child Protective Services removes a child from the home.”⁸⁰ One social worker describes the catch-22 of the old funding mechanisms: “[the parents] need a lot stuff, but I know they need counseling. And I’m being told that I cannot give them counseling unless I open a case.”⁸¹ Although foster care could be avoided with services, services could not be offered until the family was put in the system.⁸²

Family First opens up a new funding stream for services to prevent unnecessary child removals and eliminates the fifteen-month timeline for reunification services.⁸³ Barno said, “the hope is with Family First is to do more up-front work with more resources to keep those kids safe in the home [of origin].”⁸⁴ Fewer removals means fewer kids in expensive foster care.⁸⁵ In the alternative, if a child does need to be removed, the elimination of a federally-mandated deadline will hopefully lead to more reunifications and address the issues of difficult timelines and lack of emphasis on reunification. Implementation of Family First begins in October 2019, so it will be some time before we see its effects.⁸⁶

F. General Overview of California’s Dependency Court Process

In addition to federal law, the state of California has its own child dependency process. When a social worker determines that immediate protection is necessary based on child abuse allegations, a child is taken

79. Wade, *supra* note 31, at 893 (quoting Naomi R. Cahn, *Children’s Interests in a Familial Context: Poverty, Foster Care, and Adoption*, 60 OHIO ST. L.J. 1189, 1213-14 (1999)).

80. Stuck, *supra* note 51.

81. Joey J. Gardner Jr., *Understanding Social Workers’ Knowledge of Foster Care Drift*, WALDEN U. SCHOLARWORKS 72 (2018) (unpublished Ph.D. dissertation, Walden University), <https://scholarworks.waldenu.edu/cgi/viewcontent.cgi?article=6985&context=dissertations>.

82. *Id.* See U.S. DEP’T OF HEALTH & HUMAN SERVS., CHILD. BUREAU, CHILD WELFARE OUTCOMES 2015: REPORT TO CONGRESS at app. F-2 (2015), <https://www.acf.hhs.gov/sites/default/files/cb/cwo2015.pdf> (showing that the vast majority of child welfare cases are based on neglect. In 2015, 13% of removals were due to physical abuse and 4% were due to sexual abuse).

83. See Stuck, *supra* note 51.

84. *Id.* (internal quotation marks omitted).

85. See Deborah S. Harburger & Ruth A. White, *Reunifying Families, Cutting Costs: Housing-Child Welfare Partnerships for Permanent Supportive Housing*, 83 CHILD WELFARE 493, 495 (2004) (showing the foster care cost of \$45,377 per year per family in the early 2000s).

86. Stuck, *supra* note 51.

into protective custody.⁸⁷ The local county department of child welfare has two court days to file a petition that names the parties involved in the case (children and parents) and describes the allegations of abuse or neglect.⁸⁸ A detention hearing is required the next court day after the petition is filed.⁸⁹ In this hearing, a judge determines whether custody is justified based on the allegations of neglect or abuse.⁹⁰ Following the detention hearing, the social worker has fifteen days, while the child is in custody, to investigate and collect evidence to prove the allegations at the jurisdiction hearing.⁹¹ The parent can admit the allegations, submit the matter to the judge, or contest the allegations with the right to a bench trial.⁹² If the judge determines the allegations are true, then the child is within the jurisdiction of the court.⁹³ The child welfare agency then has no more than ten days—if the child is detained—to propose a plan at a disposition hearing.⁹⁴ At the disposition hearing, the judge decides whether the plan should be family maintenance (“FM”) (parents receive services and the child is returned home), family reunification (“FR”) (parents receive services and the child is placed out-of-home), or permanent placement (“PP”) (in the most serious cases services are bypassed altogether and the child stays in out-of-home care).⁹⁵

During the period between removal and disposition, foster children are normally placed in a temporary shelter or emergency foster care.⁹⁶ If the child is to remain in foster care and FR services are offered to the parent, the child welfare agency is required to plan concurrently.⁹⁷ If the emergency home is willing to adopt, the child normally stays in the same

87. *Dependency Court Process*, ADVOKIDS, <https://www.advokids.org/legal-tools/juvenile-court-process/#dcp2> (last visited Jan. 28, 2019).

88. *Id.*

89. *Id.*

90. *Id.*

91. *See id.*

92. *Id.*

93. ADVOKIDS, *supra* note 87.

94. *Id.*

95. *Id.*

96. REED & KARPILOW, *supra* note 4, at 12. If available, the child can be placed in an approved relative or non-related extended family member (“NREFM”). *See id.* at 10 (explaining when the child is removed from the home and “placed in a safe environment”). However, it is probably unlikely that a relative or NREFM is an existing approved foster home. In Santa Clara County, children are taken to an assessment intake center to obtain information about the child’s needs and locate placement. *See also Online Policies & Procedures*, SANTA CLARA COUNTY DEP’T OF FAM. & CHILD. SERVS., https://www.sccgov.org/ssa/opp2/06_outohome/6-3.html#locating (last updated Nov. 19, 2011). “When a relative or non-relative extended family member (NREFM) is not immediately available for emergency placement following a child’s being brought into temporary custody, Emergency Satellite Home (ESH) placements provide a temporary placement pending further assessment and planning.” *Id.*

97. *See* REED & KARPILOW, *supra* note 4, at 16.

home, bypassing the “matching” process.⁹⁸ If the emergency foster home is not interested in being a concurrent placement, the agency will need to find a concurrent home that best matches the child’s needs and circumstances.⁹⁹ The child is moved after being matched with a concurrent family.¹⁰⁰ If hopeful adoptive parents do not want to accept concurrent responsibilities and risk losing the child to reunification, they would wait until parental rights are terminated before having the child placed in their home—a process that takes six to eighteen months while the child continues to age.¹⁰¹

Following the disposition of the case, there are review hearings held every six months to determine the progress of the parent and discuss next steps.¹⁰² Services shall not exceed twelve months from the date of jurisdiction or eighteen to twenty-four months if the court finds a “substantial probability the child will be returned and safely maintained in the home.”¹⁰³ If the court finds by clear and convincing evidence that the parent failed to participate and make progress in the services offered and it is not probable the child can be returned home within the next six months, then the court may terminate reunification services and set a § 366.26 hearing (“26 hearing”) to select a permanent plan within 120 days.¹⁰⁴ At the 366.26 hearing, parental rights are terminated if adoption is a viable option for the child.¹⁰⁵ If adoption is not viable, other permanent placement options are considered, such as legal guardianship, long-term foster care, or emancipation.¹⁰⁶

III. THE LEGAL PROBLEM

Despite the changes in funding and timelines, Family First does not eliminate the downfalls of concurrent planning. Reunification rates have reached an all-time low, dipping below 50%.¹⁰⁷ Concurrent planning remains an obstacle to reunification. The goals of hopeful adoptive

98. See SANTA CLARA COUNTY DEP’T OF FAM. & CHILD. SERVS., *supra* note 96.

99. *Id.*

100. *See id.*

101. 49% of women surveyed preferred to adopt a child under the age of two and 22% preferred to adopt a child between the ages of two and five. Jones, *supra* note 1, at 40.

102. *See* ADVOKIDS, *supra* note 87.

103. *Id.*

104. *Id.*

105. REED & KARPILOW, *supra* note 4, at 20 (showing that the Selection and Implementation Hearing occurs before either legal guardianship is established or parental rights are terminated).

106. *See id.* at 17-18.

107. John Kelly, *A Look Back at 2018: The Year in Youth Services*, CHRON. SOC. CHANGE (Dec. 30, 2018), <https://chronicleofsocialchange.org/child-welfare-2/a-look-back-at-2018-the-year-in-youth-services/33304>.

parents conflict with those of parents—both of whom want permanent custody of the child. This is not a problem that can be glossed over.

Furthermore, the number of foster homes is dwindling and the number of foster children is increasing. Lower reunification rates increase the need for foster homes. Pushing foster parents to adopt exacerbates the decline.

Adoption from foster care also comes at a cost. The societal cost is both financial and emotional. Before a child can be adopted from foster care, they must first be removed from their family and placed in costly foster care. After “reasonable efforts” at reunification fail, parental rights have to be terminated before the child can be adopted. Adoption severs the connection with parents causing psychological and emotional difficulties. Concurrent planning negatively affects reunification rates, which also negatively affects foster children, and increases the need for more foster homes.

IV. ANALYSIS

A. Ripe for Sabotage

The issues of conflict of interest raised in Part II-D remain—the interest to adopt conflicts with the interest to reunify—even with the passing of Family First.¹⁰⁸ One issue often glossed over and never fully addressed is the problem of hopeful adoptive foster parents sabotaging reunification. A 2004 study found that a majority of foster parents became concurrent foster parents in order to increase their chances of adoption.¹⁰⁹ “People adopt children for exactly the same reasons they choose to have children biologically - they want a family; they want a child; they want a way to express and give love. They want this child so badly that the words echo in their brain: ‘I want a child.’”¹¹⁰ With the two goals of adoption and reunification at direct odds with each other, it is no surprise that foster parents often sabotage reunification to increase their chances of adoption. In one case, a foster mother told the foster children that their mother was “bad, that she was a drug addict, that she didn’t want them back.”¹¹¹ The disparagements had a negative effect on the mother: causing her to dread visits, start showing up late or sometimes

108. See *supra* Part II.D.

109. Rycraft & Benavides, *supra* note 2.

110. Thomas Simmons, *Twisted Interests: People in the Interest of S.A.H. and the State of Open Adoptions in South Dakota*, 42 S.D. L. REV. 537, 550 n.97 (1997) (internal quotation marks omitted) (internal citation omitted).

111. Larissa MacFarquhar, *When Should a Child Be Taken from His Parents?*, NEW YORKER, Aug. 7 & 14, 2017, at 37, 42.

not at all.¹¹² Despite the foster agency warning the foster mother not to bad mouth the mother in front of the children, she continued to disparage the mother—most likely because there were no consequences.¹¹³ Worse yet, after several false accusations of physical and sexual abuse by the foster mother, the children remained in the foster mother’s care.¹¹⁴ One of the children later revealed that the foster mother had told him to accuse his mother of punching him.¹¹⁵

False accusations are one extreme, but sabotage can come in more subtle ways of general lack of support, either consciously or subconsciously. For example, one foster parent reveals how she feels, “I’m furious! The case manager has told us now that Jeff will spend Christmas with his birth mother. We’ve had him as a foster child since he was one, coming to us all dirty and hungry.”¹¹⁶ Under concurrent planning, the foster parents are supposed to encourage and support visitation, not be opposed to it.¹¹⁷ The existence of articles written for hopeful adoptive foster parents, further exhibit the prevalence of the problem:

Don’t sabotage. I know this is a tricky area for foster families and sometimes they get blamed for attempting to sabotage, even if all they are doing is addressing their concerns with the team. If you are always late for visits, the child always seems to have a fever when a visit is scheduled, or you [nit]pick the biological parents’ every

112. *Id.*

113. *Id.* But see Douglas F. Johnson, *Rights and Responsibilities of Foster Parents in the Courtroom*, JUDGE’S PAGE NEWSL. 19 (Aug. 2007) (According to Judge Johnson, from the National Council of Juvenile and Family Court Judges, judges may remove children “[i]f a foster parent is sabotaging or undermining reunifications efforts . . . I have had to do this on occasion. I suspect many of you have too.”). See also *infra* Part IV.C (however, due to the shortage of foster homes, it is difficult to secure new placements); ANNE E. CASEY FOUND., *infra* note 122 and accompanying text (noting that when new placements are secured, sometimes “child welfare systems send children far from home or repeatedly move a child from one school to another, that can cause problems, too. It’s hard to maintain or rebuild family and other relationships over long distances; parents may not be able to afford visits to far away treatment centers. And school stability is an important building block for getting a good education. While federal legislation requires agencies to try to keep children in their home schools, that doesn’t always happen.”). *Id.*

114. MacFarquhar, *supra* note 111.

115. *Id.*

116. *Co-Parenting: The Key to Reunification*, FOSTER CARE REV. INC. THE REVIEWER 1, 5 (May 2010), <https://www.fostercarereview.org/wp-content/themes/Theme/theme45009/files/Co-parenting%20Newsletter%202010.pdf>

117. See generally Dana Leader, *Tip Sheet for Supporting Family Reunification*, A.B.A. (Oct. 1, 2017), https://www.americanbar.org/groups/child_law/resources/child_law_practiceonline/child_law_practice/vol-36/sept-oct-2017/tip-sheet-for-supporting-family-reunification/.

move, that is a form of sabotage, even if you don't realize you are doing it.¹¹⁸

One long-time foster parent explains, “one of the stumbling blocks to reunification right now is that the resource parents—those that become foster parents because of the possibility of adoption—do not understand their role.”¹¹⁹ Although one judge explained his ability to remove the foster child in the event of sabotage,¹²⁰ there is a shortage of foster homes¹²¹ and disrupted placements can exacerbate existing trauma with negative consequences to the child.¹²²

Despite a foster parent's desire to adopt, the United States Supreme Court has held that a foster family is not entitled to “some sort of ‘squatter's rights’” for having a child in their care.¹²³ Parents have substantive due process parental rights and these rights do not “evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.”¹²⁴ Notwithstanding ASFA's strong push for adoption, reasonable efforts towards reunification must still be made concurrently with permanency efforts.¹²⁵ Although proponents of concurrent planning emphasize that communication and relationships are necessary and productive towards reunification,¹²⁶ foster parents continue to avoid it and some caseworkers actively discourage it. One study found that foster parents were likely to avoid all contact with parents, in part because of active discouragement from child caseworkers and in

118. Caroline Bailey, *How to Support Reunification, Even If You Don't Want To*, ADOPTION.COM (Mar. 26, 2017), <https://adoption.com/how-to-support-reunification-even-if-you-dont-want-to>.

119. Trudy Petkovich, *Selling Co-Parenting*, FOSTER CARE REV. INC. THE REVIEWER 1, 2 (2010) <https://www.fostercarereview.org/wp-content/themes/Theme/theme45009/files/Co-parenting%20Newsletter%202010.pdf>.

120. See Johnson, *supra* note 113 and accompanying text.

121. John Kelly et al., *The Foster Care Housing Crisis*, CHRON. SOC. CHANGE 1 (2017), <https://chronicleofsocialchange.org/wp-content/uploads/2017/10/The-Foster-Care-Housing-Crisis-10-31.pdf>.

122. See *What is Foster Care?*, THE ANNIE E. CASEY FOUND., <https://www.aecf.org/blog/what-is-foster-care/> (last updated June 6, 2019) (noting that “[w]hen child welfare systems send children far from home or repeatedly move a child from one school to another, that can cause problems, too. It's hard to maintain or rebuild family and other relationships over long distances; parents may not be able to afford visits to far away treatment centers. And school stability is an important building block for getting a good education. While federal legislation requires agencies to try to keep children in their home schools, that doesn't always happen.”).

123. See *Smith v. Org. of Foster Families*, 431 U.S. 816, 860 (1977) (quoting in part *Bennett v. Jeffrey*, 40 N.Y.2d 543 (1976)).

124. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

125. See 45 U.S.C. § 671(a)(15)(F).

126. See Klain et al., *supra* note 66, at 109.

part because of their own reluctance to interact with parents.¹²⁷ Foster parents reported that, in training, they were expected to maintain contact with parents and work in partnership to help reunify.¹²⁸ However, in practice, caseworkers actively discouraged foster parents from initiating contact with parents or attending court hearings.¹²⁹ It could be that foster parents are reluctant to have contact with parents due to conflicting expectations, a presumed history of abuse,¹³⁰ or some form of intentional or unintentional sabotage, but the fact remains that some foster parents are not fulfilling their role as required for concurrent planning. Researchers have found when parents perceive opposition, they visit their children less and are less likely to regain custody.¹³¹

Just as conflicts of interest and sabotage can have a negative impact on reunification, support from foster families can be one of the most important resources for promoting reunification.¹³² “When foster parents support or mentor birth parents, they can enhance the ability of birth parents to stay informed about their children’s development while they are in out-of-home care, improve parenting skills, increase placement stability, and lead to more timely reunifications.”¹³³ A parent describes her experience:

She [(foster mom)] said to me, ‘No matter what I do for him, no one can give him the love you can — so don’t give up.’ I began to believe that my recovery was possible. I had someone who actually believed I could get him back. While she might have loved to adopt my son, she nevertheless encouraged me to do my best to reunite with him. That meant a lot to me. . . . About a week before Christmas, the time finally came for my son to come home.¹³⁴

Regular contact and increased visitation is one of the best predictors for successful reunifications in very young children.¹³⁵ Foster parents have the ability to advance reunification rates; however, if they sabotage

127. Ande Nesmith, *Factors Influencing the Regularity of Parental Visits with Children in Foster Care*, 32 CHILD ADOLESCENT SOC. WORK J. 219, 224 (2015).

128. *Id.* at 226.

129. *Id.*

130. See *Co-Parenting: The Key to Reunification*, *supra* note 116, at 2 (noting that foster parents do not always have information on the child or case plan); see also Leslie Rose Nelson, *The Evolving Nature and Process of Foster Family Communication: An Application and Adaptation of the Family Adoption Communication Model*, 9 J. FAM. THEORY & REV. 366, 370 (Sept. 2017).

131. Garrison, *supra* note 5, at 483.

132. Leader, *supra* note 117.

133. Laura Hutton, *Working with Parents*, FOSTERING FAMILIES TODAY, 2019, at 34 (internal quotation marks omitted).

134. Lynne Miller, *Heaven Sent*, FOSTERING FAMILIES TODAY, 2019, at 23.

135. Klain et al., *supra* note 66, at 97.

and impede in the alternative, the number of children in care will only increase.

B. Foster Family Shortage

The *Chronicles of Social Change* have declared a Foster Care Housing Crisis.¹³⁶ Hopeful adoptive parents are often recruited to fill the demand for foster homes. However, often times hopeful adoptive parents are not effective in assisting with reunification and they are difficult to retain long term. Despite the competing interests of adoption and reunification, empathy is an effective tool that can increase the length of time one chooses to foster or make a foster parent “resilient.”¹³⁷

Foster care capacity has decreased in at least half of the states between 2012 and 2017.¹³⁸ This is due to either an increase in foster children or a decrease in foster homes, and sometimes both.¹³⁹ Government officials attribute the uptick in removals to the opioid crisis but also note that high-profile death cases prompt unnecessary removal of children.¹⁴⁰ Decreasing reunification rates also keep more children in foster care.¹⁴¹ In 2016, there were 118,000 foster children whose parental rights were terminated but were still waiting to be adopted.¹⁴² The number of children “awaiting adoption” has increased every year from 2012-2016, outpacing the availability of adoptive homes.¹⁴³ The shortage of foster homes in Washington State has led foster youth to sleep in hotels, government offices, or other irregular locations, supervised by caseworkers.¹⁴⁴

136. John Kelly et al., *supra* note 121, at 11 (2017).

137. Jennifer M. Geiger et al., *Empathy as an Essential Foundation to Successful Foster Parenting*, J. CHILD. FAM. STUD. 3771 (2016).

138. *Id.* at 1.

139. *Id.*

140. *Id.* at 10. See also Gossett, *supra* note 6, at 801 (noting “[i]n late 2017, President Trump declared the ‘opioid crisis’ a public health emergency.”).

141. Reunification rates have either decreased or remained the same from 2007-2018 and reached an all-time low of 49% in 2018. *Children exiting foster care by exit reason in the United States*, KID COUNT DATA Ctr., THE ANNIE E. CASEY FOUND., <https://datacenter.kidscount.org/data/tables/6277-children-exiting-foster-care-by-exit-reason?loc=1&loct=1#de-tailed/1/any/false/870,573,869,36,868,867,133,38,35,18/2631,2636,2632,2633,2630,2629,2635,2634/13050,13051> (last visited Jan. 28, 2019).

142. *Adoption Stats for Kids in Foster Care*, KID COUNT DATA CTR., THE ANNIE E. CASEY FOUND. (Sept. 17, 2018), <https://datacenter.kidscount.org/updates/show/212-adoption-stats-for-kids-in-foster-care>; John Kelly et al., *supra* note 121.

143. *Adoption Stats for Kids in Foster Care*, KID COUNT DATA CTR., THE ANNIE E. CASEY FOUND. (Sept. 17, 2018), <https://datacenter.kidscount.org/updates/show/212-adoption-stats-for-kids-in-foster-care>; Wade, *supra* note 31, at 873-74.

144. Jeremy Loudenback, *Washington Foster Youth Sent to Hotels More Than 1,000 Times Last Year*, CHRON. SOC. CHANGE (Jan. 3, 2019),

Low to no cost adoption is an effective short-term recruitment tool but lacks long-term benefits. Federal and state funding sources not only pay for adoption transactional costs, but they also pay a monthly stipend until the age of maturity.¹⁴⁵ On the other hand, private adoptions cost around \$15,000 to \$45,000 domestically, and even more internationally.¹⁴⁶ However, when a foster family's goal is adoption, retention is difficult because they either reach their goal and adopt or drop out from the emotional toll of losing a child to reunification.¹⁴⁷ With adoption as a possibility, many foster parents say there is the temptation to prematurely fantasize about adopting.¹⁴⁸ A foster parent describes her feelings after her foster child left to reunify, "[o]ne friend called us 'saints' and another, 'heroes.' I bristled at these. We'd become foster parents because we wanted a family, not necessarily because we were unselfish or brave."¹⁴⁹ Even when adoption is not the intention, if a foster family does end up adopting, some close their homes due to lack of space or they want to focus on their newly adopted children.¹⁵⁰

Studies have found that foster families that demonstrate empathy (towards the children, first family, and social workers) are more resilient and continue fostering.¹⁵¹ The foster care process easily conjures up negative impressions and feelings that do not promote empathy.¹⁵² Separating child maltreatment from a parent's worth and dignity is difficult

<https://chronicleofsocialchange.org/stateline/washington-foster-youth-sent-to-hotels-more-than-1000-times-last-year/33302>.

145. See Child Welfare Info. Gateway, *Planning for Adoption: Knowing the Costs and Resources*, U.S. DEP'T HEALTH & HUMAN SERVS., CHILD. BUREAU 2-3 (Nov. 2016), https://www.childwelfare.gov/pubPDFs/s_costs.pdf [hereinafter *Knowing the Costs and Resources*]. See rates by state posted on *All States at-a-Glance*, N. AM. COUNCIL ADOPTABLE CHILD., <https://www.nacac.org/help/adoption-assistance/adoption-assistance-us/all-states-at-a-glance/> (last visited Jan. 10, 2019) (showing rates ranging from \$187 - \$1138 a month until age 18 or 21 depending on the state).

146. *Knowing the Costs and Resources*, *supra* note 145, at 4 (showing international adoptions costs range from \$20,000-\$50,000).

147. Laura Frame et al., *Essential elements of implementing a system of concurrent planning*, CHILD & FAM. SOC. WORK 357, 365 (2006).

148. *Considering Concurrent Planning: Is It Right for You?*, N. AM. COUNCIL ADOPTABLE CHILD. (Feb. 9, 2017), <https://www.nacac.org/resource/concurrent-planning/>.

149. Georgene Smith Goodin, *Fostering heartbreak: Yesterday, a Judge decided I'm no longer a parent*, WASH. POST (Apr. 13, 2017), https://www.washingtonpost.com/news/parenting/wp/2017/04/13/fostering-heartbreak-yesterday-a-judge-decided-im-no-longer-a-parent/?utm_term=.6ea413d1e54d.

150. See Jenn Rexroad, *Why Keeping Current Foster Parents Can Be More Important Than Recruiting New Ones*, CHRON. SOC. CHANGE (Nov. 28, 2018), <https://chronicleofsocialchange.org/child-welfare-2/why-keeping-foster-parents-is-just-as-important-as-recruiting-new-ones/32849>.

151. Geiger et al., *supra* note 137, at 3771, 3772, 3774.

152. See *id.* at 3771-73, 3775.

but essential in supporting reunification.¹⁵³ Empathy is a skill that can be enhanced and taught through training.¹⁵⁴ Asking questions like, “how would I feel?” can help foster families gain perspective.¹⁵⁵ Foster families can enhance the ability to connect on a human level by finding commonalities and ways to relate to birth parents.¹⁵⁶ One foster parent explains:

The[] [biological parents] were truly genuine people who made bad choices. And I think foster parents want to blame them, rather than understand them. And I think it’s important that we [foster parents] step back and take the time to meet those people [biological parents], because they’re people too. And they may have trauma that they’ve experienced that they haven’t dealt with that is now preventing them from being good parents themselves.¹⁵⁷

Resilient foster families acknowledge human mistakes and inter-generational abuse and poverty that contribute to removal.¹⁵⁸ Part of the child’s reunification plan can include parental visits, and it is typically the responsibility of the foster family to provide transportation to the visits.¹⁵⁹ Visits provide an opportunity for the foster family to meet the biological parents and establish a relationship with them.¹⁶⁰ However, despite the visit transportation policy,¹⁶¹ many foster families have to work full-time to meet the high cost of living, especially in California, and are unable to provide transportation to visits—thus losing opportunities to connect with first families.¹⁶² San Diego County Child Welfare Services suggests other ways to build the parent-child relationship, which can also build foster-first family relationships, such as including the child’s parent in school conferences, doctor visits, or errands like shopping for clothes.¹⁶³ These suggestions are tasks that the foster family must already undertake,¹⁶⁴ including that the parent would not be an added time commitment and could also be a time saver if the parent is

153. *See id.* at 3773, 3776.

154. *Id.* at 3777-78.

155. *Id.* at 3776.

156. *Id.*

157. Geiger et al., *supra* note 137, at 3775.

158. *Id.*

159. *See, e.g.*, COUNTY OF SAN DIEGO HEALTH & HUM. SERV. ASS’N CHILD WELFARE SERVS. ET AL., FOSTER PARENT HANDBOOK 49-50 (2012), https://www.sandiegocounty.gov/content/dam/sdc/hhsa/programs/cs/foster_and_adoptive_resource_family_services/Foster_Parent_Handbook-English.pdf [hereinafter *Foster Parent Handbook*] (explaining that in San Diego, it is the foster parent’s responsibility to provide transportation for the foster child, including to parental visits).

160. Leader, *supra* note 117, at 3.

161. *Foster Parent Handbook*, *supra* note 159, at 49-50.

162. *See* Rexroad, *supra* note 150.

163. *Foster Parent Handbook*, *supra* note 159, at 29.

164. *See id.* at 47, 49.

able to assist with the errand in some way. Other ways to connect include constant contact through phone calls or video calls, including parents in decisions, and sending pictures, school work or art projects with the children to visits.¹⁶⁵ One study found that maintenance of parental ties actually helped the child's relationship with the foster family.¹⁶⁶

Keeping existing foster families not only saves money,¹⁶⁷ but also retains years of experience and training that assists in reunification and trauma-informed care.¹⁶⁸ A foster family initially motivated by adoption can build empathy and end up becoming a resilient foster family that will continue after reunifications and/or even adoptions. However, if adoptive foster homes are not resilient and discontinue fostering after they adopt or become emotionally drained from losing a foster child to reunification, the foster care housing crisis will continue.

C. When Adoption Overrides Reunification

1. Financial Costs

Adoption costs more than reunification. Experts estimate that forty to seventy percent of foster children were not previously abused and could have stayed with their biological families if society assisted poor families adequately.¹⁶⁹ Under ASFA, 90% of child welfare funding went to case management and foster home costs, while 10% went to services for parents.¹⁷⁰ Research has shown that “30% of children currently in foster care could be reunified with their families if they had safe, affordable housing.”¹⁷¹ In 2000, a study found that housing and supportive

165. Leader, *supra* note 117, at 3.

166. Garrison, *supra* note 5, at 462.

167. Rexroad, *supra* note 150 (finding an estimate that in California, it cost around \$25,000 to recruit, train and approve a new foster family). “Just as you would not begin filling the bathtub without first stopping the drain, the retention of resource families should be addressed in tandem with recruitment.” *Id.*

168. Trauma-informed care is often taught to foster parents with the idea that foster children suffer trauma from being removed from their families and need to be approached and cared for differently than children who have not suffered trauma. For more information on trauma-informed parenting, see generally Scott A. Richardson, *Awareness of Trauma-Informed Care*, SOC. WORK TODAY (Jan. 20, 2014), https://www.socialworktoday.com/archive/exc_012014.shtml (explaining the value of adopting a trauma-informed care approach for social workers). See also *Brain Development in Traumatized Children and Youth*, ADVOKIDS, <https://www.advokids.org/childhood-mental-health/trauma-informed-caregiving/> (last visited Jan. 29, 2019) (explaining how caregivers can nurture children coping with trauma).

169. Martin Guggenheim, *Somebody's Children: Sustaining the Family's Place in Child Welfare Policy*, 113 HARV. L. REV. 1716, 1735 (2000).

170. Amy D'Andrade et al., *The California Linkages Program: Doorway to Housing Support for Child Welfare-Involved Parents*, 60 AM. J. CMTY. PSYCHOL. 125, 126 (2017).

171. Harburger & White, *supra* note 85, at 500-01.

services cost approximately \$13,412 per year per family, while foster care costs approximately \$45,377 per year per family.¹⁷² Keeping families together with housing and support services as opposed to removal and foster care, would save the country \$1.94 billion per year.¹⁷³ Unfortunately, limited and restricted funding for services make it difficult for child welfare agencies to serve housing needs and keep families together.¹⁷⁴ In one case, a foster agency helped a foster parent move three times but not the mother.¹⁷⁵ The mother explains, “[i]f they would have done that for me in the first place, I wouldn’t be in the situation that I’m in now, and I’d have my kids.”¹⁷⁶

One caseworker lists the barriers that poor families in child welfare face: not having enough income for rent, the high cost of housing and living, lack of low-income housing in the county, and the inability to compete with other renters due to criminal history, bad credit, and rental history.¹⁷⁷ Parents need to seek outside resources for housing assistance—ones that child welfare is unable to adequately provide—and they often have difficulty coordinating between the agencies.¹⁷⁸ In California, there is a housing support program called CalWORKs that helps with housing searches, first month’s rent, and deposit or first three months of rent.¹⁷⁹ An additional program was piloted, California Linkages, in an effort to improve outcomes by bridging CalWORKs and child welfare service together.¹⁸⁰ However, not all states or counties offer programs like CalWORKs or California Linkages program and when one is offered, it is limited, and some social workers do not even know programs exist.¹⁸¹ In June 2016, the Housing Authority in one county had

172. *Id.* at 495, 501.

173. *Id.* at 502. In 2000, there was approximately 202,746 families with children in foster care. *Id.* at 501. It was estimated that thirty percent of those families could reunify with housing and support services, which is 60,824 families. *Id.* The cost to provide housing and support services for those families would cost \$696 million per year, as opposed to \$2.76 billion to maintain those same families in foster care. *Id.* at 501-02. Keep in mind that between 2010 and 2014, children in foster care have remained steady around 400,000. *See also* Wade, *supra* note 31, at 873-74 n.18.

174. D’Andrade et al., *supra* note 170, at 125.

175. MacFarquhar, *supra* note 111, at 42.

176. *Id.* (internal quotation marks omitted).

177. D’Andrade et al., *supra* note 170, at 128 (See article generally for personal narratives of unnamed stakeholders, such as a statewide program director, a child services worker, a CalWORKs caseworker, and a parent program participant).

178. *Id.* at 125, 126-27.

179. *Id.* at 128.

180. *Id.* at 125-26.

181. *See, e.g., id.* at 130.

25,000 individuals on the Section 8 waitlist.¹⁸² A parent participant in California Linkages was fortunate to receive Section 8 housing assistance but describes his challenges:

Many property owners do not want to rent to people who have Section 8 because they are worried about damage to their house as well as criminal activity. . . . Another challenge is getting around on public transportation. . . . We ended up looking at only three places because we just could not get to all of them. . . . Moving in was also a challenge—while we did not have much to move in, what we did have we had to carry on the bus. . . . We got lucky—I've got four kids and we found a three bedroom house. . . . Our contribution to the rent—about 35% of our income—was very minimal when we started because we had so little money. Once again things have gotten difficult as one of our children moved out when she turned 21. We were told we needed to move to a two bedroom place, but there were no two bedroom places available in our area. We would have to move away, which we did not want to do because we wanted to keep our daughter in this school district where she is thriving. We feel that stability for our children is one of the things that can help her succeed. So instead we stayed, but I now pay something like 75% of my salary to rent. . . . Right now, the reality is that every year we become a little bit more self-sufficient. I am anticipating that in a year or two, we will not be needing it.¹⁸³

Lack of transportation, rigid government assistance program guidelines, and stigma are additional poverty related housing barriers that can prevent a child from reunifying with his or her family.¹⁸⁴

Although adoption costs are lower than foster care costs,¹⁸⁵ reunification costs are even less in a vast majority of cases—with removal prevention being the least.¹⁸⁶ In order to adopt from foster care, the child must be in foster care for a period of time—with all the costs attached to it. In addition, there are emotional costs in adoption that are unavoidable.

182. *Id.* at 128. Section 8 is a voucher program that pays a portion of your rent based on your income. *Id.*

183. *Id.* at 131.

184. *Id.*

185. *See* Lercara, *supra* note 61 (noting adoption costs the state 40% less than foster care). Once a child is reunified it is no longer a ward of the state and the state will not have to pay for foster care or adoption assistance. *See also* N. AM. COUNCIL ADOPTABLE CHILD., *supra* note 148 (showing state adoption assistance costs).

186. Harburger & White, *supra* note 85, at 500-02.

2. Emotional Costs

Adoption comes at an emotional cost when parental rights are terminated.¹⁸⁷ Martin Guggenheim, law professor at New York University, argues, “[w]e need to understand that destroying the parent-child relationship is among the highest form of state violence. It should be cabined and guarded like a nuclear weapon. You use it when you must.”¹⁸⁸ One study determined that adopted children had higher rates of depression, social and behavioral problems, and problems with peers than children in foster care.¹⁸⁹ In a recent study, 58% of adoptive parents surveyed described their adopted child as difficult or very difficult, while only 22% described their child as somewhat easy.¹⁹⁰ Sixty-nine percent of surveyed adopted parents fell into the “high stress” range in “child demandingness” as compared to 15% for parents in the general public.¹⁹¹ “[A]doption by itself, does not resolve the insecurity that derives from not ‘belonging’ to a natural parent,” explains Professor Marsha Garrison of Brooklyn Law School.¹⁹² Although ASFA intended to promote permanency through adoption,¹⁹³ the U.S. Supreme Court recognized that “[e]ven when a child’s natural home is imperfect, permanent removal from that home will not necessarily improve his welfare.”¹⁹⁴ Professor Garrison explains, “children do not measure permanency by the legal label attached to their situation. However, the permanent loss of ties to their family of origin may be far more significant than anything a legal

187. See Wade, *supra* note 31, at 875-77 (“[W]ould this child be better off in the comfortable home of this well-to-do couple or struggling on public assistance with that neglectful mother?”). Some hopeful adoptive parents argue that they have more resources and can provide a better life than the poor family of origin. See also *id.* at 876 n.31 (quoting Dorothy E. Roberts, *Is There Justice in Children’s Rights?: The Critique of Federal Family Preservation Policy*, 2 U. PA. J. CONST. L. 112, 139 (1999)). However, the Supreme Court has ruled in *Troxel v. Granville*, that the “Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a ‘better’ decision could be made.” 530 U.S. 57, 72-73 (2000). See also *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (“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.”).

188. MacFarquhar, *supra* note 111, at 47.

189. O’Flynn, *supra* note 53, at 266.

190. Ruth G. McRoy, *Barriers and Success Factors in Adoptions from Foster Care: Perspectives of Family and Staff*, ADOPTUSKIDS 75 (2007), https://adoptuskids.org/_assets/files/NRCRRFAP/resources/barriers-and-success-factors-family-and-staff-perspectives.pdf.

191. *Id.*

192. Garrison, *supra* note 5, at 471 (internal citation omitted).

193. Gossett, *supra* note 6, at 779-80.

194. *Santosky*, 455 U.S. at 765 n.15.

label can offer.”¹⁹⁵ When parental rights are terminated, adoptive parents have the right to cut off visitation and all contact with the first parent.¹⁹⁶

Children benefit from contact with their first family. The presumption that “children are better off without their natural parents” is unsupported by evidence and “ignores the important role that parents of children in long term foster care can and do play in their children’s emotional development.”¹⁹⁷ One study found that adopted foster children who did not have contact with their first family manifested more behavioral issues than those who did.¹⁹⁸ Adoptees often revisit birth connections cyclically throughout their lives.¹⁹⁹ Without contact with their first family, adoptees often face feelings of confused identity and lack of a sense of history.²⁰⁰ When a child can realistically assess the parental problems that required placement through contact and visitation they are better able to form a healthy self-image.²⁰¹ When a child can see their parent was unable to care for them, as opposed to unwilling, their placement can symbolize worth instead of worthlessness.²⁰² “[E]ven children . . . adopted as infants carry their pasts with them, perhaps *more* so because their pasts are unknown.”²⁰³ One study reported that 70% of adolescent girls and 57% of adolescent boys adopted as infants wanted to meet their first parents.²⁰⁴ The inability to connect with those parents can lead to exaggeration of their first parents’ faults—hurting the child’s self-esteem—or idealization and dreams about a future reunion.²⁰⁵

It is possible that even with contact, such fantasies could still occur, but they would be more grounded in reality, and adoptive parents would

195. Nancy Goldhill, *Ties that Bind: The Impact of Psychological and Legal Debates on the Child Welfare System*, 22 N.Y.U. REV. L. & SOC. CHANGE 296, 302-03 (1996) (internal citation omitted).

196. Solangel Maldonado, *Permanency v. Biology: Making the Case for Post-Adoption Contact*, 37 CAP. U. L. REV. 321, 323 (2008).

197. Garrison, *supra* note 5, at 472-73 (internal citation omitted).

198. Leslie Rose Nelson, *The Evolving Nature and Process of Foster Family Communication: An Application and Adaptation of the Family Adoption Communication Model*, 9 J. FAM. THEORY & REV. 366, 371 (Sept. 1, 2017).

199. Annette Ruth Appell, *Reflections on the Movement Toward a More Child-Centered Adoption*, 32 W. NEW ENG. L. REV. 1, 6 (2010).

200. Tammy M. Somogye, *Opening Minds to Open Adoption*, 45 KAN. L. REV. 619, 627 (1997).

201. Garrison, *supra* note 5, at 465.

202. *Id.*

203. Appell, *supra* note 199, at 3 (emphasis in original) (internal citation omitted).

204. *Id.* at 3 n.11.

205. Garrison, *supra* note 5, at 465.

not have to be compared to fiction.²⁰⁶ The lack of contact with a first parent is also more likely to create negative feelings with adoptive parents which the child can pick up on, ultimately hurting the child's sense of self-worth or producing cognitive dissonance due to loyalties to the first family.²⁰⁷ While coping with real parents—even those who are flawed—may bring a mixture of love and rejection, it is better than having fantasy parents that undermine the child subconsciously and the relationship with their adoptive parents.²⁰⁸

In addition to the potential loss of connection with the first family, termination of parental rights also terminates legal relationships with all blood relatives, such as siblings, grandparents, aunts, and uncles.²⁰⁹ Research has shown that warm sibling relationships result in decreased loneliness, fewer behavior problems, and higher self-worth.²¹⁰ For many foster children the most painful part of adoption is the loss of their siblings.²¹¹ Sibling relationships are especially crucial when placed out-of-home. If separated, siblings suffer traumatic consequences, including additional loss, grief, and anxiety.²¹²

ASFA's promotion of adoption has resulted in states severing sibling ties for adoption.²¹³ For example, in the case *In re Celine R.*,²¹⁴ the California Supreme Court ruled in favor of adoption despite evidence of court-ordered visitation among siblings being unreasonably denied by the prospective adoptive parents, because the legislature "[had] made adoption the preferred choice."²¹⁵ In other words, the foster parents violated court ordered visitation with siblings but they were still allowed to adopt the children.

Fortunately, post-adoption contact with first families is now the norm in all types of adoption.²¹⁶ Studies show that some type of first family contact or openness occurred in 95% of domestic infant

206. Kristin Widner, *Continuing the Evolution: Why California Should Amend Family Code Section 8616.5 to Allow Visitation in All Postadoption Contact Agreements*, 44 SAN DIEGO L. REV. 355, 367.

207. Appell, *supra* note 199, at 6-7.

208. Garrison, *supra* note 5, at 468.

209. Ross, *supra* note 35, at 224-25.

210. Child Welfare Info. Gateway, *Sibling Issues in Foster Care and Adoption*, U.S. DEP'T HEALTH & HUM. SERVS. 4 (Jan. 2013), <https://www.childwelfare.gov/pubPDFs/siblingissues.pdf>.

211. Ross, *supra* note 35, at 225.

212. *Id.* at 221.

213. *See, e.g.*, Patton & Pellman, *supra* note 38, at 187-88 (showing that in California siblings are less likely to be placed together).

214. *See* 31 Cal. 4th 45, 49-50 (2003).

215. *Id.* at 49. *See also* Patton & Pellman, *supra* note 38, at 191.

216. Appell, *supra* note 199, at 4, 25.

adoptions, 68% of private domestic adoptions, and 39% of foster care adoptions.²¹⁷ This was not the case from the late 1930s through the 1940s, when agencies advised adoptive parents not to disclose the adoptive status of the child in an effort to erase the stigma of the adopted child's past.²¹⁸ The growing awareness of the benefits of contact and the negative effects of secrecy contributed to openness in adoption.²¹⁹ The more open the communication in adoption, the less likely excessive fantasizing or acting out will result from the void in identity.²²⁰ Contact has even been shown to facilitate bonding between adoptive parents and adopted children because there is a sense of "permission" to be the child's parents.²²¹ Open adoption gives children the support of two loving families.²²² Strong psychological bonds with two sets of parents enable children to develop strong bonds with others in the future, instead of a fear of commitment from feelings of rejection and loss with no contact.²²³ The relationship between the two families models cooperation, dedication, and love to the child.²²⁴ Thus, the new norm—of open adoption—is a positive change that benefits the adoptee, the adoptive parents, and the first parents.

V. PROPOSAL

The problems of decreased reunification rates, increased need of foster homes, and costs of adoption can be addressed by legislators and local county welfare agencies requiring increased communication between foster families and first families and allowing a period of sequential planning—as opposed to concurrent planning. Contact is necessary to stop the domino effect: prospective adoptive parents opposing reunification during concurrent planning, failed reunification leads to adoption, the adoption leads to one less available foster home, and finally, adoption without contact results in emotional problems.

Mandatory contact before and after adoption addresses key dominos in the chain and thus increases the likelihood of a positive outcome.

217. *What is Open Adoption?*, ADVOKIDS, <https://www.advokids.org/legal-tools/open-adoption/> (last visited Jan. 18, 2019) [hereinafter ADVOKIDS, *What is Open Adoption?*]. However, 59% of adoptive parents surveyed revealed that they never considered contact because the birth mother had her rights terminated and/or were the child's abuser. See also McRoy, *supra* note 190, at 88-89.

218. Simmons, *supra* note 110, at 550.

219. ADVOKIDS, *What is Open Adoption?*, *supra* note 217.

220. Simmons, *supra* note 110, at 554.

221. *Id.* at 554 n.137.

222. Somogyi, *supra* note 200, at 627.

223. *Id.*

224. *Id.*

When contact is mandatory post-adoption, prospective adoptive parents will be more inclined to begin contact during the reunification period. Communication with parents will also help the prospective adoptive parents make a better-informed decision about adoption by getting to know the child and family history from the parent. Requiring mandatory contact up front reinforces the message that parental contact is important. As discussed above, contact often brings about empathy that leads to more reunification support. Empathy also makes foster families more resilient and increases retention rates. Increased reunifications lower the need for foster families and decreases the need for potentially traumatic adoptions.

In addition to promoting mandatory contact, legislatures should enact systemic reform by modifying concurrent planning to allow for a period of sequential planning. With a short period of sequential planning, reunification efforts can be targeted and intensified, without the pressures of adoption. Preserving families with services is the best outcome, but not the only outcome so long as reasonable efforts are legitimate.

A. Sequential/Modified Concurrent Planning

The existing concurrent planning model undermines reunification by dividing efforts with permanency planning. Concurrent planning should not be initiated until a poor prognosis has been properly assessed. Under the current model in California, concurrent planning is required at disposition, approximately twenty-five days after removal, when reunification services are *ordered* by the court.²²⁵ At this point, services such as drug treatment, mental health, domestic violence and parenting classes have typically not begun yet.²²⁶ If reunification stands a chance against the push of adoption, parents should be given at least six months of undivided attention and intensive services. This would relieve some of the pressure on social workers who “often experience difficulty grappling with the tension inherent in attempting to reunite a child with

225. See ADVOKIDS, *supra* note 87. *Concurrent Planning is Mandated by Law*, ADVOKIDS, <https://www.advokids.org/childhood-mental-health/concurrent-planning/> (last visited Dec. 28, 2019).

226. REED & KARPILOW, *supra* note 4, at 13-15 (If the investigating social worker determines the child needs to remain out of the home, then the court typically orders family reunification at disposition and makes services available. However, social workers *can* offer parents up to thirty days of Emergency Response services while the investigation is being conducted, prior to disposition.).

his or her family while also working on an alternative permanent plan.”²²⁷

The current model also fails to recognize “foster-only” parents that went into fostering to provide temporary homes and help heal families—they do not want to adopt. Foster-only families that do not have the goal of growing their family, lack the incentive to sabotage reunification. Foster-only homes are a valuable resource because they have experience and training (such as trauma-informed care and reunification support) that can help future foster children, whereas adoptive homes usually stop fostering once their family is complete. When a child is reunified or moves to an adoptive home, the foster-only homes can take in more foster children. Eliminating foster-only homes because they do not want to adopt would be a terrible loss to the community. No one is advocating for the elimination of foster-only homes but the message of concurrent planning is that “it is in the best interests of children to have their first placement be their last.”²²⁸ If we try to convert foster-only homes into adoptive homes, eventually they will lack the space to take in any more foster children.²²⁹

Concurrent planning also fails to recognize adopt-only homes that have no desire to foster children (i.e., to provide a temporary home while aiding reunification). Adoptive families might sign up to permanently care for a child, but assisting in reunification is an entirely separate responsibility. Mentoring the biological parents, transporting the child to weekly visits, and facilitating their constant communication are burdens that are hard to manage even if the adoptive parents want to support reunification. Especially in California, where the cost of living is high, most parents work full-time jobs and cannot afford to take the time away from work to mentor parents and transport the child to visits.²³⁰ Often, full-time working parents have to place their foster child in childcare, which could require social workers picking up the child from childcare

227. Lipp, *supra* note 65, at 18 (quoting U.S. DEP’T. OF HEALTH & HUM. SERVS., CONCURRENT PLANNING: WHAT THE EVIDENCE SHOWS, CHILD WELFARE INFORMATION GATEWAY 9 (2012)).

228. N. AM. COUNCIL ADOPTABLE CHILD, *supra* note 148 (internal quotation marks omitted).

229. REED & KARPILOW, *supra* note 4, at 43 (“The emphasis on concurrent planning has also resulted in some foster parents leaving the foster care program to become adoptive parents.”).

230. See generally Jim Rast, *Neighbor to Family — Supporting Sibling Groups in Foster Care* Formative and Efficacy Evaluation, https://static1.squarespace.com/static/59bbf0a06f4ca32f36fb4f48/t/59c41caba803bb77dcbabd9d/1506024674695/Neighbor_To_Family_Evaluation_-_Jim_Rast_PhD.pdf (last visited Dec. 28, 2019) (providing information on a program that employs professional foster parents with lower overall costs and increased reunification rates).

to take them to visits.²³¹ As a result, adoptive parents lose the opportunity to interact and build a relationship with the first parents. In addition to time constraints, there are emotional restraints that make it hard for prospective adoptive parents to support reunification.²³² Adopt-only homes may opt out of adopting from foster care if they are forced to perform the difficult dual functions of concurrent planning.²³³ We need both foster-only and adopt-only homes, especially with the diminishing availability of foster homes and increasing population of foster children.²³⁴

The sequential/modified-concurrent model allows families to be foster-only, adoption-only, or concurrent. The foster-only family can help provide intensive services and improve reunification rates, decreasing the need for foster homes. Holding off concurrent planning would increase the amount of time in care, but the trade-off is improved reunification rates; and with a defined six month timeframe, foster children will not “languish in the system” for years as they did pre-ASFA.²³⁵ Research has found that reunification is most likely during the first four months of removal, then drops dramatically and continues to decrease each passing month in care.²³⁶ If a poor prognosis is determined after six months, then the next step should be to find a concurrent home. In an ideal world, the “first placement [would] be [the child’s] last;”²³⁷ however, this can only be the case if every foster home is a concurrent home, i.e., willing to support both reunification and adoption from the first day of placement without knowing any information about the child. In reality, California’s foster children’s first placement is in emergency foster homes, before disposition when the judge determines what the case plan should be.²³⁸ Moving to a concurrent home at six months or

231. Jennifer Rexroad, *California Needs More Foster Homes, Incentives for Foster Parents*, SACRAMENTO BEE (May 1, 2017), <https://www.sacbee.com/opinion/op-ed/soapbox/article147546504.html>.

232. Simmons *supra* note 110, at 550 n.97.

233. See Lipp, *supra* note 65, at 17.

234. See KID COUNT DATA CTR., THE ANNIE E. CASEY FOUND., *supra* note 142 (explaining that in 2016, there were 118,000 foster children “awaiting adoption.”).

235. See Gossett, *supra* note 6, at 776-77.

236. Sarah Carnochan et al., *Achieving Timely Reunification*, 10 J. EVIDENCE-BASED SOC. WORK 179, 182-83 (2013).

237. N. AM. COUNCIL ADOPTABLE CHILD., *supra* note 148 (internal quotation marks omitted).

238. See REED & KARPILOW, *supra* note 4, at 10 (showing that the child is removed from the home before the dependency petition is filed and the case can be dismissed or settled).

one month is still traumatic.²³⁹ However, a slow transition plan can minimize the trauma.²⁴⁰

B. Promoting Empathy and Mandatory Contact

As discussed above, empathy can be taught, but the strongest effect comes from contact with parents. Increased empathy and contact would help eliminate some sabotage.

Adoptive parent Mary says that witnessing the love between the birth parent and the child is what hooks her to want to mentor birth parents. Watching a child cry all the way home after a visit with his mom motivates her to want to help that relationship for the sake of the child.²⁴¹

Foster families should be mandated to have contact with parents during the reunification period. Although contact is often encouraged in policies and procedures,²⁴² and trainings, it is typically not required, and sometimes discouraged by social workers.²⁴³ In addition, sabotage often goes un-penalized. Under the concurrent planning model, foster families are expected to support reunification.²⁴⁴ Foster families are typically required to transport their foster children to parent visits, medical appointments, school, therapy, court, and social functions.²⁴⁵ Each of those occasions are opportunities for the foster family to interact with parents.²⁴⁶ Although many foster parents have to work full-time and cannot transport the child to visits with the parents, they still have to take their foster child to medical and school appointments.²⁴⁷ Traditional parents are required to take their children to appointments; it should be no different for foster parents. If prospective adoptive parents are unable to

239. *Transition Planning*, ADVOKIDS, <https://www.advokids.org/childhood-mental-health/transitions/> (last visited Dec. 28, 2019).

240. *Id.*

241. N. AM. COUNCIL ADOPTABLE CHILD., *supra* note 148.

242. *Foster Parent Handbook*, *supra* note 159, at 29.

243. Nesmith, *supra* note 127, at 226.

244. Klain et al., *supra* note 66, at 102 (advising judges, “[f]or concurrent planning to succeed, foster/adoptive families, must understand and distinguish between their multiple roles. They must be willing to make a long-term commitment to the child and mentor the birth family toward reunification”). SANTA CLARA COUNTY DEP’T OF CHILDREN AND FAMILY SERVICES, *Concurrent Home Agreement*, https://www.sccgov.org/ssa/forms/department/dfcs/scz1348_english.doc (the concurrent agreement requires the foster parent to acknowledge, “As participants in the concurrent plan, I/we understand that I/we have an important role in supporting all efforts for reunification and agree to support those efforts.”). *Foster Parent Handbook*, *supra* note 159, at 27-28 (“You (foster parent) are expected to . . . work with the child’s family toward reunification.”).

245. *Id.* at 49-50.

246. See Leader, *supra* note 117.

247. *Foster Parent Handbook*, *supra* note 159, at 43, 49-50.

take their foster child to necessary appointments, they might have to reconsider adoption and contemplate the commitments required to raise a child. Mandatory contact during crucial child appointments would not be over burdensome.

As discussed above, adoption is an effective recruitment tool. However, recruitment based on adoption usually results in adopt-only homes.²⁴⁸ Adopt-only homes sometimes decide to become concurrent only to increase their odds of adoption.²⁴⁹ With empathy training and mandatory contact, concurrent homes might be more open to fostering for the sake of reunifying families as opposed to just growing their own family. An increase in foster homes would also make it easier for judges to remove a child from a concurrent home that sabotages reunification.

If reunification is achieved, established relationships can become lifelong. A foster parent describes her thoughts after her foster child reunifies: “[t]he most disconcerting part was being unable to offer any reassurances; I don’t know if they will see us again; I don’t know if everything will be okay.”²⁵⁰ If there is a pre-existing relationship, parents have a way to stay in contact with foster families and continue receiving their support. For example, Juvenile Court Judge Jeri Cohen described one set of foster parents who visit their former foster children (who reunified) on Sundays and were becoming Godparents to one of the children.²⁵¹ Continuous contact also facilitates post-termination contact, in the event the concurrent family adopts.²⁵² Maximum contact agreeable to all parties supports the child’s mental, emotional, and physical well-being.²⁵³

C. Mandatory Contact Concerns: Workload, Safety, and “The Chilling Effect”

Although contact appears like more work for social workers, i.e., an extra visit to supervise, it need not be. Social workers can move a regularly scheduled visit to the medical or school appointment. Once a relationship is established, at some point the foster parents can supervise visits with parents, freeing up agency resources.

248. Frame et al., *supra* note 147, at 365.

249. See Rycraft & Benavides, *supra* note 2, at 259.

250. Goodin, *supra* note 149.

251. The Honorable Judge Jeri Cohen, *Co-Parenting is Common Sense*, FOSTER CARE REV. INC. THE REVIEWER 1, 5 (May 2010), <https://www.fostercarereview.org/wp-content/themes/Theme/theme45009/files/Co-parenting%20Newsletter%202010.pdf>.

252. Patton & Pellman, *supra* note 38, at 193.

253. Widner, *supra* note 206, at 368 (in addition to mental and emotional benefits of contact, parents can provide medical history to aid in early detection and prevention and promotion of physical health).

Some foster parents bring up their concern of safety and fear that biological parents might be harmful.²⁵⁴ Fortunately, during the reunification period, visits are usually monitored by social workers, in a secure building,²⁵⁵ to observe parenting skills and appropriateness. Normally, visits are only unsupervised when the parent is doing well and reunification is close.²⁵⁶ Since the social worker is in constant contact with the parent while providing services, the social worker is able to gauge if contact is safe. There may be some instances where contact is not safe. If a social worker deems contact unsafe, the foster parents should not be required to have contact with an unsafe parent.

Contact can also come in many forms. If a first parent is deemed dangerous post-adoption, there are various safe ways to keep in contact, such as email, phone calls, separate social media accounts, or P.O. boxes. A seemingly dangerous first parent may not be so dangerous ten or twenty years down the road. Adoption is a lifelong process and adoptees will always carry their past. It is better to facilitate contact early on when the situation can be somewhat more controlled than if the child seeks contact on his or her own without the adoptive parents' knowledge.

Mandatory contact, especially post-adoption, could cause a chilling effect by dissuading hopeful adoptive parents from adopting from foster care.²⁵⁷ However, some hopeful adoptive parents agree to post-adoption contact in private domestic adoptions as a condition to adopt.²⁵⁸ In 2002, there were 901,000 women in the United States seeking to adopt.²⁵⁹ In addition, the low to no cost of adoptions from foster care plus the monthly adoption subsidy make it more attractive and cost effective than domestic or international private adoption.²⁶⁰ When hopeful adoptive parents sign up to become concurrent foster parents, they already agree to support reunification and have contact with parents.²⁶¹ The extra

254. McRoy, *supra* note 47, at 89 (showing survey results where 11-15% of adoptive parents surveyed did not have contact due to concerns about child safety and 15% did not have contact because they thought the parent was troubled).

255. Usually with some type of private security guard or local law enforcement. Interview with Elisa Medina, Social Worker I/Case Aide, Santa Clara County Dep't Fam. & Child. Servs., in San Jose, Calif. (Dec. 21, 2018) (on file with author).

256. *Id.*

257. Maldonado, *supra* note 196, at 349.

258. *See id.* at 324-25 (if they do not agree to contact, they are unlikely to be selected by the birth mother to adopt due to the high demand for healthy, white infants).

259. Jones, *supra* note 1, at 8.

260. *See* McRoy, *supra* note 47, at 3 (finding that "[f]inancial constraints were the second most common reason for adopting from foster care rather than internationally or through a private agency.").

261. SANTA CLARA COUNTY DEP'T OF CHILDREN AND FAMILY SERVICES, *supra* note 96. *Foster Parent Handbook*, *supra* note 159, at 28.

requirement of post-adoption contact should not be a deterrent if they are committed to pre-adoptive contact. One study showed that adoptive parents were initially opposed to court-ordered contact but that their opposition tempered over time.²⁶² In addition, mandatory contact during the reunification period could actually facilitate and increase adoptions.²⁶³ If the parent has a relationship with the prospective adoptive parents, the adoption could less likely be contested.²⁶⁴ Parents sometimes challenge termination of their parental rights because they do not want to lose all contact with their child or they do not want their child to think that he or she was unwanted or unloved.²⁶⁵ Minnesota, Massachusetts, and Florida have already passed statutes that approve court-imposed post-adoption contact.²⁶⁶ Connecticut and Illinois courts have imposed mandatory post-adoption contact through equitable means.²⁶⁷ States that permit mandatory post-adoption contact recognize that there are people who are important to the child that adoptive parents may not appreciate.²⁶⁸ The interest of the child should be paramount to state and county adoption numbers or bonuses.

VI. CONCLUSION

Child welfare legislation has been a work in progress for over a century. Lawmakers look backwards instead of forwards when they pass bills to address past mistakes. Reunification is slowly coming back to the forefront with the passage of Family First, but more needs to be done to achieve better results. Sequential planning should be reinstated and empathy should be promoted by encouraging contact. Federal legislation should provide monetary incentives to states for keeping families together—as opposed to adoption—as a matter of public policy and cost-effectiveness. As a result of these changes, states would be properly incentivized to guide their child welfare agencies so that social workers, foster parents, and parents are all working towards the same goals and support frequent contact for the sake of the children. If reunification is truly not in the best interest of the child, open adoptions can lessen the trauma of losing family.

262. Appell, *supra* note 199, at 22.

263. See Somogyi, *supra* note 200, at 626.

264. *Id.*

265. *Id.*

266. Appell, *supra* note 199, at 11-14.

267. See *id.* at 6 n.19.

268. See *id.* at 6-8 (“growing recognition of the importance of birth heritage to adoptees, have led a number of states to codify such (open) adoptions.”).