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An Ounce of Prevention is Worth a Pound of Cure: Why Children's Lawyers Must Champion Preventive Legal Advocacy

Melissa D. Carter¹

I. INTRODUCTION

The time for prevention in child welfare finally seems to have arrived. More than two decades ago, research documenting the effects of child abuse, neglect and family adversity on adult health and well-being furthered understanding about the ways in which adversity and toxic stress experienced in childhood relate to poor outcomes and highlight the need for prevention.² This research on Adverse Childhood Experiences (ACEs) compelled formal systems and institutions to reflect on how routine practices and procedures exacerbate or mitigate trauma and commit to being more trauma-informed.³ The increased awareness and mounting evidence that a child's removal from home and the subsequent experience of foster care can cause acute and enduring trauma⁴ have helped broaden thinking about the relationship between child protection and child well-being. In response, momentous changes have been made recently to federal policy to unlock new resources for the prevention of unnecessary separation of children from their families.⁵ As these structural changes take root, more resources and interventions will be focused upstream of Child Protective Services, addressing the conditions that bring

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² Vincent J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 14 AM. J. PREVENTIVE MED. 245, 245-46 (1998), <https://www.ajpmonline.org/action/showPdf?pii=S0749-3797%2898%2900017-8>; see also, *Adverse Childhood Experiences (ACEs)* CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/violenceprevention/aces/index.html> (last updated Apr. 2, 2021).

³ See e.g., Jan Jeske & Mary Louise Klas, *Adverse Childhood Experiences: Implications for Family Law Practice and the Family Court System*, 50 FAM. L.Q. 123, 123-37 (2016).

⁴ Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523, 526-27 (2019).

⁵ The Family First Prevention Services Act, Pub. L. No. 115-123, 132 Stat. 64 (codified as amended in scattered sections of 42 U.S.C.) authorizes federal reimbursement to states for the provision of certain evidence-based services to prevent the unnecessary placement of children in foster care. Before it became law in December 2019, the U.S. Department of Health and Human Services Administration on Children, Youth, and Families, Children's Bureau revised policy to allow state child welfare agencies to claim federal financial participation for administrative costs of independent legal representation provided by attorneys representing children and their parents. See CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., *Utilizing Title IV-E Funding to Support High Quality Legal Representation for Children and Youth Who Are in Foster Care, Candidates for Foster Care and their Parents and to Promote Child and Family Well-being* 12 (2021), <https://www.acf.hhs.gov/sites/default/files/documents/cb/im2106.pdf>.

families to the attention of the child welfare system in ways that can advance a child's right to family integrity.⁶

As child welfare system stakeholders coalesce around a prevention agenda, the role and responsibility of the legal and judicial community in achieving the outcomes of safety, permanency, and well-being for children must be redefined. One promising opportunity for system improvement that has captured the full attention of judges, lawyers, and agency administrators throughout the country is the national focus on high-quality legal representation. A subtle but significant policy change expands access to federal resources to support the provision of high-quality legal representation for all parties in dependency cases.⁷ Implementation strategies will integrate research with practice, leveraging knowledgeable and well-trained lawyers as problem-solvers who can achieve improved individual client and system-level outcomes.⁸

It has been said that “an ounce of prevention is worth a pound of cure.”⁹ Thus far, research and evaluation has demonstrated the benefits of quality legal representation, primarily in the context of foster care proceedings and the permanency outcomes sought for children, youth, and families who have already been separated through state intervention.¹⁰ The convergence of the aforementioned policy changes inspires reflection and imposes a new responsibility: system interventions must “move upstream” to address the social determinants of health that create vulnerabilities within families.¹¹ The emergence of models for preventive legal advocacy responds to this call for action.¹² Multidisciplinary legal teams work to resolve a family's unmet legal needs to prevent unnecessary reports to Child Protective Services.¹³ Children's attorneys have a vested professional interest in preventive legal advocacy as an emerging strategy for protecting a child's right to family integrity and should be among the approach's most fervent supporters.

⁶ See Shanta Trivedi, *My Family Belongs to Me: A Child's Constitutional Right to Family Integrity*, 56 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 267, PAGE 523 (2021); see also See Vivek Sankaran, *Using Preventive Legal Advocacy to Keep Children from Entering Foster Care*, 40 WM. MITCHELL L. REV. 1036, 1037 (2014).

⁷ CHILD.'S BUREAU, *supra* note 5, at 2.

⁸ See CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., HIGH QUALITY LEGAL REPRESENTATION FOR ALL PARTIES IN CHILD WELFARE PROCEEDINGS 1, 3 (2017), <https://www.acf.hhs.gov/sites/default/files/documents/cb/im1702.pdf>.

⁹ Benjamin Franklin, *On Protection of Towns from Fire*, PA. GAZETTE, Feb. 4, 1735, at 1.

¹⁰ CHILD.'S BUREAU, *supra* note 8, at 2.

¹¹ David R. Williams et al., *Moving Upstream: How Interventions That Address the Social Determinants of Health Can Improve Health and Reduce Disparities*, 14 J. PUB. HEALTH MGMT. & PRAC. S8, S9 (2008).

¹² Preventive legal advocacy refers to a variety of models for the provision of civil legal aid. See CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., CIVIL LEGAL ADVOCACY TO PROMOTE CHILD AND FAMILY WELL-BEING, ADDRESS THE SOCIAL DETERMINANTS OF HEALTH, AND ENHANCE COMMUNITY RESILIENCE 1 (2021), <https://www.acf.hhs.gov/sites/default/files/documents/cb/im2102.pdf>; see also CASEY FAMILY PROGRAMS, HOW CAN PRE-PETITION LEGAL REPRESENTATION HELP STRENGTHEN FAMILIES AND KEEP THEM TOGETHER? 1 (2020), https://caseyfamilypro-wpengine.netdna-ssl.com/media/20.07-QFF-SF-Preventive-Legal-Support_fnl.pdf.

¹³ Sankaran, *supra* note 6, at 1037.

II. THE RESEARCH CASE FOR INVESTING IN HIGH-QUALITY LEGAL REPRESENTATION

Interest in measuring the impact of legal representation provided to children and parents in dependency proceedings has been building for decades to inform strategies for advancing the right to counsel and securing adequate resources for a legal system that serves primarily indigent clients. Child welfare proceedings unfold within a complex and highly technical legal framework, and parents and children face challenges navigating the legal process and social services system. The vast majority of parents involved in child welfare cases contend with financial insecurity, and struggle with mental health and addiction issues.¹⁴ Children, who have fundamental liberty interests at stake, are not provided with party rights in every state and representation models vary widely.¹⁵ Procedural safeguards are needed to ensure parties fully participate in the legal process, yet low levels of engagement are pervasive and result in consistently poor outcomes.¹⁶

Over time, a body of research has developed, demonstrating the connection between high-quality legal representation and individual client and system-level outcomes.¹⁷ Studies show that competent legal representation is associated with increased engagement of parties in court hearings, case planning, and services; more individually-tailored case plans and services; increases in family time; and increased party perception of fairness.¹⁸ More remarkably, high-quality legal representation has been shown to expedite children's exits to permanency.¹⁹ By reducing the amount of time children spend in state custody, such legal representation is also cost-effective for state and local government.²⁰

A. Research Highlights

Researchers have studied individual attorney factors, such as specialized training, and systemic factors, including compensation, caseload, and administrative supports and

¹⁴ Lucas A. Gerber et al., *Effects of an Interdisciplinary Approach to Parental Representation in Child Welfare*, 102 CHILD. & YOUTH SERVS. REV. 42, 42 (2019); Susan P. Kemp et al., *Engaging Parents in Child Welfare Services: Bridging Family Needs and Child Welfare Mandates*, 88 CHILD WELFARE 101, 104-05 (2009).

¹⁵ Wendy Shea, *Legal Representation for Children: A Matter of Fairness*, 47 MITCHELL HAMLINE L. REV. 728, 731 (2021).

¹⁶ Kemp et al., *supra* note 14, at 101.

¹⁷ CHILD.'S BUREAU, *supra* note 8, at 7.

¹⁸ THE JUSTICE IN GOVERNMENT PROJECT, KEY STUDIES AND DATA ABOUT HOW LEGAL AID HELPS KEEP FAMILIES TOGETHER AND OUT OF THE CHILD WELFARE SYSTEM 7 (2021), <https://legalaidresourcesdotorg.files.wordpress.com/2021/04/foster-care.pdf>; *see also* CHILD.'S BUREAU, *supra* note 8, at 2.

¹⁹ CHILD.'S BUREAU, *supra* note 8, at 6.

²⁰ *Id.*

supervision to understand how these factors combine to foster or hinder the provision of quality legal representation. One of the earliest contributions to this research base was a study examining the impact of Palm Beach County's Foster Children's Project (FCP).²¹ The FCP model, which adheres to an expressed interest model of child representation, was found to produce improved permanency outcomes, particularly with respect to increased rates of adoption.²² On a larger scale, the federal government made a sizeable investment to develop and evaluate a model of child representation through the National Quality Improvement Center on the Representation of Children in the Child Welfare System (QIC-ChildRep).²³ Findings from a randomized-control trial evaluating the QIC-ChildRep Best Practice Model were more nuanced, but nevertheless provided insight into attorney behaviors that facilitate party engagement and strong support for the early appointment of counsel to expedite permanency for children and youth.²⁴ Most recently, a study of the impact of interdisciplinary parental representation on child welfare outcomes showed that such a model, "significantly reduces the length of time children spend in foster care; increases rates of timely permanency, reunification, and guardianship; and does so without increasing repeat maltreatment."²⁵ The researchers in that study noted, "[t]hese results align with the stated goals not only of children, parents, and parent defenders, but of family courts, child welfare agencies, and other advocates."²⁶

B. Moving from Research to Practice

With the value proposition of high-quality legal representation now clear, the federal government has consistently emphasized it as a priority for states, endorsing it as "critical to a well-functioning child welfare system."²⁷ The Children's Bureau of the U.S. Department of Health and Human Services issued specific guidance on the topic, encouraging state child welfare agencies and courts to ensure that all parties received high-quality legal representation during all stages of child welfare proceedings.²⁸ Acting further on its commitment, the Children's Bureau then expanded access to federal funding to resource quality legal representation by revising its guidance as to the activities for which states are allowed to claim federal reimbursement under Title IV-E of

²¹ Andrew Zinn & Clark Peters, *Expressed-Interest Legal Representation for Children in Substitute Care: Evaluation of the Impact of Representation on Children's Permanency Outcomes*, 53 FAM. CT. REV. 589, 589 (2015).

²² *Id.* at 596.

²³ National Quality Improvement Center on the Representation of Children in the Child Welfare System, QIC CHILDREP, <http://improvechildrep.org/Home.aspx> (last visited Oct. 22, 2021).

²⁴ BRITANY ORLEBEKE ET AL., CHAPIN HALL, EVALUATION OF THE QIC-CHILDREP BEST PRACTICES MODEL TRAINING FOR ATTORNEYS REPRESENTING CHILDREN IN THE CHILD WELFARE SYSTEM, 1, 71 (2016), https://www.chapinhall.org/wp-content/uploads/QIC-ChildRep_Chapin_Hall_Evaluation.pdf.

²⁵ Gerber et al., *supra* note 14, at 53.

²⁶ *Id.*

²⁷ CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., ENGAGING, EMPOWERING, AND UTILIZING FAMILY AND YOUTH VOICE IN ALL ASPECTS OF CHILD WELFARE TO DRIVE CASE PLANNING AND SYSTEM IMPROVEMENT 1, 1 (2019), <https://www.acf.hhs.gov/sites/default/files/documents/cb/im1903.pdf>.

²⁸ CHILD.'S BUREAU, *supra* note 8, at 1.

the Social Security Act, the largest federal child welfare funding source.²⁹ A portion of the cost of independent legal representation for a child who is a candidate for title IV-E foster care or in foster care and his/her parent now can be recovered through the federal reimbursement scheme.³⁰ The policy was subsequently amended to include tribal representation and costs of paralegals, investigators, peer partners, social workers, support staff, and oversight for independent child and parent legal representation,³¹ signaling clear support for multidisciplinary models of legal practice. The express objective of the Children's Bureau is "to promote and sustain high quality legal representation for all parents, children and youth, and child welfare agencies in all stages of child welfare proceedings."³²

III. A CHILD'S RIGHT TO FAMILY INTEGRITY AS A MATTER OF CONSTITUTIONAL LAW

The U.S. Supreme Court first explicitly recognized the constitutional rights of children in *In re Gault* when the Court pronounced "...[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone."³³ However, lawyers who represent children know that children's legal rights are not coextensive with the legal rights of adults.³⁴ Though children are regarded generally as "rights-bearing individuals," in the balancing of interests between children, parents, and the state, children's rights are often disregarded or routinely subordinated.³⁵ Explanatory theories suggest that children's interests are less important than those that outweigh them, or that children's constitutional rights are more limited because children lack "full capacity for individual choice."³⁶ The U.S. Supreme Court has explicitly and affirmatively declined to engage in an analysis of the full scope of children's rights on more than one occasion.³⁷ Thus, as

²⁹ *Title IV-E, Administrative Functions/Costs, Allowable Costs – Foster Care Maintenance Payments Program*, CHILD.'S BUREAU,

https://www.acf.hhs.gov/cwpm/public_html/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=36 (last visited Oct. 30, 2021); see 45 C.F.R. § 1356.60(c) (2016).

³⁰ CHILD.'S BUREAU, *supra* note 29.

³¹ *Id.*; see 45 C.F.R. § 1356.60(c)(2)(i-x) (2016).

³² CHILD.'S BUREAU, *supra* note 8, at 1.

³³ *In re Gault*, 387 U.S. 1, 13 (1967).

³⁴ See *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944) (recognizing the state's authority to regulate children's behavior is broader than for adults); see also *Bethel Schl. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986) (recognizing that offensive speech made by children in public schools can be prohibited even though offensive speech may not be prohibited to adults).

³⁵ Shea, *supra* note 15, at 731-32; see generally Aoife Daly, *Assessing Children's Capacity: Reconceptualising Our Understanding Through the UN Convention on the Rights of the Child*, 28 INT'L J. CHILD.'S RTS. 471, 472 (2020) (arguing for a rights-based approach to assessing children's capacity).

³⁶ Daly, *supra* note 35, at 483.

³⁷ See *In re Gault*, 387 U.S. at 13 (clarifying that the Court's opinion does not "consider the impact of these constitutional provisions upon the totality of the relationship of the juvenile and the state"); see also

has been succinctly observed, “[t]o date, neither legislatures nor courts have developed a coherent philosophy or approach when addressing questions relating to children’s rights. Different courts and legislatures have been willing to give some new rights to children, while denying them others, without explaining the difference in outcome.”³⁸

A. The Parental Rights Paradigm

Reflecting this imbalance, familial rights have developed largely along a single analytical and conceptual dimension that, historically, has placed greater emphasis on the interests of parents than children.³⁹ Common law recognized certain parental duties stemming from the natural affection of parents for children.⁴⁰ This legal concept of natural affection has been afforded constitutional protection traditionally framed as a substantive due process right of a parent to the custody and care of his or her child and a corresponding privacy interest to exercise that right free from unwarranted government intrusion.⁴¹ The U.S. Supreme Court first articulated the parental right in the 1923 case of Meyer v. Nebraska as an individual freedom included in the scope of liberty protected by the Fourteenth Amendment, stating, “[w]ithout doubt” that such liberty includes “the right of the individual . . . to establish a home and bring up children . . .”⁴² Thus, the parental prerogative to direct the “upbringing . . . of children under their control”⁴³ became the basis for the legal doctrine of parental rights.

The Court has reaffirmed the parental rights doctrine time and again, most recently, in the case of Troxel v. Granville. In a plurality opinion, the Court held that the Constitution protects “the fundamental right of parents to make decisions concerning the care, custody, and control of their children” free from undue government interference, stating:

[S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.⁴⁴

Ginsberg v. New York, 390 U.S. 629, 636 (1968) (finding “no occasion . . . to consider the impact of the guarantees of freedom of expression upon the totality of the relationship of the minor and the State”); Michael H. v. Gerald D., 491 U.S. 110, 130-31 (1989) (declining to decide “whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship”).

³⁸ Michael S. Wald, *Children’s Rights: A Framework for Analysis*, 12 U.C. DAVIS L. REV. 255, 258 (1979).

³⁹ Barbara Bennett Woodhouse, *Child Abuse, the Constitution, and the Legacy of Pierce v. Society of Sisters*, 78 U. DET. MERCY L. REV. 479, 482 (2001).

⁴⁰ WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 447 (1893); JAMES KENT, COMMENTARIES ON AMERICAN LAW 225 (1873).

⁴¹ Meyer v. Nebraska, 262 U.S. 390, 400 (1923); Pierce v. Soc’y of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 534-35 (1925); Stanley v. Illinois, 405 U.S. 645, 651 (1972).

⁴² See Meyer, 262 U.S. at 399.

⁴³ See Pierce, 268 U.S. at 534-35.

⁴⁴ Troxel v. Granville, 530 U.S. 57, 65-66, 68 (2000).

The Troxel Court characterized the liberty interest at issue as being “perhaps the oldest of the fundamental liberty interests recognized by this Court” and reaffirmed the existence of a “constitutional dimension” to the parent-child relationship.⁴⁵

However well-established, the parental right is not absolute, but rather, must be balanced against the state’s *parens patriae* interest in promoting the well-being of children.⁴⁶ In the Court’s own words, “the state has a wide range of power for limiting parental freedom and authority in things affecting the child’s welfare.”⁴⁷ In the balancing of interests, parental rights “are limited by the existence of an actual, developed relationship with a child, and are tied to the presence or absence of some embodiment of family.”⁴⁸ Thus, the scope of the liberty interest in a familial relationship is, at one level, defined by the quality and enduring nature of that relationship.⁴⁹ Natural affection does not flow in a unilateral direction. Accordingly, “the child’s own complementary interest in preserving relationships that serve her welfare and protection”⁵⁰ warrants the same legal recognition and protection as has been extended to the parent’s liberty interest in preserving an established familial bond.

B. Children’s Evolving Capacity

As child development research illuminates a more nuanced understanding of children’s mental capacity for decision-making, children’s legal capacity is no longer regarded as fixed.⁵¹ With support, children’s legal capacity has evolved and can be maximized, thereby allowing them greater autonomy to pursue their personal interests – that is, to maintain control over their own lives.⁵² Arguably, one of the most fundamental personal interests is the one that an individual has in maintaining relationships with his or her family.⁵³ Recognition of the weight of this interest has shifted the law’s conceptualization of family privacy from a narrow view of parental rights to a broader construction of a mutual and reciprocal right to family integrity.⁵⁴

In his dissent in Troxel, Justice Stevens broadened the traditional framing of the rights protecting the parent’s relationship to his or her child by elevating the interests of

⁴⁵ *Id.* at 65.

⁴⁶ *Prince v. Massachusetts*, 321 U.S. 158, 167 (1944).

⁴⁷ *Id.*

⁴⁸ *See Troxel*, 530 U.S. at 88 (Stevens, J., dissenting).

⁴⁹ *See Lehr v. Robertson*, 463 U.S. 248, 260 (1983); *Caban v. Mohammed*, 441 U.S. 380, 397 (1979).

⁵⁰ *See Troxel*, 530 U.S. at 88 (Stevens, J., dissenting).

⁵¹ Daly, *supra* note 35, at 489; *see also* MODEL CODE OF PRO. RESP. r. 1.14(a) (AM. BAR ASS’N 1980) (directing lawyers to “maintain a normal client-lawyer relationship” as far as reasonably possible with a client with diminished capacity).

⁵² Daly, *supra* note 35, at 473-74 (distinguishing legal capacity from mental capacity and rejecting a binary approach to capacity for one that recognizes children’s rights as a function of evolving capacities).

⁵³ Kevin B. Frankel, *The Fourteenth Amendment Due Process Right to Family Integrity Applied to Custody Cases Involving Extended Family Members*, 40 COLUM. J.L. & SOC. PROBS. 301, 319-20 (2007).

⁵⁴ *Id.*

the children involved.⁵⁵ He asserted that while a child's liberty interests in the family relationship had not been clearly established as a matter of law:

...it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation. At a minimum, our prior cases recognizing that children are, generally speaking, constitutionally protected actors require that this Court reject any suggestion that when it comes to parental rights, children are so much chattel.⁵⁶

Justice Stevens's dissent recognizes that the liberty inherent in familial relationships does not flow in one direction from the parent to the child but, instead, is mutual and reciprocal between the two.⁵⁷ The argument holds that just as a parent possesses a natural and legal right to maintain a relationship with his or her child, the child also possesses a right to family integrity that warrants protection from undue state interference.

Similarly, the Federal District Court for the North District of Georgia acknowledged a child's right to family integrity in the state's child welfare reform lawsuit.⁵⁸ In its order denying the motions for summary judgment filed by defendants Fulton County and DeKalb County, the court elevated the child's liberty interest in family integrity to the status of a substantive right deserving of procedural protections, concluding:

...children have fundamental liberty interests at stake in deprivation [dependency] and TPR [termination of parental rights] proceedings ... includ[ing] a child's interest in his or her own safety, health, and well-being, as well as an interest in maintaining the integrity of the family unit and in having a relationship with his or her biological parents.⁵⁹

Against the now near-century of precedent examining the scope of family privacy rights, Justice Stevens's dissent in Troxel and the Kenny A. v. Perdue federal district court opinion stand out as potential inflection points in the evolution of children's rights. While the U.S. Supreme Court has not explicitly recognized a child's independent right to family integrity, such a right enjoys "strong theoretical and normative support."⁶⁰ It is consistent with parental privacy rights long protected in the tradition of American law,

⁵⁵ See *Troxel*, 530 U.S. at 88–89 (Stevens, J., dissenting).

⁵⁶ *Id.*

⁵⁷ *Id.* at 89–90.

⁵⁸ *Kenny A. ex rel. Winn v. Perdue*, 356 F. Supp. 2d 1353, 1360 (N.D. Ga. 2005).

⁵⁹ *Id.*

⁶⁰ See *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ("The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment."); Trivedi, *supra* note 6, at 563.

particularly when asserted in response to the threat of family separation through state action.⁶¹ Recognizing an independent right to family integrity “would let children’s voices be heard, allow their needs to be met, give children more power, and honor the fact that children are affected by state intervention into families.”⁶²

IV. A CHILD’S RIGHT TO FAMILY INTEGRITY AS A MATTER OF STATUTORY LAW

Expectations about children’s rights in the child welfare system originate with a number of complex and varied federal laws, the key provisions of which established child safety, permanency, and well-being as priorities central to the agency’s responsibilities for placement and service provision and the court’s oversight role.⁶³ These laws are enforced mainly through federal penalties imposed on states for findings of noncompliance or deficiency and lack meaningful enforcement as substantive rights for individual children.⁶⁴ The most significant federal child welfare laws have been roundly criticized for hindering the advancement of a child’s right to family integrity, primarily by framing the interests of children as antagonistic to family preservation policies.⁶⁵

The first comprehensive federal child welfare law, the Adoption Assistance and Child Welfare Act of 1980, prioritized the preservation of families.⁶⁶ It opened a new resource path to fund “child welfare services” offered to prevent child maltreatment and “the unnecessary separation of children from their families,” and to restore families that had been separated.⁶⁷ More famously, the Act required as a condition of funding that state child welfare agencies make “reasonable efforts . . . prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child’s home . . .”⁶⁸ A decade and a half later, the Adoption and Safe Families Act of 1997 (ASFA) “clarified” the reasonable efforts requirement, in part, by creating exceptions to its application when certain “aggravated circumstances” are present in a case and by extending the requirement to permanency planning efforts that are inconsistent with

⁶¹ Trivedi, *supra* note 6, at 564.

⁶² *Id.*

⁶³ EMILIE STOLTZFUS, CONG. RSCH. SERV., IF10590, CHILD WELFARE: PURPOSES, FEDERAL PROGRAMS, AND FUNDING (2021), <https://fas.org/sgp/crs/misc/IF10590.pdf>.

⁶⁴ *Id.*

⁶⁵ Dorothy E. Roberts, *Is There Justice in Children’s Rights?: The Critique of Federal Family Preservation Policy*, 2 U. PA. J. CONST. L. 112, 117 (1999).

⁶⁶ Robert F. Kelly, *Family Preservation and Reunification Programs in Child Protection Cases: Effectiveness, Best Practices, and Implications for Legal Representation, Judicial Practice, and Public Policy*, 34 FAM. L.Q. 359, 363-64 (2000).

⁶⁷ Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, § 425(a)(1)(C), 94 Stat. 500, 519 (1980) (amended 2006).

⁶⁸ § 471 (current version at 42 U.S.C. § 671(a)(15)(B)(i)); Raymond C. O’Brien, *Reasonable Efforts and Parent-Child Reunification*, MICH. STATE L. REV. 1029, 1041 (2013); *see also* Kathleen S. Bean, *Aggravated Circumstances, Reasonable Efforts, and ASFA*, 29 B.C. THIRD WORLD L.J. 223, 224 (2009).

reunification as a goal.⁶⁹ Critics convincingly argue that ASFA abandons family preservation policies by constructing and exploiting an artificial “opposition of children’s to families’ rights.”⁷⁰

Such “divergent understandings of the relationship between children’s interests and preserving families”⁷¹ are apparent in the weak and inconsistent enforcement of the reasonable efforts requirements. Self-report surveys reveal that judges consistently fail to enforce reasonable efforts requirements.⁷² Judges either do not make the required findings or defer to the agency in the assessment of the efforts made to prevent family separation.⁷³ In this way, the reasonable efforts requirement has become a *pro forma* exercise, and the courts are not engaging in proper and meaningful oversight over state efforts to maintain the family.⁷⁴ “In abdicating their responsibility to carefully scrutinize removal petitions for reasonable efforts, courts have become complicit in the system’s failure to prevent unnecessary removals, thereby compounding the trauma a child experiences.”⁷⁵

V. A CHILD’S RIGHT TO FAMILY INTEGRITY IN THE CHILD WELFARE SYSTEM

The child welfare system is neither designed nor resourced to protect a child’s right to family integrity, even if that right enjoyed greater legal recognition. Inadequate staffing, high staff turnover, conflicting and incongruent policy priorities, insufficient resources, and unrealistic public and political expectations are among the many external forces distracting the system’s focus from that central tenet.⁷⁶ The child welfare system did not become overwhelmed on its own; federal policies and supports to address the economic needs of families were separated from child protection policies, creating service silos that increase the vulnerability of families and children.⁷⁷ The result is a child welfare system that lacks both sensitivity and precision in responding to child maltreatment.

⁶⁹ Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (current version at 42 U.S.C. § 671(a)(15)(D)(i)).

⁷⁰ Roberts, *supra* note 65, at 116.

⁷¹ *Id.* at 117.

⁷² See e.g., MUSKIE SCH. PUB. SERV. CUTLER INST. FOR CHILD & FAM. POL’Y & A.B.A CTR. ON CHILD. & L., MICHIGAN COURT IMPROVEMENT PROGRAM REASSESSMENT 106 (2005), http://muskie.usm.maine.edu/Publications/cf/MI_CourtImprovementProgramReassessment.pdf.

⁷³ *Id.*

⁷⁴ See Vivek S. Sankaran & Christopher Church, *Easy Come, Easy Go: The Plight of Children Who Spend Less Than Thirty Days in Foster Care*, 19 U. PA. J.L. & SOC. CHANGE 207, 227 (2016).

⁷⁵ *Id.* at 229.

⁷⁶ See Brenda D. Smith & Stella E.F. Donovan, *Child Welfare Practice in Organizational and Institutional Context*, 77 SOC. SERV. REV. 541, 546-53 (2003).

⁷⁷ Roberts, *supra* note 65, at 112.

System outcome and performance data consistently show that the majority of children who enter foster care are removed from their families for reasons of neglect.⁷⁸ For Federal Fiscal Year (FFY) 2019, the U.S. Department of Health and Human Services reports that 74.9% of victims were neglected.⁷⁹ For comparison, the next-highest category is physical abuse, at 17.5%.⁸⁰ Furthermore, “[t]hree-fifths (61.0%) of victims [were] neglected only” (i.e., were not substantiated for multiple maltreatment types).⁸¹ Preliminary estimates for that same time period indicate that 63% of all removals to foster care involved neglect.⁸² Researchers have observed a clear trend: “child abuse has become much less common; child neglect has not.”⁸³

The Federal Child Abuse Prevention and Treatment Act defines child abuse and neglect as, an “act or failure to act . . . which presents an imminent risk of serious harm.”⁸⁴ State statutory definitions of child abuse and neglect vary considerably. Lacking precise definitional boundaries, state intervention often sweeps broadly, drawing many families deeper into the formal child welfare system unnecessarily and unjustly, particularly for reasons of chronic family adversity rooted in conditions of poverty.⁸⁵ Research has shown that family income status is a significant predictor of child welfare system involvement.⁸⁶ Families below the poverty line are three times more likely to be substantiated for child maltreatment, and children in poverty are more likely to enter foster care.⁸⁷ Put in starker terms, one out of three children living in neighborhoods with a poverty rate greater than 20% will experience a Child Protective Service (CPS) investigation.⁸⁸ Financial instability can create or exacerbate parental stress.⁸⁹

⁷⁸ See CHILD.'S BUREAU, U.S. DEP'T. OF HEALTH & HUM. SERVS., CHILD MALTREATMENT 2019, at 6-15 (2019), [HTTPS://WWW.ACF.HHS.GOV/SITES/DEFAULT/FILES/DOCUMENTS/CB/CM2019.PDF](https://www.acf.hhs.gov/sites/default/files/documents/cb/cm2019.pdf).

⁷⁹ *Id.* at xi.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² CHILD.'S BUREAU, U.S. DEP'T. OF HEALTH & HUM. SERVS., THE AFCARS REPORT 2 (2020), <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport27.pdf>.

⁸³ Natalie K. Worley & Gary B. Melton, *Mandated Reporting Laws and Child Maltreatment: The Evolution of a Flawed Policy Response*, in A 50 YEAR LEGACY TO THE FIELD OF CHILD ABUSE AND NEGLECT 103, 106 (Richard D. Krugman & Jill E. Korbin eds. 2013).

⁸⁴ CAPTA Reauthorization Act of 2010, Pub. L. No. 111-320, 124 Stat. 3459, 3482 (2010) (current version at 42 U.S.C. § 5101 note (Definitions) defining child abuse and neglect as “any recent act or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm, sexual abuse or exploitation . . . or an act or failure to act which presents an imminent risk of serious harm”).

⁸⁵ BRETT DRAKE & MELISSA JONSON-REID, *Child Maltreatment: Contemporary Issues in Research and Policy, Poverty and Child Maltreatment*, HANDBOOK OF CHILD MALTREATMENT (Jill E. Korbin & Richard D. Krugman eds. 2013).

⁸⁶ Kelley Fong, *Child Welfare Involvement and Contexts of Poverty: the Role of Parental Adversities, Social Networks, and Social Services*, 72 CHILD. & YOUTH SERVS. REV. 5, 6 (2017).

⁸⁷ Kelley Fong, *Neighborhood Inequality in the Prevalence of Reported and Substantiated Child Maltreatment*, 90 CHILD ABUSE & NEGLECT 13, 17 (2019).

⁸⁸ *Id.*

⁸⁹ DRAKE & JONSON-REID, *supra* note 85, at 137.

Unemployment and lack of access to concrete resources such as food, adequate housing, and child care can increase the risk of child maltreatment.⁹⁰

The broad sweep is powered by mandated reporters, the system's primary device for detecting the occurrence of child maltreatment in the community.⁹¹ Professional report sources routinely constitute the majority of all reports of alleged or suspected child abuse or neglect made to CPS.⁹² In FFY 2019, mandated reporters accounted for 68.6% of all CPS reports,⁹³ yet the majority of those reports (71%) find no victimization following an investigation (i.e., are unsubstantiated).⁹⁴ In this way, a structural incongruity exists between the system for detecting child maltreatment in the community and the tools available for responding to it.

That structural incongruity is a result of the flawed assumptions underlying the policy of mandatory reporting.⁹⁵ Though the majority of states had enacted mandatory reporting schemes prior to the 1962 "discovery" of battered child syndrome by pediatrician C. Henry Kempe, his body of work focused national attention on child maltreatment and led to the federal requirement for all states to adopt mandated reporting laws.⁹⁶ Dr. Kempe's conceptualization of the problem of child maltreatment was narrowly defined by physical harm inflicted on children by parents with significant mental health problems.⁹⁷ "[H]is focus was not on maltreatment that occurred because families lacked housing, lacked food security, or were unable to control their children's behavior."⁹⁸ As Worley and Melton observe,

From this erroneous starting point, policymakers developed vague and inconsistent statutes designed to mandate a broad range of professionals to report suspected cases of child maltreatment. Rather than detecting a narrow band of cases for early intervention, this system of mandated reporting has resulted in a child protection system so overburdened by the requirement to investigate reports of suspected child maltreatment that it is unable to respond adequately to genuine needs. By largely absolving professionals and communities of the responsibility to keep children safe (in effect, to do

⁹⁰ *Id.* at 141.

⁹¹ Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (1974) (current version at 42 U.S.C. § 601, 620, 5101-06).

⁹² DANA WEINER ET AL., CHAPIN HALL, SYSTEM TRANSFORMATION TO SUPPORT CHILD & FAMILY WELL-BEING: THE CENTRAL ROLE OF ECONOMIC & CONCRETE SUPPORTS 3-4 (2021), <https://www.chapinhall.org/wp-content/uploads/Economic-and-Concrete-Supports.pdf>.

⁹³ CHILD.'S BUREAU, *supra* note 78, at 9.

⁹⁴ DANA WEINER ET AL., CHAPIN HALL, COVID-19 AND CHILD WELFARE: USING DATA TO UNDERSTAND TRENDS IN MALTREATMENT 4 (2021), <https://www.chapinhall.org/wp-content/uploads/Covid-and-Child-Welfare-brief.pdf>.

⁹⁵ Worley & Melton, *supra* note 83, at 107.

⁹⁶ *Id.* at 103.

⁹⁷ *Id.* at 104.

⁹⁸ WEINER ET AL., *supra* note 92, at 10.

more than report), the evolution of our current system falls far short of fulfilling Kempe's intended objective.⁹⁹

Adding nuance, Professor Fong points to the reliance of reporting professionals on the child protective service agency's "dual supportive and coercive capacities to rehabilitate families,"¹⁰⁰ stating that, "Child maltreatment investigations thus emerge not so much from professionals sounding the alarm about children in imminent danger, but from constrained street-level bureaucrats hoping to rehabilitate families in need by shuttling them to a multifaceted surveilling agency."¹⁰¹ When reporting professionals turn to CPS for support, they do so seeking assistance for the family, knowing that CPS can require a family to participate in services and monitor the family's compliance.¹⁰² In this way, "CPS's dual therapeutic and regulative roles ... align[ed] with reporting professionals' aspirations for families."¹⁰³ Restated, Fong's observation is that mandated reporters make referrals to CPS on the basis of concern for the family and an interest in ensuring the family gets services. Child Protective Services in turn, responds with an investigation and provision of services under ongoing oversight and threat of forced removal of a child from parental custody. The result is that the mandatory reporting system functions as a "system of surveillance rather than support."¹⁰⁴

Rather than expand the mandatory reporting system and amplify its inefficiencies, system resources should be rededicated in ways that align with the prevention agenda. As observed by Chapin Hall researchers,

...hotline reports consisting solely of neglect allegations (i.e., "neglect only") may be a phenomenon distinct from child endangerment. While lack of supervision, food, clothing, or shelter can surely jeopardize the safety of children, addressing these directly through concrete supports may be more efficient and effective than initiating a child welfare case that punishes families living in poverty.¹⁰⁵

The child welfare system reimagined for the prevention era is one "that builds protective capacities, mitigates maltreatment risk factors, and addresses racial disparities[.]"¹⁰⁶ It is one that can reduce unnecessary intrusion on family privacy by replacing surveillance with a robust service array through which families can access

⁹⁹ Worley & Melton, *supra* note 83, at 104.

¹⁰⁰ Kelley Fong, *Getting Eyes in the Home: Child Protective Services Investigations and State Surveillance of Family Life*, 85 AM. SOCIO. REV. 610, 620 (2020).

¹⁰¹ *Id.* at 622.

¹⁰² *Id.*

¹⁰³ *Id.* at 621-22.

¹⁰⁴ WEINER ET AL., *supra* note 92, at 3.

¹⁰⁵ DANA WEINER ET AL., CHAPIN HALL, ACHIEVING IMPROVED CHILD WELL-BEING THROUGH PREVENTION: A CALL FOR SYSTEM ADAPTATION 22 (2021), https://www.chapinhall.org/wp-content/uploads/AchievingImprovedChildandFamily-PP_Oct2020.pdf.

¹⁰⁶ WEINER ET AL., *supra* note 92, at 8.

supportive services directly.¹⁰⁷ And, in this way, it is one that changes the conditions holding the problems in place, by moving upstream.¹⁰⁸

VI. PROTECTING A CHILD'S RIGHT TO FAMILY INTEGRITY THROUGH "UPSTREAM" PREVENTIVE LEGAL ADVOCACY

The upstream intervention alternative for legal and judicial actors in the child welfare system has a name: Preventive Legal Advocacy. The term Preventive Legal Advocacy (PLA) refers to a critical stage in a continuum of civil legal aid afforded to families who are at risk of being reported to CPS and/or losing custody of their children because of unresolved legal issues.¹⁰⁹ The model is still emerging but its core elements have been previously described:

Child welfare agencies, courts, community-based organizations, and others refer families at risk of losing children to foster care because of unresolved legal issues. Once a case is accepted, the programs provide families with the assistance of an attorney, a social worker, and a parent advocate to help resolve legal issues ... which affect the safety of the child in the home.¹¹⁰

This model is a data-driven and research-informed strategy with the potential to transform the child welfare system by shifting resource capacity in ways that support a more effective response to the needs of families and the conditions that drive the entry of children into foster care.

A. *Civil Legal Advocacy Preserves Family Integrity*

Administrative data, research, and experience compel recognition of the fact that most families involved with the child welfare system are economically insecure or living in poverty. As a population, low-income families also evidence a high need for civil legal advocacy. The Justice Gap Report, authored by the Legal Services Corporation (LSC), found that "71% of all low-income families experienced at least one civil legal problem in the last year."¹¹¹ Higher rates were documented for "households with survivors of domestic violence or sexual assault (97%), with parents/guardians of kids under 18 (80%), and with disabled persons (80%)."¹¹² Yet "86% of civil legal problems reported

¹⁰⁷ *Id.*

¹⁰⁸ See JOHN KANIA ET AL., *THE WATER OF SYSTEMS CHANGE* 2-3 (2018), <http://efc.issuelab.org/resources/30855/30855.pdf>.

¹⁰⁹ See *How is Preventive Legal Advocacy Critical to the Continuum of Legal Advocacy?*, CASEY FAM. PROGRAMS, <https://www.casey.org/preventive-legal-advocacy/> (last visited Nov. 3, 2021).

¹¹⁰ Sankaran, *supra* note 6, at 1041.

¹¹¹ LEGAL SERVS. CORP., *THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS* 6-7 (2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf>.

¹¹² *Id.* at 7.

by low-income Americans received inadequate or no legal help.”¹¹³ As documented and discussed further by the LSC, the civil legal problems faced by most low-income individuals are those “most often related to basic needs” including access to health care, housing, and financial security.¹¹⁴ Twenty-seven percent of low-income families reported a civil legal problem related to children or custody, including being investigated by CPS and having trouble with custody or visitation arrangements.¹¹⁵ Families also reported legal problems related to being denied access to special education services, school discipline, and income maintenance.¹¹⁶ At one level, these, as well as related unmet civil legal needs, are manifestations of individual and family adversity. But they unfold in a broader context, and their effects are compounded by the adverse community environments in which those individual experiences of adversity are rooted.¹¹⁷

Social determinants of health refer to “[t]he contexts in which people live, learn, work, and play.”¹¹⁸ Examples include quality of education, neighborhood safety, educational and job opportunities, and access to healthcare and transportation.¹¹⁹ Deficits in these areas negatively affect a wide range of outcomes and can create or increase vulnerability within families.¹²⁰ For example, a child living in an unsafe neighborhood faces an increased risk of exposure to violence; a family’s lack of access to healthcare means a child goes without necessary treatment for a chronic disease or injury; and an underemployed parent becomes homeless. When such adversity presents in clinical, educational, or social settings, mandated reporters alert child protection authorities to the perceived danger.¹²¹ In this way, the “justice gap”¹²² can lead to permanent family separation. Legal advocacy can offer an effective alternative early intervention strategy.

Civil legal advocacy has proven effective at addressing the social determinants of health that create vulnerability within families. For example, in the context of housing, Harvard University researchers found that clients “who were offered full legal representation were less likely to lose possession, less likely to have a judgment or writ of

¹¹³ *Id.* at 6.

¹¹⁴ *Id.* at 21.

¹¹⁵ *Id.* at 23.

¹¹⁶ *Id.*

¹¹⁷ Wendy R. Ellis & William H. Dietz, *A New Framework for Addressing Adverse Childhood and Community Experiences: The Building Community Resilience Model*, 17 *ACAD. PEDIATRICS* S86, S86-87 (2017).

¹¹⁸ Paula A. Braveman et al., *Broadening the Focus: The Need to Address the Social Determinants of Health*, 40 *AM. J. PREVENTIVE MED.* S4, S5 (2011); see also COMM’N ON SOC. DETERMINANTS OF HEALTH, WORLD HEALTH ORG., *CLOSING THE GAP IN A GENERATION: HEALTH EQUITY THROUGH ACTION ON THE SOCIAL DETERMINANTS OF HEALTH* 26 (2008), https://www.who.int/social_determinants/final_report/csdh_finalreport_2008.pdf.

¹¹⁹ See Off. of Disease Prevention & Health Promotion, U.S. Dep’t of Health & Hum. Servs., *Social Determinants of Health*, HEALTHY PEOPLE 2030, <https://health.gov/healthypeople/objectives-and-data/social-determinants-health> (last visited Dec. 5, 2021).

¹²⁰ Ellis & Dietz, *supra* note 117, at S87.

¹²¹ Fong, *supra* note 100, at 13.

¹²² *Id.* (defining “justice gap” as the difference between the civil legal needs of low-income Americans and the resources available to meet those needs).

execution entered against them, and required to pay less, on average,” than those in the control group.¹²³ Studies also show more favorable outcomes for clients with legal representation in matters affecting economic prosperity such as successfully claiming unemployment, disability, and public benefits.¹²⁴ Legal representation in family law cases has been found to be positively associated with more favorable custody outcomes, greater protections against domestic violence, and increased alimony and support awards.¹²⁵ Resolving issues of housing, economic supports, health care, family conflict, and child custody through legal advocacy stabilizes the family and has been shown to reduce the need for further contact or involvement with the child welfare system.¹²⁶

A. Pre-Petition Legal Representation

Researchers have observed that the “potential purchase of legal advocacy” may be a function of the “exigencies of each legal milestone.”¹²⁷ The pre-petition stage of a case is a key transition point, presenting a strategic opportunity to prevent further progression of a potential child welfare case. In pre-petition programs, referrals for legal assistance are made by child welfare agencies, courts, community-based organizations, or by self-referral *after* a CPS report is made.¹²⁸ The purpose of the referral is to resolve an identified ancillary legal issue in order to divert the family from deeper involvement in the child welfare system.¹²⁹

Federal law requires state child welfare agencies to make “reasonable efforts” to prevent removal,¹³⁰ but parents do not have a right to legal representation until after their child has already been removed.¹³¹ Pre-petition legal representation programs seek to provide services that prevent the need for the agency to file a petition for custody.¹³² In this way, making legal representation for parents available at the point of the CPS investigation for maltreatment provides an opportunity for the child welfare agency to make meaningful efforts to prevent removal.

One leading exemplar of a pre-petition legal representation program is the Detroit Center for Family Advocacy (CFA), which operated from 2009 to 2016 as a grant-funded

¹²³ Emily S. Taylor Poppe & Jeffrey J. Rachlinski, *Do Lawyers Matter? The Effect of Legal Representation in Civil Disputes*, 43 PEPP. L. REV. 881, 901 (2016).

¹²⁴ *Id.* at 913-18.

¹²⁵ *Id.* at 922-26.

¹²⁶ CHILD.’S BUREAU, *supra* note 5, at 1.

¹²⁷ Zinn & Peters, *supra* note 21, at 598.

¹²⁸ Sankaran, *supra* note 6, at 1040.

¹²⁹ *Id.* at 1041.

¹³⁰ Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (current version at 42 U.S.C. § 671(a)(15)(B)(i)).

¹³¹ Sankaran & Church, *supra* note 74, at 230-33.

¹³² Gianna Giordano & Jey Rajaraman, *Increasing Pre-Petition Legal Advocacy to Keep Families Together*, AM. BAR ASS’N (Dec. 15, 2020), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2020/winter2021-increasing-pre-petition-legal-advocacy-to-keep-families-together/>.

project of the University of Michigan Law School's Child Advocacy Law Clinic.¹³³ Families were referred to CFA primarily by the Michigan Department of Human Services when the agency identified a legal issue affecting child safety.¹³⁴ Center for Family Advocacy multidisciplinary legal teams, consisting of an attorney, a social worker, and a family advocate, provided legal counseling and out-of-court advocacy to prevent children from unnecessarily entering foster care.¹³⁵ Legal matters commonly addressed included housing, custody, public benefits, and domestic violence.¹³⁶ In addition, CFA social workers assessed families for additional, non-legal needs and provided resource assistance, counseling, and other services.¹³⁷ The CFA achieved its legal objectives in 98.2% of prevention cases, resolving collateral legal issues ultimately to prevent 110 children in fifty-five cases from entering foster care.¹³⁸ These results are demonstrable evidence of reasonable efforts to prevent removal and the ability of lawyers to protect a child's right to family integrity.

Legal Services of New Jersey (LSNJ) operates an established pre-petition legal representation program that has enjoyed comparable success. Since it began its pre-petition work in 2018, LSNJ has prevented removal in every one of the more than 200 referrals received.¹³⁹ Similar to the Center for Family Advocacy, LSNJ provides advice, social service support, and legal assistance through a multidisciplinary team approach to families who have come to the attention of the child protection agency.¹⁴⁰ All clients accepted by LSNJ meet income guidelines, and most are contending with issues with housing or public benefits.¹⁴¹

Another well-publicized example is Iowa's Parent Representation Pilot Project (PRP), which began in 2013.¹⁴² The PRP offers a multidisciplinary approach that makes holistic supports available to families, including social services (mental health or substance abuse counseling, housing supports, and domestic violence advocacy) and legal

¹³³ DETROIT CTR. FOR FAM. ADVOC., UNIV. OF MICH. L. SCH., PROMOTING SAFE AND STABLE FAMILIES (2014), <https://artscimedia.case.edu/wp-content/uploads/sites/35/2014/02/14194055/CFARreport.pdf>; Vivek Sankaran, *What We Need to Protect American Families*, IMPRINT (Oct. 30, 2018), <https://imprintnews.org/opinion/need-protect-american-families/32590>.

¹³⁴ DETROIT CTR. FOR FAM. ADVOC., *supra* note 133.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ VIVEK SANKARAN & ROBBIN POTT, UNIV. OF MICH. L. SCH., RESPONSE TO THE STATE OF MICHIGAN'S REQUEST FOR INFORMATION: SOCIAL IMPACT BONDS – PAY FOR SUCCESS BASED FINANCING 7 (2013), https://www.michigan.gov/documents/micontractconnect/The_Regents_of_the_University_of_Michigan_442319_7.pdf.

¹³⁹ Giordano & Rajaraman, *supra* note 132.

¹⁴⁰ *About Us*, LEGAL SERVS. OF N.J., <https://www.lsnj.org/AboutUS.aspx> (last visited Nov. 11, 2021); Giordano & Rajaraman, *supra* note 132.

¹⁴¹ Giordano & Rajaraman, *supra* note 132.

¹⁴² Amber Gilson & Michelle Jungers, *Preserving Families Through High-Quality Pre-Petition Representation*, AM. BAR ASS'N (Mar. 4, 2021), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2021/spring2021-preserving-families-through-high-quality-pre-petition-representation/>.

representation to prevent formal dependency court proceedings.¹⁴³ Typical legal representation matters include child custody and guardianship, protective orders, criminal record expungements, and eviction.¹⁴⁴ The PRP reports receiving 450 referrals in the last three years, serving nearly 300 clients, and preventing 468 children from entering the juvenile court system.¹⁴⁵ Building on this success, the PRP is expanding to more local jurisdictions. A state law took effect on July 1, 2020, authorizing the state public defender to lead a four-year “pilot project to implement innovative models of legal representation in order to assist families involved in the child welfare system.”¹⁴⁶ The law specifically allows and appropriates funding for the appointment of an attorney to represent a parent prior to the initiation of formal dependency court proceedings.¹⁴⁷

Though few formal evaluations of pre-petition programs have been undertaken, available findings are encouraging. These programs do, in fact, prevent family separation. Unsurprisingly, more jurisdictions are considering creating pre-petition legal representation programs, and as they do, another innovation in the field has emerged.

B. Preventive Legal Advocacy

Moving the intervention further upstream, Preventive Legal Advocacy (PLA) programs make legal services available to address social determinants of health¹⁴⁸ *before* a CPS report is made. Preventative Legal Advocacy programs may address the same or similar legal issues as pre-petition legal representation programs – matters like housing, domestic violence, public benefits, employment, custody, special education and school discipline – they just provide advocacy at an earlier stage.

The classic example of PLA program is a medical-legal partnership (MLP).¹⁴⁹ MLPs conceive of lawyers as part of the health care team.¹⁵⁰ Lawyers are embedded in health care settings where their expertise can be leveraged to resolve problems for individual patients and to support professionals to overcome policy barriers, navigate complex regulatory and service systems, and transform institutional practice.¹⁵¹ Other examples include school-based legal clinics and dedicated staff within existing civil legal

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ 2020 Iowa Acts 73.

¹⁴⁷ 2020 Iowa Acts 74.

¹⁴⁸ *See About Social Determinants of Health*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/socialdeterminants/about.html> (last reviewed Mar. 10, 2021). The CDC defines the social determinants of health (“SDOH”) as the environmental conditions in the places where people live, learn, work, and play that affect a wide range of health risks and outcomes. *Id.* Examples of SDOH include income insecurity, food insecurity, affordable and quality housing, quality education, and cohesion within a community. *Id.*

¹⁴⁹ *Home*, NAT’L CTR. FOR MED.-LEGAL P’SHP, <https://medical-legalpartnership.org> (last visited Nov. 12, 2021).

¹⁵⁰ *Id.*

¹⁵¹ *The Need*, NAT’L CTR. FOR MED.-LEGAL P’SHP, <https://medical-legalpartnership.org/need/> (last visited Nov. 12, 2021).

aid offices, or specially-designed programs through which legal assistance is available to address matters that are often referred to as “collateral legal issues,” including housing, immigration, debt, employment, criminal records expungement, and access to public benefits, education, and healthcare.¹⁵² Preventative Legal Advocacy programs are based on an understanding that individual, community, and societal factors create vulnerability within families and communities and increase the risk of child maltreatment.¹⁵³ Legal advocacy that addresses the social determinants of health promotes resilience at the individual and community level which, in turn, acts as a protective factor to prevent the harms of child abuse, neglect, and system intervention.

C. Key Elements

There is no single model for pre-petition legal representation nor for preventive legal advocacy programs, and imposing a standard model may limit the ability of such programs to help local communities respond to the unique needs of families. The key elements of the approach are familiar, however, and include:

- Collaboration with the child protection agency. In pre-petition legal representation programs, the legal services provider or legal advocacy organization is receiving referrals directly from CPS. In preventive legal advocacy programs, the legal representation is undertaken with an express goal of preventing CPS involvement with the family.
- Focus on legal issues that directly affect the ability of the parent or caregiver to provide for the child’s safety, permanence, and well-being. The scope of representation varies and critical design questions must be answered about the capacity and expertise of the legal team and the costs and benefits of continuing representation of the parent or caregiver if or when the case comes within the formal jurisdiction of the juvenile court.
- A multidisciplinary team approach. The legal team includes lawyers with experience in child welfare matters, social workers with knowledge of available social services, and peer advocates with direct, personal experience in the child welfare system who can build trusting relationships and assist clients in navigating complex systems and processes.

Building a pre-petition legal representation or PLA program requires an assessment of need, identification and engagement of critical partners and system stakeholders, secure funding, and adequate staffing capacity. However, the key is to start with early adopters and scale-up as need requires and resources allow.

¹⁵² For example, see Atlanta Volunteer Lawyers Foundation Standing With Our Neighbors, <https://avlf.org/standing-with-our-neighbors/>

¹⁵³ *Risk and Protective Factors*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/violenceprevention/childabuseandneglect/riskprotectivefactors.html> (last reviewed Mar. 15, 2021).

VII. CONCLUSION

Recent changes in federal legislation and policy are reorienting the child welfare system toward prevention of unnecessary family separation. The momentum that has built around prevention outcomes simultaneously has renewed the attention to the power of lawyers as problem-solvers. High-quality legal representation has clear benefits, particularly with regard to timely disposition of cases. Lessons learned from studying the role of lawyers in achieving downstream impacts on permanency, which occur after the state has intervened in the privacy of a family and separated a child from his parents, are instructive for moving forward a prevention policy agenda. The prevention conversation has inspired strategies for deploying the power and resources of a lawyer earlier, in a pre-removal or pre-petition context to prevent unnecessary further contact with the child welfare system and to mitigate the risk of unnecessary removal of a child to foster care. Legal advocacy used to address the social determinants of health can have measureable impact on child welfare system outcomes and the children and families whose needs can be met more effectively with upstream interventions.

Preventive Legal Advocacy programs are an effective upstream intervention. Children's lawyers can and should be among the early adopters of this approach as a practice that stabilizes rather than separates families. Multidisciplinary teams mitigate risk that brings families to the attention of CPS by offering holistic advocacy to resolve legal issues and clear pathways to services. Positioned upstream, the legal team can effectively function as an expert resource for rights enforcement and a beacon to guide families as they navigate complex and overlapping bureaucratic systems. By preventing family separation, Preventive Legal Advocacy programs directly advance and protect a child's right to family integrity.