

The Adoption and Safe Families Act of 1997
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I. Background

The Adoption and Safe Families Act (ASFA) was signed into law by President Clinton in November of 1997. ASFA is intended to clarify Congress's intent regarding child welfare practice, including the "reasonable efforts" requirement, and reaffirm its commitment to family preservation and reunification while ensuring the safety of children. In addition, ASFA shortens the allowable time frames that a child may spend in certain parts of the child welfare system and provides additional financial incentives for placing children in adoptive homes.

II. Purpose

In enacting the ASFA, Congress had three broad purposes:

- assuring the safety of children who become involved in the child welfare system;
- expediting permanency; and
- providing states with greater options to achieve permanency.

It should be noted that not all of the provisions contained in ASFA fall precisely within one of these topics, which should be viewed more as general rubrics than as exclusive categories.

III. Reasonable Efforts

ASFA reaffirms that the general rule continues to be that reasonable efforts must be made to prevent the removal of children from their homes and to safely reunify children with their parents. In fact, ASFA provides additional funds to support and expand these services. ASFA also makes several significant changes in the application of the reasonable efforts requirement.

A. The Child's Safety is the Most Important Concern

ASFA provides that a child's health and safety are the most important concerns when determining reasonable efforts made with respect to that child. In considering the reasonableness of efforts with respect to the preservation or reunification of a family, Children's Protective Services (CPS) workers, foster care workers, and the courts are required to give extra weight to the child's welfare. In other words, ASFA mandates that a child's health and safety be given a higher status than family preservation in determining whether protective action should be taken.

Consider the following example. CPS substantiates that a mother has committed physical abuse in a case of excessive discipline when, while under the influence of alcohol, she hits her son 8-10 times with a belt and leaves numerous bruises and abrasions on the child's buttocks, upper legs, and lower back. An in-home services program is put in place to work intensively with the

family, and the mother receives outpatient treatment for her alcohol abuse problem along with actively participating in parenting classes aimed at increasing her disciplining techniques. Counseling services for the entire family are also provided. After six weeks, the case is closed. Two months later, CPS substantiates another incidence of abuse based on a similar set of facts. Instead of providing further in-home services, the agency must determine whether giving extra weight to the child's health and safety requires it to take more drastic measures, such as seeking voluntary placement of the child with a relative or a court petition seeking wardship and out of home placement, to protect the child.

In assessing what responsive is reasonable, agency workers must give more weight to the child's need for a safe home. Consequently, cases that used to automatically trigger an in-home program will now, due to ASFA, require consideration of more aggressive protective action. Those cases which are closely divided between protection and family preservation should be decided in favor of protecting the child.

B. Reasonable Efforts and Permanency Planning

To reduce the number of children languishing in temporary placements as permanent wards of the state, ASFA requires that reasonable efforts be made to implement a permanent plan for the children who cannot be safely returned to their families. ASFA states "reasonable efforts shall be made to place the child in a timely manner in accordance with the permanency plan, and to complete whatever steps are necessary to finalize the permanent placement of the child."¹ Therefore, where a court determines that reasonable efforts to reunify the family are no longer required, the agency must then establish that it has taken those steps that would reasonably lead to achieve the permanency plan in as soon as possible.

For example, in a case where an agency and the court both agree that continued efforts to reunify a family is not in the child's interest. Instead, both parties agree that the alternative plan will be for a relative to adopt the child. In order for this to happen, the agency must establish that reasonable efforts have been made to achieve the permanent plan (e.g. the child is placed with the relative, a petition to terminate parental rights has been filed, the adoptive home assessment has been completed, and the adoption petition has been filed). If the court finds that the child has not been placed consistent with the permanency plan or that steps necessary to achieve this plan have not been taken, the court must make a finding that reasonable efforts have not been made. This finding could jeopardize federal funding.

C. Reasonable Efforts Are Not Required Under Certain Circumstances

1. Aggravated Circumstances

ASFA provides that reasonable efforts are not required in certain cases, such as when a parent has subjected the child to "aggravated circumstances."² Although individual states have the authority to determine what is meant by aggravated circumstances, ASFA states that the definition "may include but need not be limited to abandonment, torture, chronic abuse, and

¹ 42 United States Code Section 671(15)(A).

² 42 United States Code Section 671(15)(D)(i).

sexual abuse."³ For example, Michigan has determined that a petition for permanent custody must be filed with the court in every case in which a parent sexually abuses a child and that abuse involves penetration.

2. Parent Has Committed Certain Crimes of Violence or Had Their Parental Rights to a Sibling Terminated

Apart from aggravated circumstances, ASFA defines other cases in which reasonable efforts to either prevent removal or reunify the family are not required. Specifically, reasonable efforts are not required if a parent has been convicted in a criminal proceeding of one of the following: 1) murder or voluntary manslaughter upon another child of the parent; 2) aiding or abetting, conspiring, or soliciting to commit murder or voluntary manslaughter of the child or a sibling of the child; 3) committing a felony assault resulting in serious bodily injury to the child or another child of the parent. Likewise, if a parent's rights to one of his or her child have been involuntarily terminated the state need not make reasonable efforts to reunify subsequent children with the parents.

IV. Mandatory Petitions to Terminate Parental Rights

A. States Must File or Join Petitions to Terminate Parental Rights

As a condition of receiving federal funds for child abuse prevention and foster care services, states are required by ASFA to either file or join, if another party files, a petition to terminate the parental rights of the child's parents in the following cases:

- The child has been in foster care for 15 of the most recent 22 months;
- The parent has murdered another of his/her children;
- The parent has committed voluntary manslaughter of another of his/her children;
- The parent aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter upon a child of the parent;
- The parent committed a felony assault upon the child or another of his/her children that results in serious bodily injury; and
- The court with jurisdiction determines that the child is an abandoned infant.

Along with the requirement that states move to terminate parental rights under the aforementioned circumstances, ASFA also mandates that states work concurrently to "identify, recruit, process, and approve a qualified family for an adoption."⁴

The following examples illustrate circumstances in which states would be required to pursue an alternative placement while at the same time seeking to terminate parental rights:

1. A father attending to a crying infant in the middle of the night loses his temper and shakes the child, resulting in shaken baby syndrome which causes the child's death. The

³ Id.

⁴ 42 United States Code Section 675(5)(E).

state would be required to file a petition to terminate the parental rights of both the father and mother in their other children.

2. A mother beats a child in a manner that both constitutes a felony assault under state law and results in serious bodily injury to the child. Here again, the state would be required to file a petition to terminate the parental rights of both parents.

3. A child is placed in foster care, returned to the parent, then placed again in foster care so that she has spent 15 of the last 22 months in foster care. In this case also, the state must seek to terminate the parental rights of the parents.

B. Exceptions to the Termination Rule

There are three exceptions to the mandate that states file or join a petition to terminate parental rights:

1. The child is being cared for by a relative;
2. The state has documented a compelling reason that filing a petition to terminate would not serve the child's best interests; or
3. The state has not made reasonable efforts to reunify the family.

These exceptions were adopted in order to remedy injustices like those illustrated by the following case. The parents of a young child are divorced. While with the non-custodial parent for visitation, the non-custodial parent attempts to kill the child. Without one of the exceptions to the general rule, state would be required to terminate the rights of the custodial parent, i.e. non-offending parent, as well as the offending parent.

V. Criminal Records Checks

ASFA generally requires that before a foster or adoptive parent may be finally approved for placement of a child, that individual must have undergone a criminal records check. Conviction of a felony related to any of the following will prevent that individual from ever being approved to be a foster or adoptive parent:

- child abuse or neglect;
- spousal abuse
- a crime against a child, specifically including child pornography; and
- the following crimes of violence, rape, sexual assault, and homicide.

In addition, the following crimes bars an individual from being approved as a foster or adoptive parent if the individual has been convicted of 1) felony physical assault or battery (e.g. felonious assault, assault with intent to commit great bodily harm) or 2) any drug-related felony in the five years prior to the check. Although ASFA generally requires that a state's plan for the provision of child welfare services to children contain the aforementioned five years bars to placement, this provision is one of the few areas that states may opt out of without suffering a penalty.

VI. Shortened Time Frames for the Achievement of Permanency

Through several of its provisions, ASFA shortens the time frames to achieve permanency for children who are removed from their families

A. The Definition of "Entered Foster Care"

In defining what it means for a child to enter foster care, Congress sought to harmonize the meaning of the term across the states and shorten the length of time a child spends in temporary foster care. For example, in Michigan the Permanency Planning was formerly required to be held at least 364 days after the court entered its dispositional order, a date that could be several months after the child had been removed from the parent's care. As a result, children often spent much longer in temporary foster care than intended.

ASFA states that a child shall be considered to have entered foster care on the earlier of 1) the date of the first judicial finding that the child has been abused or neglected OR 2) 60 days after the date on which the child is removed from the home.⁵ To illustrate, suppose a child enters foster care on January 1, 2000 and that the case is decided on February 22, 2000. For federal funding purposes, that child will be deemed to have entered foster care on February 22, 2000, because the date the case was decided is less than 60 days after the child was removed from the home. If the case had not been decided until May 1, 2000, then the child will be deemed to have entered foster care on March 1, 2000, 60 days after removal from the home.

B. Permanency Planning Hearings

In addition to defining when a child is determined to have entered foster care, ASFA also shortens the period of time from that time to the date by which the state must hold a permanency planning hearing. Prior to ASFA, the permanency planning hearing was required to have been held within eighteen months of original placement in foster care. ASFA now requires that the permanency planning hearing be held within twelve months of the date the child entered foster care. So, for example, where a child is deemed to have "entered foster care" on March 1, 2000, the permanency planning hearing must be conducted on or before March 1, 2001.

C. Expedited Permanency Planning Hearings

When a court with jurisdiction over child abuse and neglect proceedings determines that reasonable efforts to prevent removal and safely reunify children with their parents are not required, ASFA requires that a permanency planning hearing be held within 30 days.⁶ Once it is determined that reasonable efforts are not necessary, the next step is achieving the permanency plan.⁷ Consequently, caseworkers will be required to demonstrate to the court that they have taken the necessary actions to move toward permanency.

⁵ 42 United States Code Section 675(5)(F).

⁶ 42 United States Code Section 671(E)(i).

⁷ 42 United States Code Section 671(E)(ii).

D. Concurrent Planning

The ASFA allows child welfare agencies to use reasonable efforts to simultaneously pursue inconsistent permanency goals for a child. In many jurisdictions, the concept of concurrent planning is a new concept. Concurrent planning, which was developed as an alternative to sequential planning, is an approach to case management that emphasizes the importance of providing for family reunification services while at the same time developing an alternative plan (such as adoption, relative placement, and foster parent guardianship) in case it is needed.

E. Documentation of Permanency Efforts

In order to achieve a permanent home for children unable to return to their family of origin, the ASFA requires the states to have in place procedures for documenting efforts to permanently place a child. Accordingly, the caseworker must document the actions taken by the agency to find an adoptive family for the child or place him/her with a suitable relative, legal guardian, or in another planned living arrangement and finalize the adoption or guardianship.⁸ Although the statute does not specifically define the form of this documentation, caseworkers must include at minimum the “child specific recruitment efforts such as the use of State, regional, and national adoption exchanges including electronic exchange systems.”⁹

VII. Expanded Options to Achieve Permanency

In most jurisdictions, legal guardianship is meant to be a temporary arrangement to provide care for a child when a parent is unable or unwilling to do so. In general, a court that grants guardianship has either the right or the obligation to supervise the child’s welfare while under guardianship. Under some states’ laws, a legal guardian may request to adopt the child or petition for termination of parental rights.¹⁰

In authorizing the use of concurrent planning, Congress indicated that among the permanency options that should be available to the states is the placement of a child under legal guardianship. To clarify its intention that guardianship is an available option for permanency, Congress defined guardianship as follows:

A judicially created relationship between a child and caretaker which is intended to be permanent and self-sustaining as evidenced by the transfer to the caretaker of the following parental rights with respect to the child: protection, education, care and control of the person, custody of the person, and decision-making. The term ‘legal guardian’ means the caretaker in such a relationship.¹¹

⁸ 42 United States Code Section 671(1)(E).

⁹ Id.

¹⁰ See Michigan Compiled Laws 712A.19b(3)(d),(e), and (f).

¹¹ 42 United States Code Section 675(7).

VIII. Adoption Incentive Program

ASFA establishes a program of financial incentives to encourage each state to move children out of foster care and into adoptive homes.¹² In other words, the more children a state places from foster care into adoptive homes in the current year, the more federal funds it will receive to run its program in the following fiscal year.

A. Program Overview

Each state must establish a base number of adoptions and also a base number of special needs adoptions for each year. For every adoption in excess of the base number, the state will receive an additional \$4,000 from the federal government. For every special needs adoption over the base number, the state will receive an additional \$2,000. Thus, each state may receive up to \$6,000 for each special needs adoption beyond its base number. The state's base number for a given year may go up, but it cannot go below the original base number. Consequently, the state will need to achieve adoption of more children from foster care to be eligible for the incentive funds.

The program is in place for the years 1998-2002. ASFA authorizes 20 million dollars for the program for each fiscal year through 2002, but the amount of money actually available will depend on the appropriation agreed to by Congress and the President in each of the fiscal years. If the money appropriated is less than 20 million dollars, then states will receive a pro rata share of the money it would have received had the entire amount of money been appropriated.

B. Program Eligibility

In order to be an incentive eligible state, it will receive additional funds to support its programs. In order to be eligible for incentives, the state must meet the following criteria:

- The state has a plan approved by the Secretary of HHS to assure that children in foster care are moving into adoptive homes;
- The number of adoptions during the fiscal year (e.g. October 1, 1999-September 30, 2000) exceeds the base number of adoptions;
- The state has used prescribed methods to 1) determine the number of children adopted from foster care; and 2) determine the number of special needs children adopted from foster care; and

¹² 42 United States Code Section 673(b).

- If there is an adoption assistance agreement in place for special needs adoptees (i.e. children already adopted), the state provides health care coverage as part of the assistance.

ASFA requires that if a child eligible for an adoption subsidy is adopted and then the adoption breaks down, the child will remain eligible for a subsidy in a second adoption.¹³

C. Technical Assistance to States

ASFA authorizes 10 million dollars for HHS to provide grants and contracts to provide states with technical assistance to improve their ability to expedite the adoption or permanent placement of foster placement.¹⁴ This technical assistance may take one of the following forms:

1. Developing best practices guidelines;
2. Using models to encourage concurrent planning;
3. Developing specialized units to expedite adoptions;
4. Developing risk assessment tools;
5. Developing "fast track" adoption for infants; and
6. Developing programs to place children in pre-adoptive homes before termination of parental rights has taken place.

At least half of the money appropriated for technical assistance must target state courts.

D. Cross-Jurisdictional Adoption

To ensure that children available for adoption have the best possible chance of achieving permanency, ASFA requires that states implement "plans for effective use of cross-jurisdictional resources to facilitate timely adoptive or permanent" homes.¹⁵ (Cross-jurisdictional means across state or county lines for purposes of ASFA.) Moreover, ASFA provides for financial penalties if state either fails to place a child across state or county lines or delays a placement across state lines when a family in another jurisdiction has been approved.¹⁶ In addition, the state must provide a potential adoptive parent a fair hearing if that parent alleges the denial or place of a cross-jurisdictional placement.

E. Health Insurance for Children With Adoption Subsidies

ASFA requires that states put in place a plan for services to children that includes providing health care insurance as part of its adoption assistance program. This insurance must cover children's special "medical, mental health, or rehabilitative care."¹⁷ The insurance provision was put in to reverse a trend by states to reduce or eliminate medical subsidies as part of their adoption subsidy programs.

¹³ 42 United States Code Section 673(a)(2).

¹⁴ 42 United States Code Section (b)(i).

¹⁵ 42 United States Code Section (b)(12).

¹⁶ 42 United States Code Section 674(e)(1).

¹⁷ 42 United States Code Section 671(a)(21).

F. Standards of Care

Under ASFA, states are required to establish standards of care for children in foster care placements, whether public or private. The purpose of these standards of care are to ensure that children in foster care receive "quality services that protect the safety and health of the children."¹⁸

IX. Miscellaneous Provisions

A. Notice to Caretaker

ASFA requires that the child's caretaker, whether foster parent, preadoptive parent, or relative, receive notice of review hearings, including the right to be heard during the conduct of those hearings. An individual responsible for day-to-day care of the child must be notified of the time and place of a review hearing concerning a child in his/her care. At the hearing, the court must provide the caretaker the chance to address the court and express his/her concerns regarding the case. However, this does not give the caretaker the right to be represented by an attorney, to ask questions of witnesses, or to call witnesses to support his/her position.

B. Parent Locator Service

The Federal Parent Locator Service is a nationwide data bank that is used to help states, courts, and agencies locate parents who owe child support or who have child custody or visitation disputes.¹⁹ This data bank includes information such as the person's name, address, employment information, income information, and information related to an individual's assets. ASFA permits a state child protective services agency to access this data bank for the purposes of locating a child's parent.²⁰

C. Annual Report

ASFA directs the Secretary of HHS to do the following:

- Use the Adoption and Foster Care Analysis and Reporting System (AFCARS) to develop outcome measures to assess the performance of the states in operating their child protection and child welfare programs;
- Develop a rating system for states relative to those outcome measures;
- Require that the states provide the necessary information so that HHS can rate them; and

¹⁸ 42 United States Code Section 671(a)(22).

¹⁹ 42 United States Code Section 653.

²⁰ 42 United States Code Section 653(c)(4).

- Make an annual report to Congress regarding the performance of each state relative to outcome measures and include an assessment of the reasons for good and poor performance as well as make recommendations for improvement of performance.

In addition, HHS must study, develop, and recommend an incentive-based system for the provision of support to states for child abuse related programming.

D. Report on Kinship Care

The ASFA requires that the Secretary of HHS convene an advisory panel and submit a report concerning the extent to which children in foster care are placed in the homes of relatives. By June 1, 1999, HHS must submit a final report to Congress regarding policy recommendations for the use of kinship care for foster children. HHS must convene an advisory panel of parents, foster parents, relative caregivers, former foster children, state and local welfare officials, private child welfare agency representatives, tribal governments, and courts. This advisory group must review the report regarding kinship care and comment on it to HHS.

E. Substance Abuse and Child Welfare

The HHS Secretary must submit to Congress a report describing the extent and scope of the substance abuse problem within the child welfare population. The report must also examine the services provided to this population and the outcomes attributable to those services and make recommendations for legislation to address the problem.