

# THE NEED FOR A CONSENSUS STANDARD OF CARE IN SCREENING PROSPECTIVE ADOPTIVE, FOSTER, AND KINSHIP PLACEMENTS

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## I. INTRODUCTION

The lack of a clear legal “standard of care” for the evaluation and screening of prospective adoptive, foster, and kinship applicants directly undermines the child placement process, the physical and emotional development of children placed in adoptive and foster homes, and the adjudication of legal issues arising when children are harmed. Often, it is only when a lawsuit is filed that society is forced to take a hard look at its legal expectations, and it is then compelled to acknowledge that there may be a very real distinction between child welfare’s “best practice” standard and the legal standard of care.

Standards of care are defined by statute, contract, common law, professional guidelines, and experience, and may vary widely from state to state.<sup>1</sup> Differences in training, knowledge bases, and culture yield a wide variety of definitions. The best practice standard in child welfare refers to those actions, processes, strategies, or interventions that claim to produce the best results for children and families.<sup>2</sup> When based on valid evidence and offered by reputable organizations, the best practice standard will often lead to superior outcomes. The best practice standard may or may not be considered the legal standard of care. Indeed, there is no single, universally-accepted depository of published standards of care or best practice standards for screening prospective adoptive, foster, and kinship

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<sup>1</sup> *Online Resources for State Child Welfare Law & Policy*, CHILD WELFARE INFO. GATEWAY (Oct. 2009), [http://www.childwelfare.gov/systemwide/laws\\_policies/statutes/resources.pdf](http://www.childwelfare.gov/systemwide/laws_policies/statutes/resources.pdf).

<sup>2</sup> *Child Protection Practices Bulletin: Innovative Strategies to Achieve Safety, Permanence, and Well-Being*, U. N.M., [http://childlaw.unm.edu/docs/BEST-PRACTICES/WHAT%20IS%20BEST%20PRACTICE%20\(2011\).pdf](http://childlaw.unm.edu/docs/BEST-PRACTICES/WHAT%20IS%20BEST%20PRACTICE%20(2011).pdf) (last visited Oct. 18, 2011).

placements.<sup>3</sup> Despite the lack of absolute clarity of either best practice standards or the legal standard of care, this article advocates a narrowing of the gap between the two, when applicable, with the legal standard of care coming closer to that of child welfare best practice standards.

There is a pressing need to establish, by consensus, professional practice guidelines, both to ensure improved placements for children and to provide courts and clinicians with an accepted baseline standard. This is a time-consuming and arduous undertaking; yet, it has been done by other professional specialty areas without sacrificing flexibility for unity.<sup>4</sup> It is time for the child welfare community to do the same in the area of screening prospective adoptive and foster parents.

The importance of the placement and screening process and the importance of the standard of care in that process are the two principal concerns of this article. Liability of parents, agencies, and the state are addressed tangentially. Part II examines the importance of the assessment, evaluation, and screening process. Part III then discusses the elements of this process. Part IV looks at the standard of care of the assessment, evaluation, and screening process, and Part V offers a brief conclusion and recommendations.

The term standard of care is firmly grounded and accepted in law. No such consensus definition exists regarding screening prospective adoptive and foster parents. Consequently, workers, agencies, and courts may lack a measurable, agreed-upon guideline by which to determine if a worker or agency provided the required legal standard of care. Any clarity the professional child welfare community can offer, especially if derived by consensus, will greatly assist workers and agencies to act appropriately in specific circumstances.

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<sup>3</sup> DICKERSON ET AL., HOW TO SCREEN ADOPTIVE AND FOSTER PARENTS: A WORKBOOK FOR PROFESSIONALS & STUDENTS 7 (2011).

<sup>4</sup> See, e.g., Ching H. Wang et al., *Consensus Statement for Standard of Care in Spinal Muscular Atrophy*, 22 J. CHILD NEUROL. 1027 (2007), available at <http://jcn.sagepub.com/content/22/8/1027.full.pdf+html> (describing how the International Standard of Care Committee for Spinal Muscular Atrophy was formed with a goal of establishing practice guidelines for clinical care of these patients). The twelve core committee members worked with more than sixty spinal muscular atrophy experts in the field through conference calls, e-mail communications, etc. to accomplish this goal. *Id.*

## II. THE IMPORTANCE OF SCREENING PROSPECTIVE ADOPTIVE, FOSTER, AND KINSHIP PLACEMENTS

The Director of the Michigan Department of Human Services recently said:

A child's welfare is first and foremost the responsibility of the family. . . . [W]hen a family is unable, or unwilling, to care for their children, the courts, law enforcement, community partners and DHS all share responsibility for ensuring that children are safe and that families receive the support and services needed to achieve successful reunification.<sup>5</sup>

This work is demanding, and safety and well-being simply cannot be compromised. Child welfare professionals should not only view child placement as one possible after-the-fact response to abuse and neglect but should also focus on promoting the safety and well-being of all children who are in state custody.

Just as solid research can overcome skepticism, a better understanding of the crucial nature of the evaluation and screening process of prospective adoptive, foster, and kinship parents can illuminate what is truly useful welfare policy. Under the current child welfare framework, however, there remains a puzzle: Why do adoptive and foster children still get severely injured and killed in their placements?<sup>6</sup> Regrettably, part of the answer is that guaranteeing the safety and well-being of any one child is most strongly influenced by factors beyond the control of child welfare authorities.<sup>7</sup> The answer is also that, from a legal standard of care

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<sup>5</sup> Maura D. Corrigan, Op-Ed, *Removing Children from Families Always Follows Legal Procedures*, DETROIT FREE PRESS, May 9, 2011, at A22. See also Amy M. Salazar et al., *Understanding Social Support's Role in the Relationship Between Maltreatment and Depression in Youth with Foster Care Experience*, 16 CHILD MALTREATMENT 102, 103–11 (2011).

<sup>6</sup> Whether the rate of abuse of adoptive children, foster children, or both is greater than the general population is a matter of debate. See Richard J. Gelles & Ira Schwartz, *Children and the Child Welfare System*, 2 U. PA. J. CONST. L. 95, 107 (1999) (“[C]hildren who reside in foster care fare neither better nor worse than children who remain in homes in which maltreatment occur[s].”).

<sup>7</sup> See Jocelyn Brown et al., *A Longitudinal Analysis of Risk Factors for Child Maltreatment: Findings of 17-Year Prospective Study of Officially Recorded and Self-Reported Child Abuse and Neglect*, 22 CHILD ABUSE & NEGLECT 1065, 1073–75 (1998) (discussing the complex nature of risk factors for child abuse and neglect).

perspective, child welfare professionals have not embraced an evaluation and screening process that is adequate in scope, depth, and quality.<sup>8</sup> The bottom line is that screening and evaluation matter, and child welfare authorities do have a healthy measure of control over the selection of adoptive and foster parents, even if they cannot guarantee the safety of any one child.<sup>9</sup>

The United States Department of Health and Human Services reports that “an estimated 1,460 children . . . died from abuse or neglect—at a rate of 1.96 deaths per 100,000 children” during the federal fiscal year of 2005.<sup>10</sup> The department further noted:

Three-quarters (76.6%) of child fatalities were caused by one or more parents . . . . More than one-quarter (28.5%) of fatalities were perpetrated by the mother acting alone. Nonparental perpetrators (e.g., other relative, foster parent, residential facility staff, “other,” and legal guardian) were responsible for 13.0 percent of fatalities.<sup>11</sup>

In 1874, when child abuse first came to the nation’s attention,<sup>12</sup> child protection services were established in response to physical abuse and

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<sup>8</sup> See, e.g., Joan Heifitz Hollinger, *Adoption Law*, 3 FUTURE OF CHILD. 43, 48 (1993).

<sup>9</sup> R. Alta Charo, *And Baby Makes Three—Or Four, Or Five, Or Six: Redefining the Family After the Reprotech Revolution*, 15 WIS. WOMEN’S L.J. 231, 238 (2000) (discussing modern adoption statutes’ focus on the well-being of the adopted child and the rigorous screening process prospective parents must go through).

<sup>10</sup> CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2005 61 (2007), available at <http://www.acf.hhs.gov/programs/cb/pubs/cm05/cm05.pdf>.

<sup>11</sup> *Id.* at 62. The study also noted:

More than three-quarters (76.6%) of children who were killed were younger than 4 years of age, 13.4 percent were 4–7 years of age, 4.0 percent were 8–11 years of age, and 6.1 percent were 12–17 years of age . . . . The youngest children experienced the highest rates of fatalities. Infant boys (younger than 1 year) had a fatality rate of 17.3 deaths per 100,000 boys of the same age. Infant girls (younger than 1 year) had a fatality rate of 14.5 deaths per 100,000 girls of the same age. In general, fatality rates for both boys and girls decreased as the children get older.

*Id.*

<sup>12</sup> Lois A. Weithorn, *Protecting Children from Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment Statutes*, 53 HASTINGS L.J. 1, 48–49 (2001).

neglect.<sup>13</sup> Due to societal expectations and desires, child protection services now respond to issues of sexual abuse, emotional abuse, and neglect as well.<sup>14</sup> This enhanced responsibility increased demands on child protection services in general and on the expectation of safe adoptive and foster home placements in particular.<sup>15</sup>

Under the Adoption and Safe Families Act of 1997<sup>16</sup> (ASFA) and other federal statutes,<sup>17</sup> the primary goal for a child in the child welfare system is that child's safety and well-being.<sup>18</sup> In particular, when the evaluation and screening process is mishandled, it can be disastrous for the child and can quickly result in a lawsuit.<sup>19</sup> The following are very likely scenarios under the current child welfare system:<sup>20</sup>

- A husband and wife moved from one state to another. After only a matter of weeks, they applied to be foster parents. A home study and background check were conducted, but the background check was conducted in the couple's new state only. Of course, the background check revealed no criminal record. Had a criminal background check been conducted in the couple's previous state of residence, it would have revealed clear warning signals not to place a child with this couple. Months after a child was placed with the couple, it was discovered that the child was being repeatedly sexually molested.

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<sup>13</sup> John E. B. Myers, *A Short History of Child Protection in America*, 42 FAM. L.Q. 450, 451–52 (2008); Patricia A. Schene, *Past, Present, and Future Roles of Child Protective Services*, 8 FUTURE OF CHILD. 23, 25 (1998).

<sup>14</sup> Schene, *supra* note 13, at 27.

<sup>15</sup> DICKERSON ET AL., *supra* note 3, at 166.

<sup>16</sup> Adoption and Safe Families Act of 1997, 42 U.S.C. §§ 620–679 (2006).

<sup>17</sup> *See, e.g.*, Foster Care Independence Act, 42 U.S.C. § 677 (2006).

<sup>18</sup> Charo, *supra* note 9, at 238. *See also* Individuals with Disabilities Education Act of 1975, 20 U.S.C. § 1401 (2006); Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901–1963 (2006); Adoption and Safe Families Act of 1997, 42 U.S.C. §§ 620–679 (2006); Foster Care Independence Act of 1999, 42 U.S.C. §§ 677, 1305 (2006); 42 U.S.C. §§ 1396(a)(43), 1396(d)(a)(4)(B) (2006); American Indian Religious Freedom Act Amendments of 1994, 42 U.S.C. § 1996 (2006); Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5101 (2006); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2006).

<sup>19</sup> DICKERSON ET AL., *supra* note 3, at 6–8.

<sup>20</sup> For numerous examples of actual cases in which children in foster care died, see Daniel Pollack & Gary L. Popham, Jr., *Wrongful Death of Children in Foster Care*, 31 U. LA VERNE L. REV. 25, 32–38 (2009).

- A couple applied to adopt a multi-handicapped child. As part of the application process, the interviewer questioned whether the father was “mentally stable.” The father’s response made the interviewer uneasy; however, the interviewer never followed up this apprehension. Subsequently, the child was severely injured and needed to be placed into another protective setting.
- The department of human services completed an emergency foster care placement for an older teenage boy with a history of violence and sexual predatory behavior. The boy was placed after only a five minute home study, and the department of human services failed to inform the family of the boy’s history. On the first night of the placement, the boy assaulted a woman at knifepoint. Because the department had never informed the foster parents of the boy’s violent history, they were unaware of the need for constant, close supervision.

It is apparent from the examples above that the screening of prospective adoptive and foster parents should be permanently set in an explicit evidence-based legal standard of care. Doing so would lessen the chances of inappropriately screening applicants in when they should have been screened out.

### III. ELEMENTS OF THE ADOPTIVE, FOSTER, AND KINSHIP EVALUATION AND SCREENING PROCESS

The effective evaluation of adoptive, foster, or kinship applicants should be done with the principal purpose of ensuring the child’s safety and well-being. A successful placement is the result of an accurate screening and evaluation;<sup>21</sup> a good assessment does not just happen. Workers and their supervisors must be trained<sup>22</sup> to take into account the needs of the child, the biological parents, the adoptive or foster parents, and the agency.

Each question an applicant answers should provide another perspective into the potential success or failure of the placement. If the agency designs and carries out the evaluation process well, the information gained will serve as the cornerstone to support the placement and inform other

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<sup>21</sup> Thomas M. Crea et al., *The Intersection of Home Study Assessments and Child Specific Recruitment: The Performance of Home Studies in Practice*, 33 CHILD. & YOUTH SERVICES REV. 28, 28 (2010).

<sup>22</sup> MICHAEL E. LAMB ET AL., TELL ME WHAT HAPPENED: STRUCTURED INVESTIGATIVE INTERVIEWS OF CHILD VICTIMS AND WITNESSES 266 (2008).

professionals who are involved in the placement.<sup>23</sup> It is incorrect to assume that an applicant understands the skills necessary to parent dependent children; it is also insufficient to merely explain to an applicant what the law and regulations demand. Indeed, the home study practitioner's job is to understand the applicants, not to change them.<sup>24</sup> Further, the practitioner must attain an accurate picture of how they really live and not how they want life to be. As Lisa Fontes writes, "Professionals who interview children and families in a variety of settings share the same goal—just to get the facts. However, this process is usually stressful and challenging . . . ."<sup>25</sup> The challenges lie in the fact that it is human nature to avoid discussing certain personal topics with a stranger.<sup>26</sup>

The underlying purpose of the interviewer's questions is to explore and probe (through both open-ended and specific questions) the applicant's personality, attitudes, and behavior, to gauge if the applicant is minimally qualified to be an adoptive or foster parent.<sup>27</sup> Under no circumstances should the interviewer exaggerate or minimize the actual responses.<sup>28</sup>

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<sup>23</sup> Crea et al., *supra* note 21, at 33.

<sup>24</sup> DICKERSON ET AL., *supra* note 3, at 6.

<sup>25</sup> Lisa A. Fontes, *Interviewing Immigrant Children and Families for Suspected Child Maltreatment*, APSAC ADVISOR (Am. Prof'l Soc'y on the Abuse of Children, Elmhurst, Ill.), Spring 2009, at 7, 7. See also Alan J. Dettlaff & Jodi Berger Cardoso, *Mental Health Need and Service Use Among Latino Children of Immigrants in the Child Welfare System*, 32 CHILD. & YOUTH SERVICES REV. 1373 (2010).

<sup>26</sup> GARY ALTHEN ET AL., AMERICAN WAYS: A GUIDE FOR FOREIGNERS IN THE UNITED STATES 39 (2003) (noting that Americans reveal little about themselves in public situations).

<sup>27</sup> Crea et al., *supra* note 21, at 29.

<sup>28</sup> Daniel Pollack, *Do Child Protection Workers Deserve Immunity When They Misrepresent or Fabricate Evidence?*, APSAC ADVISOR (Am. Prof'l Soc'y on the Abuse of Children, Elmhurst, Ill.), Spring 2009, at 18, 19. The author noted:

There is, of course, a difference between misrepresentation of a piece of physical or verbal evidence and the actual creation of false evidence. Misrepresentation involves the willful giving of a misleading representation of the facts. Creation of false evidence involves the act of improperly causing a 'fact' to exist. More often, critics and attorneys accuse workers of a willingness to misrepresent, selectively quote, and misconstrue information to support their claims and therefore to present an entirely misleading case. Rather than sticking to agency protocols and training, the workers sensationalize their documentation and findings in a misleading fashion.

(continued)

The literature on risk assessment of dependent children<sup>29</sup> and home study assessment is growing rapidly.<sup>30</sup> The approaches usually favor a theoretical empirically-guided model or a clinically-adjusted actuarial model.<sup>31</sup> One approach to risk assessment in child placement includes a three-step process: identify the potential risks of the placement and the causes of the risks, determine the consequences of those risks, and calculate the probability of each risk occurring.<sup>32</sup> Children are potentially in the greatest danger when a single risk factor has been overlooked or when multiple, seemingly small risk factors combine.<sup>33</sup> Accordingly, the home study methodology for the evaluation of a prospective adoptive or foster parent sets the foundation for ensuring that applicant's success and the safety and well-being of children. A home study practitioner who fails to complete an adequate screening may ironically do more harm than good: the practitioner's failure to recognize risk factors can jeopardize the child instead of protecting the child.<sup>34</sup>

Dickerson et al. noted:

Reform of the system frequently has come from the legal profession. Today, when change occurs at the state level

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*Id.* See also Daniel Pollack, *Child Abuse Investigations: Fibbing and Fudging Are Wrong*, POLICY & PRACTICE, Dec. 2009, at 20, 20.

<sup>29</sup> See, e.g., *State and Local Examples*, CHILD WELFARE INFO. GATEWAY, [http://www.childwelfare.gov/systemwide/assessment/family\\_assess/safety.cfm;#state](http://www.childwelfare.gov/systemwide/assessment/family_assess/safety.cfm;#state) (last visited Oct. 26, 2011).

<sup>30</sup> Crea et al., *supra* note 21, at 29–33.

<sup>31</sup> CHILD WELFARE LEAGUE OF AM., A COMPARISON OF APPROACHES TO RISK ASSESSMENT IN CHILD PROTECTION AND BRIEF SUMMARY OF ISSUES IDENTIFIED FROM RESEARCH ON ASSESSMENT IN RELATED FIELDS (2005), available at <http://www.pacwebt.pitt.edu/Organizational%20Effectiveness/Practice%20Reviews/RevisedRAArticleCWLA11-05.DOC>.

<sup>32</sup> WESTERN SUBURBS LEGAL SERV. INC., CHILD PROTECTION: A GUIDE FOR PARENTS AND FAMILY MEMBERS 17–18 (2008), available at [http://www.communitylaw.org.au/westernsuburbs/cb\\_pages/images/475B-WLS%20Child%20Protection%20Book%2005-08\(web\).pdf](http://www.communitylaw.org.au/westernsuburbs/cb_pages/images/475B-WLS%20Child%20Protection%20Book%2005-08(web).pdf).

<sup>33</sup> OFFICE FOR STANDARDS IN EDUC., CHILDREN'S SERVS. AND SKILLS, LEARNING LESSONS, TAKING ACTION: OFSTED'S EVALUATION OF SERIOUS CASE REVIEWS 1 APRIL 2007 TO 31 MARCH 2008 (2008), available at [http://www.ofsted.gov.uk/sites/default/files/documents/surveys-and-good-practice/l/learninglessons\\_scr.pdf](http://www.ofsted.gov.uk/sites/default/files/documents/surveys-and-good-practice/l/learninglessons_scr.pdf). See also Brown et al., *supra* note 7; Samuel S. Wu et al., *Risk Factors for Infant Maltreatment: A Population-Based Study*, 28 CHILD ABUSE & NEGLECT 1253 (2004).

<sup>34</sup> DICKERSON ET AL., *supra* note 3, at 5, 166.

in departments of human services, it is often the result of a lawsuit that has forced agencies to confront their failures. It is an issue that the social work profession should seize as a natural outgrowth of its historical mandate for social justice. The first step in doing so is for social work professionals to demand that every social worker who works as a screener be properly trained. There is a direct relationship between the skill of the screener and the number of breakdowns that occur at the caregiver level. The more skilled the screener, the fewer the breakdowns in adoptive and foster homes—and the fewer children who are emotionally scarred by multiple placements.<sup>35</sup>

The primary mission of any department of human services is to protect its clients.<sup>36</sup> In terms of placing children in adoptive and foster care settings, a department's mission is generally to understand the needs and priorities of each child; provide leadership through credibility, integrity, and technical excellence; develop resources to provide guidance for each child; assist the adoptive or foster parents and the larger community with realistic regulatory compliance mechanisms; and provide quality services in a responsive and professional manner.<sup>37</sup> Toward these ends, one of the purposes of evaluating prospective parents is to encourage them to talk. Without forethought, the home study practitioner is apt to leave whole areas of concern unexplored.<sup>38</sup> For this reason, Dickerson et al. offer interviewers numerous organized lists including hundreds of questions to use in the screening process. Among the more probing questions are:

- Why do you think the time is right for adoption [or] foster parenting?
- Have you ever applied elsewhere to adopt children?
- Describe the child that you think would fit best into your home[.]
- How do you think . . . adoption will change your life?

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<sup>35</sup> *Id.* at 5.

<sup>36</sup> See, e.g., *Protecting Children by Strengthening Families*, FRANKLIN COUNTY CHILD. SERVICES, [http://www.franklincountyohio.gov/children\\_services/about-us/mission.cfm](http://www.franklincountyohio.gov/children_services/about-us/mission.cfm) (last visited Oct. 26, 2011).

<sup>37</sup> See, e.g., *id.*; *About DHS*, ILL. DEP'T HUM. SERVICES, <http://www.dhs.state.il.us/page.aspx?item=27897> (last visited Oct. 26, 2011); *DHS Core Values – DHS DELIVERS – What Is Important to Us*, PHILA. DEP'T HUM. SERVICES, <http://www.phila.gov/dhs/dhsCoreValues.html> (last visited Oct. 26, 2011).

<sup>38</sup> DICKERSON ET AL., *supra* note 3, at 7.

- How would you describe your childhood? Was it different in any important ways from your friends' childhoods?
- How would you describe your partner's childhood?
- How would you describe your relationship with your parents?
- In what ways are your mother and father different?
- Were your parents fair when disciplining you?
- What quality of yours do you think your partner most appreciates?
- If you hurt your partner's feeling[s], whether intentionally or unintentionally, how do you handle the [fallout]?<sup>39</sup>

Screening prospective adoptive and foster parents requires workers to ask questions about and evaluate the answers to sensitive topics. To probe and weigh these responses means that an applicant cannot necessarily be taken at face value. Instead, screeners need to be trained to be keen observers of spoken and unspoken behavior and feel there is no time constraint. What an applicant might be willing to disclose after several interviews, each lasting more than a couple of hours, may be unattainable in a single, brief interview.

Despite the great need for more adoptive and foster parents, there are factors that could and should have an adverse impact on accepting an applicant.<sup>40</sup> Applicants should be rejected for many different legitimate reasons including:

- Lack of financial resources
- Sexual abuse in the applicant's past that has gone unresolved
- Screener concerns about potential pedophilia
- Alcoholism or drug addiction
- History of spousal abuse, either as victim or abuser
- Inadequate socialization
- Alienation from family members
- A history of unresolved relationship difficulties (individuals who make the same bad relationship choices over and over again)
- Hostile statements or attitudes toward the country of origin of a prospective adopted child
- Arrests or convictions for assault, substance abuse, or drug trafficking
- Poor health prognosis

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<sup>39</sup> *Id.* at 25–35, 59–61, 70–71, 131, 148.

<sup>40</sup> *Id.* at 174–75. See also Elaine Farmer et al., *Foster Care Strain and Its Impact on Parenting and Placement Outcomes for Adolescents*, 35 BRITISH J. SOC. WORK 237, 241–51 (2005).

- History of serious mental illness
- Poor parenting skills<sup>41</sup>

Just as law enforcement agencies have strict guidelines relating to the personal characteristics required for employment, so too states and social service agencies are justified in enumerating reasonable automatic disqualification criteria to be an adoptive or foster parent.

#### IV. THE STANDARD OF CARE IN SCREENING PROSPECTIVE ADOPTIVE, FOSTER, AND KINSHIP PLACEMENTS

In any action for injury, damages, or wrongful death against a social services provider for breach of the standard of care, the plaintiff has the burden of proving that the department or agency failed to exercise the reasonable care, skill, and diligence that would be exercised by other similarly situated providers.<sup>42</sup> The standard of care for screeners of prospective adoptive, foster, and kinship applicants should be as objective as possible.<sup>43</sup> They should have and use the same skills and knowledge typically used by screeners in the adoption and foster care fields<sup>44</sup> and should stay informed of contemporary professional developments.<sup>45</sup> A worker whose conduct falls below this standard of care is negligent.<sup>46</sup>

The fundamental issue in negligence cases is whether the defendant violated the standard of care and, if so, whether that violation resulted in

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<sup>41</sup> DICKERSON ET AL., *supra* note 3, at 174–75.

<sup>42</sup> 43 SHEPARD'S CAUSES OF ACTION § 5 (2d ed. 2010).

<sup>43</sup> *See also* DICKERSON ET AL., *supra* note 3, at 167–68.

<sup>44</sup> *See* RESTATEMENT (SECOND) OF TORTS § 299A (1965) (“One who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.”); *Kaho’ohanohano v. Dep’t of Human Servs., State of Haw.*, 178 P.3d 538, 572 (Haw. 2008) (“Both the supervisor and [social worker] have specialized knowledge which the average person does not have. They are professionals and they are going to be held to the same standard of care as other professionals who practice in their profession who operate in [Child Protective Services].”).

<sup>45</sup> For a case analogizing the standard of care for placement screeners to the duty owed by medical professionals, see *Pringle v. Rapaport*, 980 A.2d 159, 170 (Pa. Super. Ct. 2009) (“The Supreme Court [of Pennsylvania] . . . made clear that the standard of care for physicians is an objective one—physicians must have and employ the same skill and knowledge typically used by physicians in the medical profession, and must keep themselves informed of contemporary developments in the profession.”).

<sup>46</sup> 43 SHEPARD'S CAUSES OF ACTION §§ 5, 8 (2d ed. 2010).

injury to the plaintiff.<sup>47</sup> The key inquiry is whether the worker's conduct comported with the requisite standard of care.<sup>48</sup> If the worker did not exercise reasonable care, the worker may not be insulated from potential liability.<sup>49</sup> Alternatively, if the worker's conduct does not violate the standard of care, then, by definition, the worker should not be liable.<sup>50</sup>

There are a number of specific sources addressing the best practice standard for screening and evaluating prospective adoptive, foster, and kinship placements. The following are examples.

First, the Child Welfare League of America (CWLA) publishes Standards of Excellence for Adoption Services<sup>51</sup> and its companion Standards of Excellence for Family Foster Care Services.<sup>52</sup> In its preface to the adoption standards, the CWLA gives the following caution:

The [CWLA] standards of excellence are intended to be used as ideals or goals for practice in the field of child welfare services. They are intended to provide a vision of what is best for children and their families and as such, encourage the continual strengthening of services. CWLA standards carry no implication of control or regulation. Rather, by bringing together the collective experience of the field to bear upon the work of each organization, they provide a valuable tool for both public and non-profit agencies.<sup>53</sup>

Conceding further that the Standards of Excellence are aspirational, the CWLA notes that the standards "make it possible to compare what exists with what is considered most desirable for children and their families, and

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<sup>47</sup> See *Pringle*, 980 A.2d at 173–74; 43; SHEPARD'S CAUSES OF ACTION § 5 (2d ed. 2010).

<sup>48</sup> *Kaho'ohanohano*, 178 P.3d at 572–73.

<sup>49</sup> *Id.* at 573 (notwithstanding issues regarding immunity). See, e.g., Karen Rothschild & Daniel Pollack, *When Qualified Immunity Protects Social Workers from 42 U.S.C. § 1983 Lawsuits*, APSAC ADVISOR (Am. Prof'l Soc'y on the Abuse of Children, Elmhurst, Ill.), Summer/Fall 2008, at 7.

<sup>50</sup> 43 SHEPARD'S CAUSES OF ACTION § 17 (2d ed. 2010).

<sup>51</sup> CHILD WELFARE LEAGUE OF AM., CWLA STANDARDS OF EXCELLENCE FOR SERVICES FOR ABUSED OR NEGLECTED CHILDREN AND THEIR FAMILIES (Rev. ed. 1999).

<sup>52</sup> CHILD WELFARE LEAGUE OF AM., CWLA STANDARDS OF EXCELLENCE FOR FAMILY FOSTER CARE SERVICES (Rev. ed. 1995).

<sup>53</sup> CHILD WELFARE LEAGUE OF AM., *supra* note 51, at xv.

to judge the extent to which current performance approximates or deviates from the most desirable practice.”<sup>54</sup> Further, the CWLA notes:

No standards should be considered final; in one sense, soon after they are issued they are out of date. Standards must be subject to continual review and revision [because] knowledge about children, families, communities, human behavior, and the treatment of human ills constantly changes. Developments in the social and medical sciences; the continuing evaluation of the effectiveness of current social service practices, policies, and programs; and shifting patterns of social values and social organization must lead to change in child welfare practice.<sup>55</sup>

A second source comes from the Council on Accreditation (COA), which authors its own adoption assessment,<sup>56</sup> home study,<sup>57</sup> and foster care screening<sup>58</sup> standards and “partners with human service organizations worldwide to improve service delivery outcomes by developing, applying, and promoting accreditation standards.”<sup>59</sup> It envisions the following:

[A]ccreditation [can be] a catalyst for change that builds on an organization’s strengths and helps it achieve better results in all areas. The accreditation process is designed to meet the needs of diverse organizations. An organization is evaluated against best-practice standards, which are developed using a consensus model with input from a wide range of service providers, funders, experts, policymakers and consumers.<sup>60</sup>

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<sup>54</sup> *Id.* at xvi.

<sup>55</sup> CHILD WELFARE LEAGUE OF AM., *supra* note 52, at vii.

<sup>56</sup> COUNCIL ON ACCREDITATION, ADOPTION SERVICES 4 (2008), available at <http://www.coastandards.org/pdf/makepdf.php?id=85>.

<sup>57</sup> *Id.* at 7.

<sup>58</sup> COUNCIL ON ACCREDITATION, FOSTER CARE SERVICES 3 (2008), available at <http://www.coastandards.org/pdf/makepdf.php?id=74>.

<sup>59</sup> *About COA*, COUNCIL ON ACCREDITATION, (2008) <http://www.coastandards.org/about.php>.

<sup>60</sup> *Id.*

Although COA accredits more than 1,500 private and public organizations,<sup>61</sup> this is a mere fraction of the total number of private and public human service agencies.<sup>62</sup> Thus, COA, like CWLA, cannot be said (and does not purport) to set the standard of care in the legal sense.

Further, the National Association of Social Workers (NASW) also publishes a thirty-seven page document containing sixteen standards entitled *NASW Standards for Social Work Practice in Child Welfare*.<sup>63</sup> While the document is informative and could be considered to have some bearing on the standard of care, it is more descriptive than prescriptive and is certainly not comprehensive.

Additionally, the CWLA, in conjunction with the Institute for Human Services (IHS), published the *Field Guide to Child Welfare*<sup>64</sup> in 1998. This comprehensive, four-volume set “provides an explicit compilation of ‘best practice’ standards for child welfare.”<sup>65</sup> Once again, the authors acknowledge that they have written a treatise that goes beyond the standard of care, yet they do not detail what the minimum standard of care is.

The NASW also published Dickerson, Allen, and Pollack’s *How to Screen Adoptive and Foster Parents*.<sup>66</sup> Dealing specifically with the topic of this article, the authors also felt compelled to tell their readers the following:

Administrators, social workers, and adoptive and foster parents are operating in a litigious climate. As meticulous as we have tried to be in our choice of words, we recognize that, by their nature, words are capable of being interpreted in a variety of ways, or even misunderstood completely. We acknowledge that there is also, of course, room for healthy disagreement with and application of our guidelines. These guidelines are offered primarily with a

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<sup>61</sup> *Id.*

<sup>62</sup> *Number of Public Charities in the United States, 2010*, NAT’L CENTER FOR CHARITABLE STAT., <http://nccsdataweb.urban.org/PubApps/profileDrillDown.php?state=US&rpt=PC> (last visited Nov. 13, 2011) (reporting there were 88,605 human services agencies in the United States in 2010).

<sup>63</sup> NAT’L ASS’N OF SOC. WORKERS, *NASW STANDARDS FOR SOCIAL WORK PRACTICE IN CHILD WELFARE* (2005), available at <http://www.socialworkers.org/practice/standards/NASWChildWelfareStandards0905.pdf>.

<sup>64</sup> JUDITH S. RYCUS & RONALD C. HUGHES, *FIELD GUIDE TO CHILD WELFARE* (1998).

<sup>65</sup> *Id.* at xiv.

<sup>66</sup> DICKERSON ET AL., *supra* note 3.

view toward moving the field of adoption and foster care to a higher level of practice. They are not necessarily offered as legal benchmarks.<sup>67</sup>

Finally, the Consortium for Children publishes a home study methodology<sup>68</sup> that is presently used by thirteen states, three Canadian provinces, and numerous Native American tribes.<sup>69</sup> Its six primary components include the following:

1. A statement of practice values that outlines 10 practice guidelines to ensure the validity of the process
2. Information-gathering tools that include standardized questionnaires and templates for the family's references
3. A psychosocial inventory that provides assessment based on 68 psychosocial factors using a 5-point scale
4. The desk guide, a tool for rating and analyzing the data gathered using the psychosocial inventory
5. A preformatted home study that provides a comprehensive, standardized report
6. The matching inventory, a structured compatibility list designed to assist placement workers in assessing the "goodness of fit" between children and prospective families<sup>70</sup>

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<sup>67</sup> *Id.* at iii.

<sup>68</sup> SAFE HOME STUDY: STRUCTURED ANALYSIS FAMILY EVALUATION, <http://www.safehomestudy.org> (last visited Oct. 18, 2011).

<sup>69</sup> CONSORTIUM FOR CHILDREN, STRUCTURED ANALYSIS FAMILY EVALUATION (SAFE) (2008), available at <http://icpc.aphsa.org/home/Doc/UniformHomeStudies.pdf>.

<sup>70</sup> Thomas M. Crea et al., *Structured Home Study Evaluations: Perceived Benefits of SAFE Versus Conventional Home Studies*, 12 ADOPTION Q. 78, 79 (2009). The authors concede:

Some consensus exists with regard to the essential components of home studies in the field of adoption, including demographic, relational, and financial information; a series of interviews; and references. Yet, even in adoption, the application of home study processes varies such that the level and quality of information under consideration may differ considerably among states and agencies. Even less uniformity exists among conventional foster care licensure and kin care assessments.

(continued)

Even absent a particular best practice standard (which may or may not be included as part of the legal definition of standard of care), each state's laws and regulations are certainly the bedrock of that concept.<sup>71</sup> South Carolina explicitly uses the term standard of care to describe its legal expectations. From the South Carolina foster care handbook<sup>72</sup> the following standards of care are included:

- Each child shall be provided with adequate health and hygiene aids.
- Children of opposite sex sleeping in the same bed must be limited to siblings under the age of four years. Children of opposite sex sleeping in the same room must be limited to children under the age of four years.
- Children shall sleep within calling distance of an adult member of the family, with no child sleeping in a detached building, unfinished attic or basement, stairway, hall, or room commonly used for other than bedroom purposes. . . .
- Foster parents shall follow instructions and suggestions of providers of medical and health related services. If receiving medication, a child's prescription shall be filled on a timely basis and medications will be administered as prescribed, and otherwise be kept secured.
- Foster parents shall obtain emergency medical treatment immediately as need arises, and shall notify [South Carolina Department of Social Services] and child placing

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Foster care licensing activities tend to focus more on physical and safety issues than psychosocial dimensions. Kin care assessments fall somewhere between adoption practice and foster care in terms of scope and comprehensiveness. Some evidence suggests that child welfare workers tend to make inconsistent decisions that likely affect home study assessment decisions.

*Id.* (internal citations omitted).

<sup>71</sup> *Online Resources for State Child Welfare Law & Policy*, *supra* note 1.

<sup>72</sup> S.C. DEP'T OF SOC. SERVS., HUMAN SERVICES POLICY AND PROCEDURE MANUAL: CHAPTER 9, FOSTER CARE LICENSING (2009–2010), *available at* [https://dss.sc.gov/content/library/manuals/foster\\_care\\_licensing.pdf](https://dss.sc.gov/content/library/manuals/foster_care_licensing.pdf).

agency staff, no later than 24 hours of receiving [the] care. . . .

- Foster parents should contact [South Carolina Department of Social Services] for coordination of any elective or non-emergency surgical procedures as far in advance of the procedure(s) as possible.
- Any injuries sustained by a foster child must be reported as they occur and no later than 24 hours of incident. . . .
- Foster parents are responsible for notifying [South Carolina Department of Social Services] and child-placing agency staff as soon as possible when a critical incident has occurred such as: (a) [d]eath of any child in the home; (b) [a]ttempted suicide by the child; (c) [c]hild is caught with a weapon or illegal substance; (d) [c]hild is charged with a juvenile or adult offense; (e) [c]hild is placed on homebound schooling or is suspended or expelled from school; [and] (f) [c]hild has left the home without permission and has not returned.

. . . .

- Infants and children shall not be left without competent supervision.
- Foster parents, in conjunction with [South Carolina Department of Social Services], shall keep a life book/scrapbook on each foster child placed in their home. Children's records and reports shall be kept confidential and shall be returned to [South Carolina Department of Social Services] when a foster child leaves the foster home.
- Firearms and any ammunition shall be kept in a locked storage container except when being legally carried upon the foster parent's person . . . .

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- No unrelated lodger or boarder shall be allowed to move into a foster home without the agency's concurrence.<sup>73</sup>

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<sup>73</sup> *Id.* § 918.01.

By specifically using the term standard of care, does South Carolina thereby exclude other professional sources? By not specifically using the phrase “standard of care,” do other states leave the definition of standard of care in doubt?

Although child welfare professional ethics and rules of conduct may offer guidance on how a professional should act,<sup>74</sup> they do not necessarily create a duty or establish a standard of care. It may be that all one can say with certainty is that it is each state’s laws and regulations (as well as any applicable federal laws and regulations) that constitute the nucleus of its standard of care,<sup>75</sup> with the other previously mentioned materials also having an aspect of a standard of care. It is unclear, however, exactly how much weight to give to each source and guideline.

## V. CONCLUSION AND RECOMMENDATIONS

A risk management issue that child welfare workers and supervisors must understand and appreciate is the professional standard of care by which they perform an adoptive or foster care home screening. Placing a child in an out-of-home setting always entails a large measure of ambiguity, uncertainty, and chance.<sup>76</sup> In an effort to ensure the well-being of children in state custody, child welfare agencies are constantly issuing more policies and procedures.<sup>77</sup> Child welfare agencies and professionals in general are also simultaneously aware of the need to rely on the experience and innate judgment of workers and their supervisors.

When adoptive and foster home studies are conducted, workers rely on a combination of their knowledge of state laws and regulations, research on the child welfare best practice standard, and their own experience. The legal standard of care is what reasonably prudent, similarly situated professionals regard as the acceptable level of care.<sup>78</sup> Standard of care does not necessarily mean “best” care; rather, it refers to the usual care.<sup>79</sup> Not all home studies are conducted in exactly the same way, but all home

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<sup>74</sup> NAT’L ASS’N OF SOC. WORKERS, *supra* note 63, at 10.

<sup>75</sup> *Online Resources for State Child Welfare Law & Policy*, *supra* note 1.

<sup>76</sup> Crystal Collins-Camargo et al., *Collaborative Research in Child Welfare: A Rationale for Rigorous Participatory Evaluation Designs to Promote Sustained Systems Change*, CHILD WELFARE, Mar/Apr 2011, at 69, 77.

<sup>77</sup> *About Us: Project Overview*, KIDS ARE WAITING: FIX FOSTER CARE NOW, <http://www.kidsarewaiting.org/about/> (last visited Oct. 29, 2011).

<sup>78</sup> Daniel Pollack, *Legal Risk, Accountability and Transparency in Social Work*, 52 INT’L SOC. WORK 837, 839 (2009).

<sup>79</sup> *Id.*

studies should be done by using similar, evidence-based procedures. The standard of care should move closer to that of the best practice standard. A home study worker cannot be replaced by a checklist of questions, risk assessment instruments, and policy manuals,<sup>80</sup> nor, however, can a worker do an assessment based solely on instinct.

In the end, society “will have to build the trust that is required to support the mistakes [it] will inevitably make.”<sup>81</sup> In those situations, “when [the] mistakes are made, the verdicts and monetary damage awards handed down by judges and juries may be significantly less because of [the] history of good faith, accountability, . . . transparency,”<sup>82</sup> and a consensus of what the appropriate legal standard of care should be.

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<sup>80</sup> The recent death of a sixteen month old in foster care led Jeff Rainey, Chief Executive Officer of Hillsborough Kids (an organization that contracts with the Florida Department of Children & Families) to say that “we get into almost a robotic mode because there’s so many other requirements that we’re almost not able to do the social work part of it.” Josh Poltilove, *Foster Care Review Completed: More Training, Supervision Urged For Caseworkers*, TAMPA TRIBUNE, May 11, 2011, at 7.

<sup>81</sup> Pollack, *supra* note 78, at 842.

<sup>82</sup> *Id.*