



KINSHIP CARE IN TEXAS

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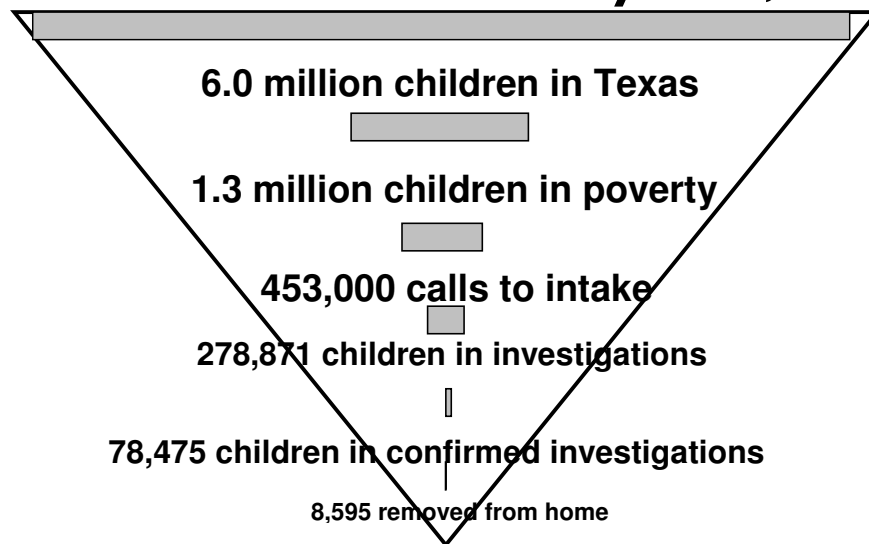
When the state must remove a child from a parent for the child’s protection, the child is often best served by placement with a relative, commonly called *kinship care*. When a judge makes a placement decision, however, the judge must determine the best interest of a particular child. This determination can be extraordinarily complex. In this policy brief, we discuss these complexities and make recommendations about how to enhance the use of kinship care.

OVERVIEW

Texas has a Tiny System of Child Protection

Texas brings children into care in very small numbers in only terrible circumstances. In Fiscal Year 2003, Texas removed 8,595 children from their homes out of a total population of six million children—less than one-quarter of one percent of Texas children.¹ Texas had only 16,267 children in foster care on any given day—less than one-half of one percent of Texas children.² Texas ranks forty-seventh among the states in the number of children in foster care for every thousand children in the state.³ If Texas merely had the average number of children in care per one thousand, our foster care population would be 53,114.⁴ With a relatively high percentage of families living in poverty and anemic child abuse prevention programs, there is no reason to think Texas has fewer abused and neglected children than other states. Texas simply intervenes far less frequently than other states. The chart below helps put the size of our system in perspective.⁵

Texas Child Protection System, 2003

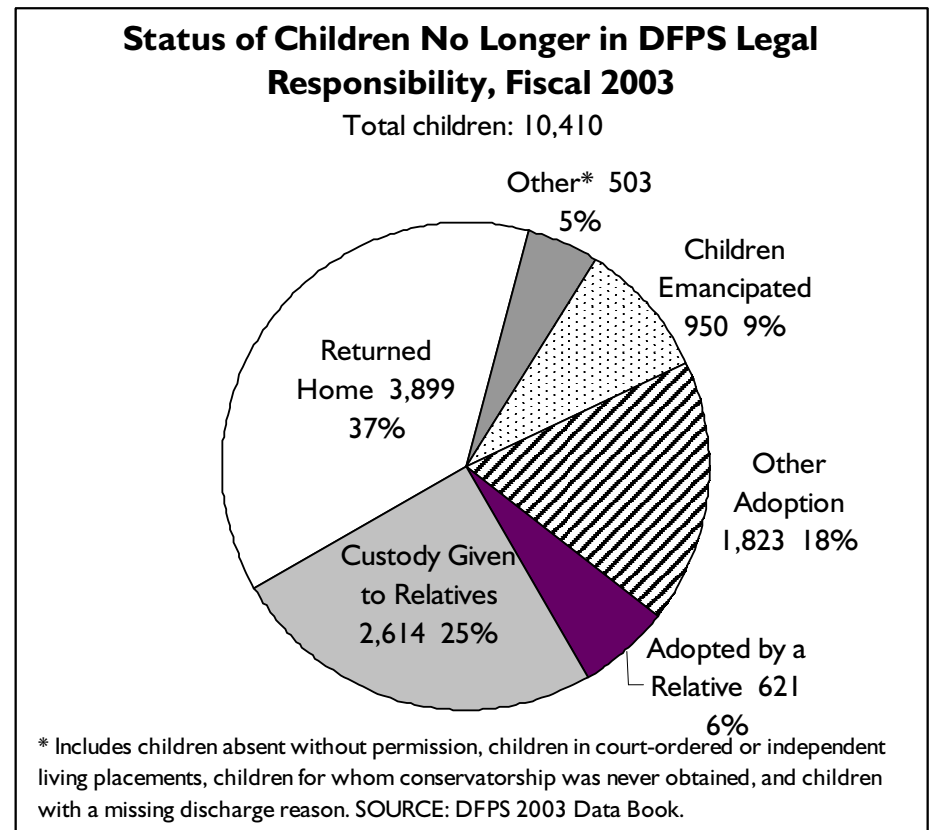
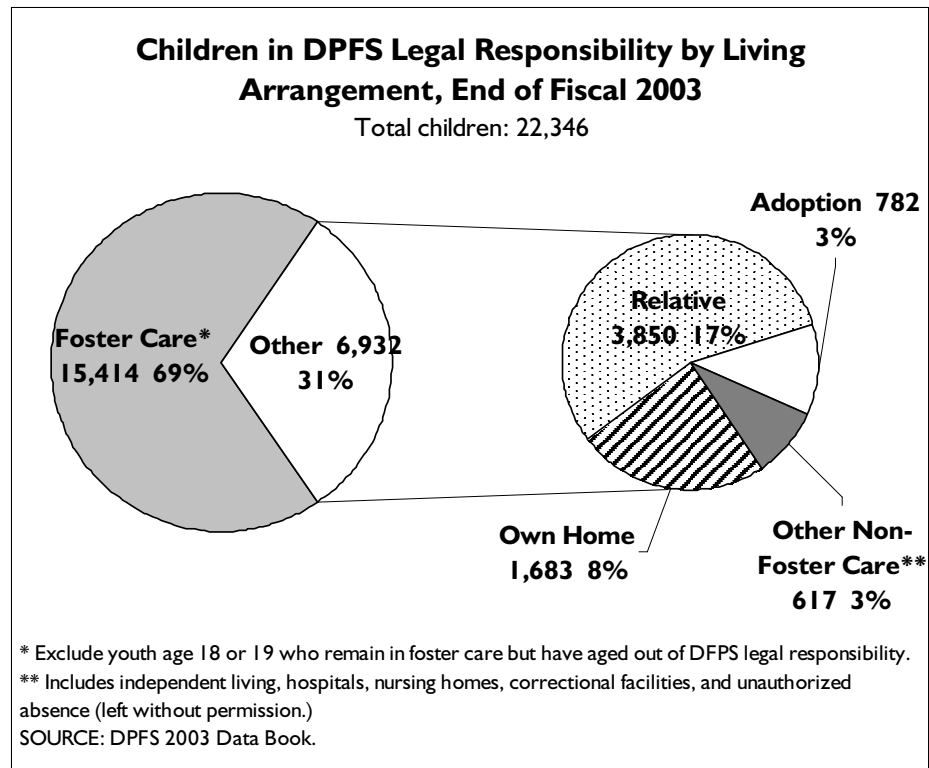


Texas Makes Significant Use of Relative Placements

Texas already relies upon relatives to care for children. In those cases where Child Protective Services determines that it is safe, CPS and the parent can agree to a “safety plan” where the parent places the child with a relative pending completion of an investigation or a court hearing. When CPS must seek the court-ordered removal of a child from a parent, judges often place children in temporary relative placements, and when a child cannot be successfully reunified with a parent, judges often place children in permanent relative placements through either conservatorship or adoption.

This top chart shows that 25% of the children in the state’s legal responsibility are placed with either a relative or a parent. The bottom chart shows that 68% of children are ultimately reunited with a parent or placed permanently with relatives through conservatorship or adoption.⁶

In Fiscal Year 2003, about 1,389 children were placed directly from removal into relative placements; this is about 16% of the 8,595 children removed.⁷



Can we speed the placement of children with relatives? Can we increase the placement of children with relatives? Can we improve the quality of the kinship care? To the extent that we can, it will be a matter of improving practices and providing resources. State law and departmental policy already favor kinship care. The barriers to increasing care are practical, not legal.

CURRENT LAW REGARDING RELATIVE PLACEMENTS

Texas Family Code

The legislature has balanced the rights of children, parents, and relatives in the Family Code with due regard for the constitutional rights of each. Under the U.S. and state constitutions, the legislature can give Child Protective Services authority in an emergency to remove a child from the control of a parent when necessary to protect the child. After a judge reviews the case, if the affidavit proof supports the removal, the judge can issue an emergency order regarding placement until a prompt contested hearing. After the hearing, if the evidence supports that the parent is unfit to make decisions about the child, the judge can make a temporary order regarding placement until a final hearing. At each of these points, the child's right to safety outweighs a parent's right to control of the child. This is well-settled constitutional law and the way every jurisdiction in the country protects children.

If a child must be removed from a parent, however, our legislature has made foster care the placement of last resort. Section 262.201(f) of the Texas Family Code provides:

(f) The court shall place a child removed from the child's custodial parent with the child's noncustodial parent or with a relative of the child if placement with the noncustodial parent is inappropriate, unless placement with the noncustodial parent or a relative is not in the best interest of the child.

The legislature carefully worded this provision to create a presumption that a child must go first with a non-abusing parent, unless the state shows it is not in the child's best interest; and second with a relative, unless the state shows it is not in the child's best interest; and only then with a foster parent. Judges must make this decision case-by-case in the best interest of the child.

Texas Family Code § 263.202(a)(2) also requires judges at the first status hearing to make sure that CPS has gotten all available information to locate relatives. Texas Family Code § 263.306(a)(6) requires judges at each permanency hearing to evaluate CPS' efforts to identify relatives with whom a child can be placed.

Department of Family and Protective Services - Policies and Procedures

DFPS has developed policies and procedures to implement the requirements in the Texas Family Code. The basic policy is expressed in Child Protective Services Handbook § 6322:

Placement with Noncustodial Parents and Kinship Caregivers:

DFPS responsibility

DFPS must seek to identify and locate the noncustodial parent, or kinship caregivers (relatives, or significant, long-standing, close family friends) to assess

their willingness and suitability to care for the child. Since the court is directed to make the placements noted in the law, it is important that DFPS collect what information it can about the noncustodial parent and kinship care providers to assist in making those decisions.

The child generally is already familiar with their noncustodial parents and kin and may have an ongoing relationship with them. These people may already have a personal interest in the child's care. They are usually already familiar with the child's family situation and understand the issues and limitations that are present. Their ongoing relationship with the child's parents makes it easier to work towards the permanency goal selected.

This section goes on to provide detailed guidance on assessing and making relative placements.

ISSUES IN RELATIVE PLACEMENTS

Temporary or Permanent

Temporary placements with relatives while trying to reunite a child with a parent and permanent placements with relatives to raise the child bring up separate issues even with the same child and the same relative. For example, for a temporary placement, moving a child out of town to be with a relative may be inappropriate, while for a permanent placement, it may be appropriate. Of course, temporary placements may become permanent placements, but at each stage, the issues are different.

Child Safety

The first issue in any placement decision must be child safety. Child protection policy has long balanced two old adages: On the one hand, blood is said to be thicker than water. Therefore, kinship care can be better for children. On the other hand, the fruit is said not to fall from the tree. Therefore, child abuse and neglect can be intergenerational. If dad sexually abuses his son, common sense cautions against placing the child with the paternal grandfather without an adequate home study, including a criminal background check.

Even where intergenerational dysfunction is not a concern, relative placements raise issues such as 1) the risk of the relative enabling further abuse of the child by the perpetrator; 2) the risk of the relative forcing the child to recant an outcry about abuse; and 3) the risk of the relative enabling child abduction.

A judge cannot simply rely upon a court order that prohibits access by the perpetrator, or discussion of the case, or fleeing the jurisdiction. Even with the best of relatives, court orders are frequently violated. Moreover, many relatives have no emotional or physical ability to protect a child if the perpetrator arrives at their door. A judge generally assumes any court order might be violated and places the child with a relative only when they are supportive of and reasonably able to protect the child.

At the beginning of a case, a relative may be inappropriate, but as the case progresses, things may change. As the evidence emerges, the relative may become convinced about the abuse and thus protective. Or, the perpetrator may be sent to prison, making it possible for the child to be placed with a relative who could not have otherwise physically protected the child. In any event, safety is always the primary concern.

Competing Possible Placements

A mother and father may be living together with equal parental rights. Both may be implicated in the abuse or neglect. Each, however, may argue for a different relative placement. Or perhaps the mother and father do not live together, but neither is an appropriate placement and each argues for a different relative. Or perhaps the maternal relatives and the paternal relatives each want the children. Or perhaps on the maternal side there are competing aunts while on the paternal side there are multiple fathers. Children may themselves have strong feelings about particular relatives. An older daughter may want to go with a maternal aunt, while a younger son may want to go with a paternal grandmother. The variations on the facts are endless.

Sibling Considerations

Generally, though not always, the best practice is to keep siblings together. Research suggests that sibling relationships are far more important and powerful than we have understood. Sometimes relative placements help keep siblings together, but sometimes they are a barrier. A relative may not be able to take all the children due to lack of money, space, or ability. Compounding the issue is that the relative may be related to only some of the children. (About 79% of all children live with siblings and about 11% of all children live with half-siblings.⁸) Often the paternal side of the family is willing to take only the children of the father to whom they are related. Depending on the circumstance, a judge might place siblings in foster care rather than split them between many relatives. Particularly at the temporary stage where the judge hopes that the children will be reunited with their parent, the judge might not want to split siblings.

Treatment Considerations

The treatment needs of the child must be carefully considered. At the outset, CPS must have the child assessed medically, psychologically, and educationally. CPS then must develop a treatment plan to address the problems caused by the abuse or neglect. None of this can be accomplished if the child is in an inappropriate placement: for example, in a distant relative placement, or with an uncooperative relative placement, or with a relative lacking transportation or time to participate in the treatment.

Jeopardizing Long-term Relative Placements

Too quickly naming relatives as the placement can actually jeopardize successful long-term placements with the relatives. When abused or neglected children are placed with well-meaning but unprepared relatives, it can quickly cause a breakdown in the placement and a closed door thereafter. If time is taken to get a child needed treatment and to allow the relatives to prepare for the child, the likelihood of a successful placement may be increased.

A Parent's Role in Determining Placement

In practice, from the very beginning, parents are asked to name relatives. Then every relative is asked to name additional relatives. From all the relatives, the judge must sort out the best placement for the child. The parent's view of the best placement is part of the evidence, but can be unreliable. A parent's judgment can be impaired by mental retardation, mental illness, or alcohol or other drug abuse. A parent may desire to hinder the investigation by naming someone who will help cause the child to recant. A parent may name someone who will not seek child support from the parent. Finally, a parent may be motivated by plain old meanness to cause the child further harm.

Take a typical case. A grandmother learns that her granddaughter is being abused by the mother's boyfriend. The grandmother calls CPS, which conducts an investigation and determines that the allegations are probably true. The mother takes the boyfriend's side and is furious at the grandmother and the daughter. Instead of arguing that the grandmother should serve as the placement, the mother may argue for a distant aunt or even her boyfriend's mother.

Bottom line: after hearing all the evidence, a judge must make a decision based on the best interest of a real child in the real world. There is no way to write laws or policies that can turn what must be a case-by-case decision into anything else.

ENHANCING RELATIVE PLACEMENTS

There are, however, ways to enhance how quickly children are placed with relatives and the number and quality of relative placements.

Speed the Process of Criminal Background Check between CPS and DPS

A major barrier to quick relative placements is the time it takes to get a criminal background check. Ideally, CPS should be able to access criminal records on line from the Department of Public Safety. There may be legal or policy barriers, and there are financial barriers to on line access. Eliminating these barriers would be an inexpensive and highly productive step.

Increase CPS Capacity to Conduct Diligent Searches and Home Studies

Locating relatives can be a challenge. CPS does not have sufficient diligent search staff with access to state of the art tools. Once a relative is located, CPS Handbook § 6322 requires a caseworker to obtain an assessment of the relative before recommending placement, commonly called a home study. Such an assessment is an important step in ensuring the safety of the child. A key barrier to earlier consideration of relatives is the lack of caseworkers. Whether the state adds caseworkers or contract funds, it needs to increase the capacity to conduct diligent searches and home studies.

Improve Legal Representation for Parents

The Pew Commission on Children in Foster Care recently recommended securing effective representation for parents as a key to improving outcomes for children. An example of improving outcomes for children is the role lawyers for parents play in advocating for kinship care. When a parent is represented by a lawyer from the start of a case, the parent is more likely to name possible relatives and make a case for placement with a relative. A parent's lawyer also often serves as an informal resource for relatives seeking placement. We have four recommendations to strengthen legal representation for parents.

First, attorneys for parents should be appointed in more cases. Texas Family Code § 107.013 requires a court to appoint an attorney ad litem to represent the interest of an indigent parent only in a case in which the state seeks to terminate a parent's parental rights. In contrast, Texas Family Code § 107.012 requires the court to appoint an attorney ad litem for the child whenever the state seeks termination or to be named conservator of the child (meaning to have legal custody). The code should be amended so that any time the state seeks to be named conservator, the court must appoint an attorney for any indigent parent in opposition to the state's request.

Second, attorneys for parents should be appointed at the very beginning of a case. The Texas Family Code has been interpreted to mean that a judge need not appoint an attorney for the parent any sooner than necessary for the parent to be ready for the final trial. Such an appointment may be months after the removal. While this may comport with due process, it does not help a parent make a case for a relative placement.

Third, the state should appropriate funds to adequately compensate attorneys for parents. Texas Family Code § 107.015(c) places the duty to pay attorneys fees for indigent parents on the general fund of the county in which the suit is filed. Because counties must pay the fees, judges put off making appointments until the last possible moment consistent with due process. In addition, judges have set low fees. Certainly this affects the quality of representation. If the Family Code were amended to require judges to appoint attorneys earlier, the cost to counties would increase, as would the cost if the Family Code required judges to set fees higher. Counties would naturally resist any such unfunded mandates. The state, however, could appropriate funds to compensate attorneys. To ensure that the counties did not inappropriately shift costs to the state, the state could require the counties to maintain effort—in other words, to spend as much from the general fund per attorney as historically before drawing state dollars. State dollars would then be available to pay for earlier appointments and higher fees. A back of the napkin calculation suggests an annual cost on the order of \$24 million (12,000 removals, 6,000 families, 12,000 parents, \$2,000 per case over and above current county expenditures=\$24 million).

Fourth, the state should appropriate funds to some group such as the State Bar's Committee on Child Abuse and Neglect to provide continuing legal education for lawyers who represent parents. Federal and state money trains prosecutors, attorneys for children, and volunteer child advocates, but there is little money to train lawyers for parents. A small amount of training money could have a significant impact.

Provide Financial Assistance to Relatives

A lack of family resources is a major barrier to kinship care. While relatives can become foster parents, many cannot meet the licensing standards and others do not wish to become part of the system.

The state took a small step toward providing short-term support when the 78th Legislature authorized a pilot project in Article II, Protective and Regulatory Services, Rider 7c in the 2004-05 General Appropriations Act:

The department may utilize up to \$250,000 from funds appropriated above in Strategy A.1.5, Foster Care Payments, to develop and implement a relative placement reimbursement pilot program in one region of the state. The department shall conduct an evaluation of the pilot.

DFPS launched a pilot project in four South Texas counties to provide a \$1,000 one-time payment plus day care, counseling, and other support services to relatives. In addition, families can request an additional \$500 a year for exceptional expenses. The program now serves twenty-six families caring for seventy children. The state should expand this promising program.

The state could also enhance its long-term assistance to relatives caring for children. The state offers little now. If a child comes from a family so poor as to qualify for cash assistance from Temporary Assistance for Needy Families, and if the relative caregiver is related to the child by blood, marriage, or adoption, then the relative may obtain Medicaid for the child and a small monthly payment of about \$64 per child under the "Child Only Grant" of the TANF program. If the relative is 1) a grandparent (or great-grandparent) at least

forty-five years of age 2) with an income less than 200% of the federal poverty limit (\$18,620), and 3) with resources less than or equal to the TANF resource limit of \$1,000, then the relative may also receive a one-time payment of up to \$1,000 to help transition the first child placed into the grandparent's home. We recommend raising the resource limit higher than \$1,000 to increase the number of eligible grandparents. Under the present test, any grandparent with a decent car does not qualify.

Another possibility is guardianship assistance. (We use the term guardianship to be consistent with national usage. In Texas, the technical term is conservatorship, meaning that the relative has legal care, custody, and control of the child, but parental rights have not been terminated.) The state should consider offering guardianship subsidies, much like adoption subsidies. More than thirty states provide guardianship subsidies without any federal financial participation.

Of course, federal financial participation would make guardianship assistance more affordable. The Pew Commission on Children in Foster Care has recommended to Congress that the federal government offer to match state money used to provide guardianship assistance just like the federal government matches state money used for foster care and adoption assistance. The commission has recommended that the program be limited to children 1) who the state has been forced to remove from their home and place in foster care; 2) who have been in care for a given period of time; 3) for whom there is no feasible plan of reunification or adoption; and 4) for whom a strong bond exists with a potential guardian who is committed to carrying for the child permanently.

Texas should participate in the on-going national debate about federal financial participation in kinship care. At this point, we are not advocating such a program. If federal funds become available, however, the state needs to carefully evaluate whether its next best dollar for child protection would be in a guardianship subsidy program. Like adoption assistance, guardianship assistance can help meet the needs of children and reduce the cost to the state if children who would otherwise be in foster care are instead in less expensive care.



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¹ DFPS Letter to Select Committee on Child Welfare and Foster Care (2004).

² DFPS 2003 Data Book

³ CQ State Fact Finder 2004

⁴ CQ State Fact Finder 2004

⁵ DFPS 2003 Data Book. The number of children in poverty is from 2002, the most recent data from the Census Bureau. The number of calls to intake is an extrapolation from the DFPS 2003 Data Book

⁶ DFPS Letter to Select Committee on Child Welfare and Foster Care (2004)

⁷ DFPS Letter to Select Committee on Child Welfare and Foster Care (2004).

⁸ Fields, *Living Arrangements of Children - 1996*, Current Population Reports, U.S. Census Bureau p. 9 (April 2001)

⁹ Pew Commission on Children in Foster Care, *Fostering the Future: Safety, Permanence and Well-Being for Children in Foster Care* (May 2004), available at www.pewfostercare.org.

¹⁰ *In re M.J.M.L.*, 31 S.W.3d 347, 355-56 (Tex. App.—San Antonio 2000, pet. denied)(timing within the trial court's discretion); *Lassiter v. Department of Social Services*, 452 U.S. 18, 27-32 (1981)(appointment of counsel is not required for indigent parents in all termination cases)

¹¹ Pew Commission on Children in Foster Care, *Fostering the Future: Safety, Permanence and Well-Being for Children in Foster Care* (May 2004), available at www.pewfostercare.org