The Case against Privatization of Child Protection

F. Scott McCown[1]

Introduction

Our system of protecting children has long struggled from underfunding, leaving children at risk of maltreatment both in their family home and in state care. After several high-profile child deaths, and a federal district court finding that our system subjects children to an unreasonable risk of harm,[2] Governor Abbott called upon the 2017 Legislature to take emergency action to address child protection.

In response, the Legislature added staff, increased pay, and provided more money for kinship care and foster care. The Legislature, however, insisted it would not put more money into a "broken" system. Instead, through Senate Bill 11, the Legislature mandated an ambitious program to privatize child protection, including case management.

Senate Bill 11 envisions a managed-care model that uses performance-based contracting. First, the state will be divided into "catchment" areas composed of a single county or multiple counties. Then, over time, the state will enter into a contract in each catchment area with a general contractor (called the single source continuum contractor, or SSCC) to be responsible for all the children in the area for whom a court names the state as the managing conservator.

The contract will require the SSCC to take all children—"no reject, no eject." The contract will have various performance standards and incentives for reaching certain benchmarks. The SSCC will employ various subcontractors, many of the foster care or adoption agencies or other service providers you work with now. The SSCC will also employ its own caseworkers that will replace the public caseworkers you work with now.

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[2] *M.D. v. Abbott*, 152 F. Supp. 3d 684, 823 (S.D. Tex. 2015).

Contracting Away the State's Sovereign Power

While the state touts its new model as "community based" and run by local nonprofits, in fact, the nonprofits calling the shots could as easily be from Tampa or Topeka as from Texas. Even if the nonprofit is local, it will be a private entity, not a public entity, governed by a board, not by the state.

Yet, using the state's power and money, but without public oversight, the nonprofit named the SSCC will be in charge of making decisions about placement and services for children and families and prosecuting the civil court case against the parents, even deciding whether to seek the termination of parental rights. While the legal case against the parents will still be in the name of the Department of Family and Protective Services (DFPS), and the District or County Attorney or DFPS attorney will still do the lawyering, public employees will not be in charge of managing the case.

The Health and Human Services Commission will monitor minimum operating standards through licensing, and DFPS will monitor aggregate outcomes through performance-based contracting, but neither will monitor individual cases. There will be no public caseworker assigned to an individual case. No state official will have any authority to override the private contractor's decisions regarding the best interest of the child.

DFPS does retain a fig leaf of authority. Under Senate Bill 11, DFPS may, not must, but may, "review, approve, or disapprove a contractor's recommendation with respect to a child's permanency goal." [3] Naming "the permanency goal," though, is meaningless authority. It does not include the authority to make legal decisions or decisions about placement or services. The nonprofits behind Senate Bill 11 resisted any effort to give DFPS a role in case management.

[3]Section 264.168(a)

Moreover, as a practical matter, DFPS cannot effectively review even the permanency goal because it won't have sufficient staff.

Worse Outcomes

Currently, only Region 3B, anchored by Fort Worth, is on its way to implementing privatization. DFPS has announced that the second catchment area will be Region 2, anchored by Abilene, and the third will be Bexar County, as a single county. Soon enough, Child Protective Services as we know it will cease to exist. This transition from a public to a private system will be difficult at best. Once the transition is complete, the state will be left with a fragmented system of inexperienced and undercapitalized nonprofits that is less transparent and less accountable. Afterwards, as experience in other states shows, outcomes for children and families will be worse, not better.

In fact, after finding last year that Florida's privatized system is underperforming in critical areas, the U.S. Department of Health and Human Services gave that state 90 days to produce a plan to improve its care of foster children. Florida has three times the rate of child maltreatment in foster care as Texas and three times the percentage of foster children who re-enter foster care within 12 months after going home. Kansas, an early pioneer of privatization, is also a mess.

Privatization is also more expensive. In our low-tax state, we won't be able to pay for this more expensive way of doing business. Consequently, performance will deteriorate. Financial pressures may grow so acute that some contractors go under or walk away, seriously disrupting the system.

Increased Turnover

Our main problem, caseworker turnover, will also increase. After taking significant steps to reduce turnover in our public system by raising worker salaries, the Legislature is handing the

system over to private providers who will pay less. At the outset, starting salaries may match the current state salary, but without equivalent retirement or health care benefits. As time passes, the state will not pay adequate contract rates, and private contractors will skimp on salaries, and eventually skimp on staff. Consequently, turnover will increase. Indeed, Florida has significant caseworker turnover.

Increased Removals

But the big cost driver to privatization is likely to be increased removals. Under privatization, DFPS will still be in charge of investigations, but now if a child is removed, DFPS will merely turn the child over to the SSCC under a no-reject, no-eject contract, making the decision to remove too easy. From 2012-2015, removals in Texas increased only 1.20%. In contrast, from 2012-2015, removals in Florida increased a whopping 13.77%. Florida annually removes about 3.9 children per 1000 children in the population, compared to our 2.4. Significantly increasing removals would crash our system of child protection. Our low-tax state is not able to increase spending to adequately care for children in even larger numbers; yet, with privatization, we may soon have children in larger numbers.

Conflicts of Interest in Performance-Based Contracting

Even if we had all the money we needed, though, performance-based contracting presents a conceptual challenge. If the best interest of a child is decided case-by-case for a particular child, how do you write performance measures that don't skew case-by-case decisionmaking? For example, if you pay an incentive for sending more children home, you incentivize sending children home when it isn't safe. You can add a recidivism measure, but that discourages sending a child home if there is any risk of failure. Particularly problematic for performance based contracting is

the serious conflict of interest at the heart of privatization. The SSCC makes more or less money depending on its case management decisions.

If you think this concern fanciful, consider what happened right after the Senate passed Senate Bill 11. The nonprofits behind the legislation put their financial interest above the interest of children by trying to secure extraordinary tort immunity. After having agreed in Senate Bill 11 to carry liability insurance, the nonprofits executed a classic stealth legislative move. After Senate Bill 11 passed the Senate, they secured passage of a floor amendment to House Bill 5, an unrelated CPS bill. This floor amendment stripped children of their ability to sue a SSCC for its negligence, making the promise of carrying liability insurance illusory.[4] Under the floor amendment, an SSCC would have been responsible only for intentional torts. Fortunately, the House insisted on a compromise that instead merely capped damages, but this episode illustrates the serious conflict of interest at the heart of privatization.[5]

Conclusion

As privatization moves forward, lawyers must understand how it works and be zealous in advocating for their clients. Without a public caseworker, the voice of the attorney ad litem and the guardian ad litem for the child is going to be more important than ever. Lawyers for parents may need to challenge the very constitutionality of private contractors wielding the state's sovereign authority against their clients.[6] For advocates, there are many challenges ahead

[4] Amendment F8 by Huffman to House Bill 5 on May 22, 2017.
[5] In addition to state tort liability, nonprofits are subject to federal civil-rights liability. See *Woodburn v. Fla. Dep't of Children & Family Servs*., 854 F. Supp. 2d 1184, 1200 (S.D. Fla. 2011); *Smith v. Beasley*, 775 F. Supp. 2d 1344, 1353 (M.D. Fla. 2011).
[6] *Texas Boil Weevil Eradication Foundation, Inc.*, 952 S.W.2d 454 (Tex. 1997)