

# **MAKING IT PERMANENT**

## **Reasonable Efforts to Finalize Permanency Plans for Foster Children**

*by Cecilla Fiermonte and Jennifer L. Renne*

*With a Foreword by the Honorable Leonard P. Edwards,  
and Sample Court Forms and Orders by Mark Hardin*

**Edited by Claire Sandt**

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## TABLE OF CONTENTS

Foreword .....	iv
Preface .....	vii
Acknowledgments .....	viii
About this Book .....	ix
<b>section 1: Getting Started</b>	
Chapter One: Determining the Plan .....	3
<b>section 2: Making the Plan a Reality</b>	
Chapter Two: Reunification .....	12
<i>Sample Court Report and Order</i> .....	18
Chapter Three: Termination of Parental Rights .....	26
<i>Sample Affidavit and Court Order Seeking Disclosure of Substance Abuse Records</i> .....	32
Chapter Four: Adoption .....	38
<i>Sample Court Report and Order</i> .....	45
Chapter Five: Legal Guardianship .....	50
<i>Sample Court Report and Order</i> .....	57
Chapter Six: Relative Placement .....	64
<i>Sample Court Report and Order</i> .....	72
Chapter Seven: Another Planned Permanent Living Arrangement.....	78
<i>Sample Court Report and Order</i> .....	85
<b>section 3: Tending to Details</b>	
Chapter Eight: Interstate Placements .....	96
<i>Sample Court Order</i> .....	104
Chapter Nine: Adoption Subsidies .....	108
<b>Appendices</b>	
Key ASFA Federal Regulations .....	117
ASFA Timeline .....	125
Resources .....	126
<b>Index</b> .....	129
<b>About the Authors</b> .....	131

## FOREWORD

*M*aking It Permanent: Reasonable Efforts to Finalize Permanency Plans for Foster Children is a book about finding permanent homes for children caught in the child welfare system. It is a sign of our times that two distinguished authors have spent significant time and energy writing such a book. It is a sign that we have begun to examine carefully the plight of children who have been so seriously abused or neglected that they have been removed from parental care and whose future is in the hands of judges, attorneys, and social workers.

The United States has always had abused and neglected children, but never before have we paid so much attention to them. The recent attention to these children began with the passage of Public Law 96-272, The Adoption Assistance and Child Welfare Act of 1980 (“act”). Based on findings that many foster children “drifted” from home to home never reaching permanency, Congress established the legal framework for our current efforts to address the needs of these children. Federal monies were given to states for the support of children in foster care on condition that the states provide services to families (1) to prevent removal of allegedly abused or neglected children, (2) to facilitate reunification if the children were removed, and (3) to find permanent homes for them. A timeline to accomplish these goals of from 12 to 18 months was established by the act. While the removal, service delivery, and placement of children were to be carried out by social workers, the act concluded that someone had to monitor adherence to the law. Congress designated our nation’s juvenile and family court judges and directed that they oversee the delivery of services as well as the removal and placement of children.

Passage of the act created enormous responsibilities for the juvenile and family courts in every state. Under the act, judges have a duty to review the removal of a child from parental care and only authorize such removal if it is proven that there would be serious detriment to the child if he or she remains with a parent. They were also mandated to determine whether social workers exercised “reasonable efforts” to prevent removal and to

reunify children with their parents once removed. Attorneys were to represent parents in these proceedings and guardians ad litem (volunteers or attorneys) were to represent the best interests of children before the court.

To say that implementation of the act was slow is an understatement. Judges and attorneys looked upon their legal responsibilities as little more than a form of social work. The juvenile dependency court quickly became one of the least desirable assignments for judges and lawyers. Social workers were equally unhappy with the act. Suddenly they were thrust into a legal arena where their work was attacked in the adversarial process and they were ordered to take actions by judges who in their minds did not understand social work practice. It is no wonder that implementation was slow, uneven, and in some jurisdictions the law was simply ignored.

Twenty-two years later, however, there have been significant changes in attitudes and practice. Due to a number of factors, implementation of the act has improved significantly. Each state has passed laws based on the act and judges in some jurisdictions have implemented it with energy and creativity. The National Council of Juvenile and Family Court Judges (National Council) created a Permanency Planning for Children Department which has as its primary goal educating and training judges consistent with the mandates of the act. The National Council launched numerous initiatives to address the ways in which the juvenile court operated. The Permanency Planning for Children Department trained judges across the country on how the law should be implemented. The American Bar Association’s Center on Children and the Law wrote materials and provided training for attorneys who worked in the juvenile dependency court. National and statewide conferences and trainings, started bringing together all participants in the juvenile dependency court system for cross-trainings.

Passage of Court Improvement Legislation in 1993, as a part of the Family Preservation and Support Act, signaled Congress’ interest in improving juvenile

dependency court practice. Then, in 1995, the National Council wrote the *Resource Guidelines: Improving Court Practice in Child Abuse & Neglect Cases (Resource Guidelines)*, a policy and practice guide which recommended dramatic changes in the ways in which most juvenile courts conducted dependency hearings. Based on the practices of several model courts, the *Resource Guidelines* outlined the issues which should be addressed at each juvenile court hearing, who needed to be present at these hearings, and the time it should take to address each issue adequately. The *Resource Guidelines* soon became the benchmark for practice, have been approved by several states and have been endorsed by the Conference of Chief Justices of the United States and the American Bar Association.

The *Resource Guidelines* led to the creation of the Model Courts Project of the National Council. This project brings together courts from across the country (23 to date) which are committed to adopting the practices recommended by the *Resource Guidelines*. The results of the Model Court Project have been significant practice and procedural changes in all of the participating courts and dramatic reductions in the numbers of children under court jurisdiction and the time they remain under that jurisdiction.

Congress revisited the act in the late 1990s and in 1997 the President signed the Adoption and Safe Families Act (ASFA), which tightened up the act and shifted its focus. ASFA placed a priority on child safety and made it clear to decision makers that child safety was a higher goal than family preservation. It also stressed the importance of timely permanency. This emphasis was demonstrated in three ways: first, ASFA reduced the time that courts must ensure that a child is in a permanent home to a maximum of 12 months (and in some circumstances six months); second, it emphasized that some parents may not deserve to have reunification services offered to them. The “bypass” of reunification services meant that the court could proceed to setting a permanent plan at the outset of a child’s case if

it determined that neither parent should receive such services. The grounds for bypassing services have been expanded in some states even beyond what ASFA suggested. Third, ASFA clarified and emphasized the role of the court in monitoring social service agency efforts to reach timely permanency for children under court jurisdiction. While the emphasis of the act seemed to be on the front end of the child welfare system, ASFA stressed the importance of finding permanent homes after reunification efforts had failed.

It is in the context of these changes that this book is written. It is an excellent example of experts addressing the best practices for courts, social workers, and attorneys when attempting to reach timely permanency for children caught in the child welfare system. It addresses a relatively new and much ignored area of practice—attaining permanency in a timely fashion.

ASFA highlighted a problem that many courts struggled with—timely permanency. Child safety was accomplished by removal from parental care or by supportive services. Family preservation and reunification were accomplished by supportive services, but Congress discovered that many children still remained in the child welfare system for years, waiting for a permanent home. ASFA requires social workers to identify permanent placements for children within a year and to terminate parental rights so that a child can be adopted if a child has been in out-of-home care for 15 out of the last 22 months. Once again ASFA requires juvenile and family court judges to monitor social worker compliance with the law and make findings of “reasonable efforts” or “no reasonable efforts,” depending on social worker compliance with finding permanent homes, within the statutory timeframe.

Finding permanency presents a different set of problems than those encountered at the front end of the child welfare system. Appeals take a long time to be heard. Often a proceeding to terminate parental rights or to establish a guardianship occurs in a different court

with different lawyers and judges and can drag on for months or years. Perhaps the most pervasive problem has been that these children were often forgotten or neglected by the legal system. Their cases did not demand the attention that other cases did and as a result children waited and waited. These were the silent children whose cases were not contested since the parents had lost their rights or had disappeared. Yet these silent children did not have permanent homes.

Thanks to ASFA and the national interest in improving practice, timely permanency has become an important issue within juvenile dependency courts across the country. That is where this book comes into play. The authors examine many critical issues court systems face when trying to establish permanent plans for children. They devote a chapter to each possible permanent plan: reunification, termination of parental rights/adoption, legal guardianship, relative placement, and “another planned permanent living arrangement.” Each of these chapters outlines the critical issues social workers,

attorneys, and judges must address and each is followed by materials related to those issues such as sample court reports and court orders. Two additional chapters take up the complex issues surrounding interstate placements and adoption subsidies. Finally, several useful appendices include the ASFA timeline, resources of value to participants in the permanency process, and important ASFA federal regulations.

The legal community is indebted to Cecilia Fiermonte and Jennifer Renne for writing this book. It will be an important reference for practitioners in the juvenile dependency court across the nation and its use will certainly result in the most important goal of all: timelier permanency for foster children.

LEONARD P. EDWARDS  
JUDGE, SUPERIOR COURT, COUNTY OF SANTA CLARA  
JUNE, 2002

## PREFACE

When ASFA was passed, I was in practice as an agency attorney in New York. It was my job to help the agency and the court understand and implement the new requirements—no small task. At first, the emphasis was on meeting the technical requirements. Later, the emphasis shifted to using the new law in a meaningful way to plan safely for the children in our system. Through my current work providing training and technical assistance to states, I have seen child welfare professionals all over the country struggling to make meaningful permanency plans for children and implement the new ASFA provisions. One of these new provisions is the reasonable efforts to finalize the plan finding. Those findings must be detailed and child-specific. Under ASFA, we are moving toward a more thoughtful permanency process and more thorough judicial review. We wrote this book to be used as a tool to help child welfare professionals make effective decisions for children. Understanding the permanency process will help judges, advocates, and agencies explore whether children are being placed in the most appropriate, permanent placement possible. It is my hope that permanency becomes more than just a “buzz word” or technical requirement, but a reality for children who come into the child welfare system.

CECILIA FIERMONTE

I was representing children in Maryland when ASFA was passed. My colleagues and I were concerned about some of ASFA's provisions. We wondered how the new law would be implemented and change practice. One aspect of ASFA that we were enthusiastic about was the notion of full, thorough permanency hearings. While cases were reviewed regularly, hearings were brief, and the court rarely inquired into the adequacy of the permanency plan or the sufficiency of the agency's services/efforts towards achieving permanence. The child advocates I worked with looked forward to the court taking a more active role in evaluating the agency's efforts or lack of efforts. When I started training lawyers and judges around the country, I recognized the need to develop the idea of what constitutes reasonable efforts in achieving permanence for children. The better educated judges and lawyers are on what the agency should be doing on behalf of children, the more effective advocacy and decision making for children will be.

JENNIFER L. RENNE

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book's chapters and court forms and provide us with the benefit of their considerable expertise and knowledge. Thanks to their attention to technical detail and practical advice from the field we were able to refine our work to make it more readable and useful to those who will be using it. Their thoughtful comments helped us produce a final product that incorporates various points of view and addresses issues that are important to practitioners.

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## ABOUT THIS BOOK

Permanency planning for children in the child welfare system is undergoing big changes. Foster children’s needs for safety, well-being, and permanence are driving these changes. Creating a system that is more responsive to these needs is the aim of new requirements imposed by the federal Adoption and Safe Families Act of 1997 (ASFA). ASFA requires that permanency plans be determined for children at permanency hearings. Judges must make findings that the child welfare agency is making “reasonable efforts” to finalize those plans. What this means, exactly, and how to do it is the subject of this book.

While changing practice is never easy, implementing these changes is critical. Greater judicial involvement and oversight provides added protections for foster children. It puts in place a system of checks and balances to make sure appropriate steps are being taken to select and work toward the best placement for each child. It helps identify potential trouble spots early and deal with them before they become problems. It strengthens permanency planning efforts by uncovering areas that the agency may have overlooked. It increases the chances that foster children’s paths to permanency truly lead to permanence.

While the judge or other administrative reviewer is charged with determining the permanency plan and making the reasonable efforts finding, legal representatives for the child, parent, and agency, as well as caseworkers and other agency professionals, play an important role.

**This book is designed to help you**—judges, lawyers, and agency professionals—meet ASFA’s reasonable efforts requirement. It will help:

- ♦ *judges* exercise your leadership role and use your power to issue orders and resolve disputes so children can move more quickly into permanent placements. Just adding required language to court orders, while helpful, will not ensure safety and permanence for children. You will need to dig deeply and elicit specific information to determine the child welfare agency’s level of effort in moving children to

permanent homes. Your oversight can ensure all options are considered, and that the chosen plan is the safest and most secure.

- ♦ *children’s and parent’s representatives* actively participate in the permanency planning process. Your involvement early on can prevent delays and reduce disputes about the permanency plan. Permanency hearings will provide you with opportunities to raise questions and concerns about the plans and ensure your clients’ needs are protected.
- ♦ *caseworkers, agency administrators, and agency attorneys* ensure thoroughness and attention to detail in your permanency planning efforts. It will help you prepare for court by alerting you to the areas that will be addressed.

**This book is a tool** to aid reasonable efforts determinations. It outlines specific questions you can ask to ensure permanency plans are tailored to each child and to assess the agency’s efforts to finalize the plans. These questions ensure thoroughness in the permanency planning process. It is hoped that by asking them, children will be placed in safe, stable, and enduring homes, as ASFA envisions. The questions provided are not meant to be a finite list. They are designed to stimulate your thinking and serve as a springboard for conducting thorough reasonable efforts inquiries.

Here’s a closer look at the tools this book offers:

*Nine chapters:*

**Chapter 1: Determining the permanency plan.** This chapter helps you ensure the permanency plan selected for the child is in the child’s best interests and offers the most long-term security.

**Chapters 2-7: Assessing reasonable efforts to finalize the permanency plan.** These chapters help you evaluate the agency’s efforts to finalize each of the permanency plans outlined under ASFA. These plans are addressed in order from most to least permanent:

- ◆ reunification,
- ◆ termination of parental rights/adoption,
- ◆ legal guardianship,
- ◆ relative placement, and
- ◆ another planned permanent living arrangement (APPLA).

**Chapter 8: Handling interstate placements.** Placing a child across state lines is complicated and subject to legal requirements. This chapter explains how to apply the Interstate Compact on the Placement of Children and helps you ensure reasonable efforts are being made to finalize interstate placements.

**Chapter 9: Securing adoption subsidies.** This chapter helps you understand the role adoption subsidies play in securing permanence for children. It provides you with questions to ask to ensure adoption subsidies are secured in appropriate cases.

**Sample court forms and court orders** for each of ASFA's five permanency plans appear at the end of Chapters 2 through 7. Agencies and judges may wish to adapt these forms and orders for use at permanency hearings.

*Appendices:*

Three appendices serve as additional aids for your reasonable efforts inquiries:

- ◆ **Relevant ASFA regulations.** ASFA's implementing regulations explain and clarify several issues relating to reasonable efforts determinations. These regulations are compiled here for easy reference.
- ◆ **ASFA timeline.** This timeline offers a visual guide to ASFA's permanency planning process.
- ◆ **Resources.** Organized by area of expertise, this list of resources features organizations that offer assistance on various aspects of the permanency planning process addressed in this book.

*Making it Permanent* – that is the aim of this book. While this book won't guarantee permanence for every child, it provides a solid start. Take the time to ask thoughtful questions about each child's permanency plans. Doing so will go a long way towards guaranteeing the right plans are being pursued and efforts to achieve those plans are thorough and meaningful.

*section 1*

**GETTING STARTED: DETERMINING THE PLAN**



## REASONABLE EFFORTS UNDER ASFA: DETERMINING THE PERMANENCY PLAN *by Cecilia Fiermonte*

Before a permanency plan can be approved, enough facts must be established to determine whether the proposed placement is the most appropriate for the child. Deciding which option is best requires ensuring the placement is the most long-term and secure and that more preferred options were explored and ruled out. Understanding each child's developmental level and needs is crucial to a sound determination. The inquiry should be thorough and not rely solely upon the parties' recommendations.

The agency should have identified and addressed all barriers keeping the child from achieving the most secure placement possible. Determining the child's plan requires examining how the agency reached its decision. Preference should be given to placements that are the most stable, long-term, and free from state oversight. Stability and a sense of belonging may contribute to the child's sense of well-being, and play an important role in the child's development. A secure placement may mitigate some of the damage caused by significant early losses associated with placement in foster care.<sup>1</sup>

Below are the five placement options under ASFA, and questions to ask to help determine which plan is most appropriate for the child. The questions are not exhaustive. As always, individual facts and circumstances should drive the inquiry.

### Return to Parent

ASFA makes safety of the child the paramount consideration in making placement decisions.<sup>2</sup> The preferred option is return to the parent when safe.

Return to parent can be entered as the plan at the permanency hearing even if return home is not imminent. When the parent is working diligently on reunification, return to parent with reunification services in place may be appropriate. A timeframe should be specified for completing the reunification plan, consistent with the child's developmental needs.<sup>3</sup> More time should be granted to the parent only when reunification is likely and can be accomplished within set timeframes. The parent's desire for more time should not override

the child's need for a permanent, safe home.

The standard for return home may not be specified in state law, which could lead to confusion and disagreements among parties. The parties may argue for different standards. The parent may argue that completing the service plan is enough, or that ameliorating the original neglect is sufficient. The agency may argue that an admission is necessary, or that the parent must demonstrate an ability to maintain a safe situation for a period, without agency assistance. The child's advocate may insist on a best interests of the child test. When disagreements arise, the judge should determine what factors in each case will lead to a good result for the child.

Return home should be ruled out before considering the plan of termination of parental rights and adoption. Ask the following and other similar questions:

### Have all services been explored and offered?

- ◆ Are there services the agency could offer the parent to enable him to care safely for the child within set time limits? Such services include preventive services, housing assistance, caseworker support, and day care, among others.
- ◆ Are there more targeted forms of treatment that would allow the parent to regain custody of the child within a reasonable period? For example, mental health counseling for the developmentally impaired, or more intensive substance abuse treatment and monitoring.

### Has all relevant information about the case been collected?

- ◆ Has the agency received and shared with the court and all parties the most updated treatment records available?
- ◆ What do the treatment providers recommend? Should additional reports be obtained?
- ◆ Are psychological evaluations necessary?
- ◆ Should treatment providers testify in court to allow for in-depth questioning?

### **Are nonsafety issues keeping the child from returning home?**

- ◆ Are the child's needs keeping her from being returned to the parent? If so, could services be offered that would allow the child to live safely with the parent? For example, a child with special medical needs may be able to receive a visiting nurse or comparable services at home.
- ◆ Are there issues that are collateral to the child's safety that are keeping the parent from having the child returned? There may be issues such as income or housing which, if remedied, would allow the parent to adequately care for the child.

If these and other questions are not answered satisfactorily, the judge may order further action by the agency and schedule the matter for a later date. A permanency hearing must be completed within 12 months of the child's entry into foster care, or 30 days from a finding that reunification efforts are not necessary.<sup>4</sup> If the permanency hearing must be completed to meet ASFA's time requirements, the judge can schedule the matter for another permanency review in the near future. There is no restriction on having more frequent permanency hearings than those mandated by the statute. A permanency hearing may be held any time.

### **Termination of Parental Rights with Placement for Adoption**

If the child cannot be safely returned home, adoption is the preferred placement because it is the least likely to be challenged in the future and ends the need for continued state oversight. Adoption gives the child a sense of belonging to a stable family. That family may provide the child physical security and emotional support that lasts well into adulthood.

Given the many benefits of adoption, the agency should have thoroughly explored that option. Keep in mind that adoption may be the plan even though there are no potential adoptive parents waiting in the wings. If there is no one willing and able to offer a permanent home to the child, the best plan may be to free the child for adoption and proceed with recruitment efforts. Once the termination of parental rights (TPR) petition has been filed, the agency then has an affirmative duty to recruit and identify prospective adoptive parents.<sup>5</sup>

The agency should begin recruitment efforts promptly, not wait until the TPR is filed. In some

jurisdictions, the filing of the TPR petition may take a long time and waiting to begin recruitment could delay permanence for the child.

When the agency chooses a different option, the agency should have good reasons why the child will not be placed for adoption. Before ruling out adoption, consider the following questions:

### **Have current or prospective caregivers received adoption counseling and assistance?**

- ◆ Did the agency fully explore adoption with the child's current caregivers and any relatives with whom the child has a relationship?
- ◆ Is the agency aware of any reservations the caregivers have?
- ◆ Did the agency offer services to the caregivers and the caregiver's family to address any reservations?
- ◆ Has the agency offered counseling to the caregiver, the caregiver's family, and/or the child?
- ◆ Has the agency explored public assistance or other entitlement programs to alleviate financial burdens?
- ◆ Has the agency discussed the possibility of an adoption subsidy with the family? (It helps to understand the adoption subsidy system in determining whether the caregivers have been provided adequate information. See Chapter 9 for more on adoption subsidies).
- ◆ Should the caregiver seek independent legal advice to adequately answer questions about adoption? If so, who should provide that referral?

### **Do other individuals wish to adopt?**

- ◆ Has the agency explored whether there are any adults with whom the child has bonded who would be interested in adoption?
- ◆ Have all relatives, even those not closely related to the child, been explored? The GAL, child's attorney, or CASA may be helpful in uncovering relationships which may lead to a permanent placement for the child.

### **Is adoption suitable for this child?**

Although adoption is favored because of the degree of permanency it affords, do not automatically assume it is the best option for the child. The following questions can help identify any issues which may indicate that adoption may not be a good plan for the child.

- ◆ To what degree is the child bonded to the biological parent?

## Who Chooses the Plan: Court or Agency?

ASFA clearly intends to create a role for the courts in shaping children’s permanency plans. Less clear is how far the court’s authority extends.

### What ASFA Says

The scheme set out in ASFA requires the agency to document the permanent plan for the child in the case plan. The statute says the permanency hearing will determine the plan. The statute, regulations, and preamble leave some doubt concerning what should occur if the agency and the court do not agree on the appropriate plan for the child. If the court determines a plan, is the agency bound by the court’s authority or federal law to follow the plan? Can the agency unilaterally change the plan?

### What the ASFA Regulations Say

The preamble, which clarifies how the federal agency interprets some of the regulations, states that critical decisions affecting children are made at the permanency hearing. In discussing the requirement to file a TPR at 15 months, the preamble says that the federal agency has no authority to dictate who should prevail when the court and the agency disagree. The preamble further says that the state agency may alter a permanency plan outside of a court hearing, and that federal law does not require the courts to actually set the permanency plan, although states may elect to give courts such a prescriptive role. The language of the regulation and statute themselves say “the court . . . determines whether . . . the child will be (i) returned. . . ; (2) placed for adoption; etc.”

### The Conflict

Arguably, the language of the statute conflicts with the regulations. In the original statutory language, the word “should” was changed to “will” in describing the plan for the child, indicating that the plan will be implemented and that the parties are bound to follow it. The requirement that a hearing occur also supports the argument that the court’s decision is binding. It would seem futile to require a hearing if the decision rendered could be disregarded by the parties.

### Seeking Clarity

State statutes and case law may offer some guidance.\* In states where the law is silent on the issue, courts and agencies may disagree on who has ultimate authority to set the permanency plan, and how to handle disagreements. Jurisdictions may differ in the amount of deference given to the court’s determination of the plan. There may be working groups, judicial rules committees, or others seeking changes in the law to clarify this issue. Until clarification is provided, agencies and courts must work together to avoid conflicts that could slow permanency decisions for children.

\* See, e.g., *D.S. v. R.S.*, 2001 WL 695076 (Ill. 2001), in which the Supreme Court of Illinois found no violation of the separation of powers doctrine where the lower court ordered the state to prosecute a termination of parental rights petition filed by the GAL in order to effectuate the permanency goal.

- ◆ Would the child be harmed if the bond to the biological parent were broken?
- ◆ Has the child expressed a desire to be adopted?
- ◆ Does the child have a counselor? If so, has the court heard from the counselor on the issue of adoption?
- ◆ If there is a proposed adoptive resource, does the child wish to be adopted by that person?

### Is the child opposed to adoption?

If the child opposes adoption, or if the agency claims

termination of parental of rights is not in the child’s best interests, a counselor’s report may be requested to ensure the agency has provided counseling that adequately addressed the issues. When a child is hesitant about adoption, a counselor may be able to determine whether the child has made a well-reasoned decision. The child may be reacting emotionally based on misinformation or misconceptions about adoption, which the counselor can address. Even if the child’s consent is not required by law, a child’s hesitance should be addressed.

If left unresolved, it could lead to a disrupted adoption or an unhappy adoptive placement.

- ◆ Has the child received counseling?
- ◆ If so, has a report been provided to the court and all parties?
- ◆ Has the child's attorney thoroughly explained the legal options to the child?

#### **Is open adoption available and appropriate?**

- ◆ Is the parent willing to voluntarily relinquish parental rights?
- ◆ Is ongoing contact with the biological parent in the best interests of the child?
- ◆ Are the prospective adoptive parents able and willing to allow some contact between the biological parent and child?

If termination of parental rights is not recommended because the child should have ongoing contact with the biological family, it may be worthwhile to explore the possibility of an open adoption with the agency. An open adoption may provide for some ongoing, but limited contact between the child and parent, and still ensure safety and a permanent home for the child.

Open adoption is not available in every state. Where it is recognized, it can be used to facilitate a peaceful resolution that benefits parent and child.

#### **Referral for Guardianship**

"Guardianship" describes an arrangement that is permanent and self-sustaining.<sup>6</sup> Different terms may be used to describe a relationship that would qualify as a guardianship under ASFA. For instance, "custody" in some states may qualify as guardianship. The ASFA regulations further clarify that the arrangement must include transfer of the right to protection, education, care and control of the person, custody, and decision making.<sup>7</sup> In some states, the guardianship may be accomplished in the dependency court. In other jurisdictions, the judge determines that a referral for guardianship to another court shall be made.

Guardianship has the advantage of allowing the guardian to have complete control of the child's care, free from state supervision. However, it may be open to challenge by the parent who could decide to later pursue custody or visitation. So, it is not as stable and, therefore, less preferable than adoption.

Referral for guardianship is appropriate when the

child has been living with a caregiver with whom he has bonded, but the caregiver or child does not desire adoption, or it would harm the child to terminate parental rights and pursue adoption.

Asking the questions above will ensure any potential adoptive parents and/or the child has made an informed decision against adoption and adoption has been fully considered. A guardianship should not be used to circumvent the adoption process, but only to provide stability when adoption cannot be achieved.

If adoption was thoroughly explored and ruled out, look at the potential guardianship to be sure it will be long-term and stable.

#### **What is the proposed guardian's relationship to the child?**

- ◆ How long has the potential guardian known the child?
- ◆ Is the individual a member of the child's family?
- ◆ Has the individual had ongoing visitation with the child?
- ◆ What has the quality of visitation been?

#### **How will the guardian deal with the biological parent and any rights the parent may retain?**

- ◆ Does the guardian understand the parent's role in the abuse or neglect that brought the child into foster care?
- ◆ Does the guardian understand the child's developmental needs?
- ◆ Is the guardian able to set firm limits with the parent?

Ongoing contact with the biological parent will likely require monitoring if safety issues are severe enough to prevent the child's return home. The agency and court should know the guardian's ability to identify and eliminate safety risks. The guardian should be able to withstand pressure from the parent, who may continue to pursue contact with the child. This can be especially difficult if the guardian is a relative of the parent.

#### **Is the guardian financially prepared for the arrangement?**

- ◆ Does the guardian have the means to care for the child?
- ◆ Will the guardian be eligible for any entitlements

once custody of the child is obtained? Examples include Social Security payments, food stamps, or Medicaid.

- ◆ Can other services improve the likely success of the guardianship? Services may include day care, counseling, or public health visits.

A guardianship may present financial challenges to a family who plans to take on the permanent care of a child. To increase the likelihood that the guardianship will be a long-term solution, explore whether the agency has helped the family prepare financially for the arrangement.

Learn what types of financial assistance are available to the child and/or family. Medicaid, Social Security, food stamps, public assistance and child support may be resources to help the family afford to care for the child. The agency should have helped the family explore all these options.

Some states have obtained a waiver which allows them to use IV-E funds to subsidize certain guardianships through a demonstration project.<sup>8</sup> Other states subsidize guardianships with non-IV-E funds. The criteria may be very limited. Practitioners should be familiar with the state's criteria and communicate with the agency about how subsidies are granted. (For more information on guardianship subsidies, see Chapter 5.)

### **Placement with a Fit and Willing Relative**

Relative placement does not preclude adoption or guardianship. If the child is with a relative who wishes to care for the child long-term, adoption and guardianship should still be explored as they offer more permanence than simple placement through the courts. If a child is placed with a relative without adoption or guardianship, the periodic review schedule must be maintained.<sup>9</sup>

A relative placement need not supercede a stable placement with another individual who may wish to adopt or become the child's guardian. Because most states have made relative placement an exception to the requirement that the agency file for a TPR when the child has been in foster care for 15 of the last 22 months, the agency may automatically choose this option without fully exploring adoption and guardianship. Agencies may wish to avoid the extra legal steps involved in a TPR or guardianship and may see relative placement as easier. Efforts must be made to ensure

relative placement is the best plan and the agency has not overlooked more permanent options for the child.

If the agency chooses placement with a fit or willing relative, without adoption or guardianship, ask the questions above to rule out adoption and guardianship. Then ask the following questions:

### **Is the decision not to do an adoption or guardianship fully informed?**

- ◆ Are the relatives fully informed of the legal nature of adoption and guardianship?
- ◆ Do they understand the adoption and guardianship processes?
- ◆ Have they been offered help getting their legal questions answered?
- ◆ Do they understand the protections that adoption or guardianship would confer to them and the child?

### **What is the quality and nature of the relationship to the child?**

- ◆ Are the relatives fully committed to providing a permanent, stable placement for this child?
- ◆ How do they plan to integrate the child into their family?
- ◆ Do they intend to have contact with the natural parent? If so, are they prepared to protect the safety of the child and make good decisions about the child's contact with the parent?
- ◆ What is the quality of the relatives' relationship with the child?
- ◆ Are the relatives able to meet the child's physical, emotional, and developmental needs?
- ◆ Has there been ongoing visitation with the child?
- ◆ If visitation has been limited, should it be extended?
- ◆ Should a trial home visit be ordered?
- ◆ Is this the best caregiver for the child? If others are interested in the child, do not rely on the agency's recommendation alone. Ask about others who may be able to meet the child's needs.

### **Another Planned Permanent Living Arrangement**

"Another planned permanent living arrangement" (APPLA) is meant to be a permanent placement for the child, not just a foster care placement that can be indefinitely extended.<sup>10</sup>

The agency may choose an APPLA when it has documented to the court that compelling reasons exist which make the former options unacceptable. The

ASFA regulations offer examples of compelling reasons to choose this option. They include when an older teen requests emancipation; when there is a significant bond, but the parent cannot care for the child due to disability; and when an Indian tribe has identified an APPLA for the child.<sup>11</sup>

Choosing this option is appropriate when there is a specific, long-term placement for the child. Long-term foster care is not an acceptable permanency option under ASFA, and therefore, should not be chosen as an APPLA.<sup>12</sup>

Before choosing this option, ask the following questions:

#### **Have all resources for the child been tapped?**

- ◆ Did the agency make adequate attempts to locate relatives who may be able and willing to care for the child on a long-term basis?
- ◆ Is there anyone in the child's life who may be willing to adopt or accept guardianship of the child?

#### **Is group placement the best way to meet the child's needs?**

- ◆ If an APPLA was selected because the child needs to be in an institutional or group setting, are the child's needs so great that no permanent family setting would be appropriate for this child? Is additional expert evaluation necessary before making that determination?

- ◆ Are additional services to the child necessary?
- ◆ If the child has been living with a relative or caregiver, would additional services help the child remain in that setting?
- ◆ If the child is living in an institutional setting, would additional services allow the child to move into a family setting?

An APPLA is subject to ongoing court review at later permanency hearings. Each hearing should explore more permanent options for the child. To summarily rule out more permanent options based on the child's age or needs is contrary to the goals of ASFA. ASFA prohibits states from using categories to classify children for whom an APPLA is appropriate.<sup>13</sup> Individual determinations about each child's needs and circumstances are necessary.

#### **After the Plan is Chosen**

Once the appropriate plan for the child is determined, the next step is to ensure the agency is making reasonable efforts to finalize the plan. That is the focus of the remaining chapters. These chapters explain each permanency option in more depth. They provide questions to ask to ensure the agency is making reasonable efforts to move the child swiftly toward the chosen permanent plan: return home, adoption, guardianship, relative placement, or an APPLA.

#### **Endnotes**

1. Price, Amy. "Impact of Maternal Separation on Infants and Toddlers: A Literature Review," 1999 (unpublished paper).

2. 42 U.S.C. § 671 (15) (A), 45 C.F.R. §1356.21(b).

3. 65 Fed. Reg., 4035 (January 25, 2000).

4. 42 U.S.C. § 675 (5) (C), 42 U.S.C. 671(15)(E)( i).

5. 45 C.F.R. § 1356.21(i)(3).

6. 42 U.S.C. § 675(7).

7. 45 C.F.R. § 1355.20(a)(2).

8. 65 Fed. Reg., 4034 (January 25, 2000).

9. 65 Fed. Reg., 4060 (January 25, 2000).

10. 65 Fed. Reg., 4036 (January 25, 2000).

11. 45 C.F.R. § 1356.21(h)(3)(i)(ii)(iii).

12. 65 Fed. Reg., 4036 (January 25, 2000).

13. 65 Fed. Reg., 4035 (January 25, 2000).

# Permanency Hearing Requirements

## What

1. **Determining the plan:** the permanency hearing determines whether and when the child will be returned home, placed for adoption with the state filing a petition for termination of parental rights; placed with a fit and willing relative; referred for guardianship; or, where compelling reasons exist, placed in an another planned, permanent living arrangement.
2. **Finalizing the plan:** The agency must obtain a finding that it is making reasonable efforts to finalize the plan.

## When

1. **Determining the plan:** the permanency hearing, which determines the plan, must be held within 12 months of the child's entry into foster care, every 12 months thereafter, and 30 days after a finding that reunification efforts are no longer necessary.
2. **Finalizing the plan:** the agency must obtain a finding of reasonable efforts to finalize the plan within 12 months of the child's entry into foster care and every 12 months thereafter.

## How

The order issued after a permanency hearing must be made after a review of facts before the court. Ex parte orders, agreed orders, and paper reviews are not acceptable.

If the agency presents more than one plan, only one need be considered.

Findings must:

- ◆ be explicitly documented;
- ◆ be made on a case-by-case basis;
- ◆ be case-specific if referencing a checklist, petition, or other papers;
- ◆ not merely reference state law; and
- ◆ be stated in the court order.

If the findings are not contained in a court order, a transcript may be used to show the findings were actually made. Affidavits saying the findings were made and nunc pro tunc orders are unacceptable. Bear in mind that even though a transcript is acceptable, it would probably be difficult to obtain quickly before the finish of an audit by federal reviewers. Therefore, relying on transcripts is not recommended.

## Who

The permanency hearing must be open to the participation of the parent, foster parents, preadoptive parents and child, if of a suitable age, which is not defined. The regulations do not specify what is meant by "participation."

## Failure to Comply

Failure to make the required findings could result in the loss of payment to the agency for the child's stay in foster care, and could affect future adoption subsidies.

Unlike the failure to find that reasonable efforts to prevent removal were made, a failure to find the agency made reasonable efforts to finalize the plan is remediable. Entering the required findings will restore the child's financial eligibility.

*section 2*  
**MAKING THE PLAN A REALITY**

## Reunification Checklist

**WHAT ARE THE CASE FACTS?**

**WHAT IS THE CHILD'S POSITION CONCERNING RETURN HOME?**

**WHAT DOES THE CASE PLAN INCLUDE, AND HOW WAS IT DEVELOPED?**

**DID THE AGENCY INVOLVE THE PARENT IN CASE PLANNING AND SUPPORT THE PARENT'S PARTICIPATION?**

**WHAT SERVICES ARE INCLUDED IN THE CASE PLAN?**

**HOW HAVE THESE SERVICES AFFECTED THE PARENT'S BEHAVIOR OR SKILLS?**

**WHAT SERVICES ARE NOT IN PLACE, AND WHY NOT?**

**WHAT HAS THE COURT ORDERED REGARDING VISITATION, AND WHAT IS THE STATUS OF VISITATION?**

**IS SIBLING AND EXTENDED FAMILY VISITATION TAKING PLACE?**

**HAVE AGENCY CASEWORKERS BEEN DILIGENT IN IMPLEMENTING THE AGENCY'S CASE PLAN?**

**HAVE THE PARENTS BEEN DILIGENTLY FOLLOWING THROUGH ON THE CASE PLAN?**

**WHAT HAS HAPPENED SINCE THE CASE CAME INTO THE SYSTEM AND THE CASE PLAN WAS DEVELOPED?**

**WHAT IS DIFFERENT NOW?**

**WHAT NEEDS TO HAPPEN TO MAKE RETURN HOME POSSIBLE?**

**WHAT HAS THE AGENCY PUT IN PLACE TO REDUCE THE LIKELIHOOD OF DISRUPTION AFTER THE CHILD IS RETURNED?**

**HOW MUCH EFFORT IS REASONABLE?**

## REASONABLE EFFORTS TO FINALIZE A PERMANENCY PLAN FOR REUNIFICATION *by Jennifer Renne*

Returning a child home continues to be the preferred choice among the permanency options outlined under ASFA. When the permanency goal is reunification, ASFA anticipates this outcome will be achieved by the first permanency hearing, or shortly thereafter. This chapter provides a framework for determining whether the agency is satisfying its duty to provide reasonable efforts when reunification is the permanency plan.

This assessment is distinct from determining whether to return the child home. Regardless of the judge's ruling on the issue of reasonable efforts, the decision on reunification is separate, and should be based on an assessment of the risk and safety factors.

The ASFA regulations state:

The State must make reasonable efforts to maintain the family unit and prevent the unnecessary removal of a child from his/her home, as long as the child's safety is assured; *to effect the safe reunification of the child and family (if temporary out-of-home placement is necessary to ensure the immediate safety of the child)*; and to make and finalize alternate permanency plans in a timely manner when reunification is not appropriate or possible . . . In determining reasonable efforts to be made with respect to a child and in making such reasonable efforts, the child's health and safety must be the State's paramount concern. 45 C.F.R. § 1356.21(b)

Since the federal Adoption Assistance and Child Welfare Act of 1980, state agencies have been federally mandated to provide reasonable efforts to guide a child's safe return home. Unless the court has made a specific finding that reasonable efforts to reunify are not required, the agency must provide such efforts.<sup>1</sup> What constitutes reasonable efforts must be determined on a case-by-case basis. That is why an overall understanding of the case is so important. Although there are no prescribed federally mandated services, states must describe in their state plans the services offered to reunify families.<sup>2</sup> A state plan should demonstrate the state's ability to meet national standards for outcomes

for children in the areas of child safety, permanency, and well-being.

It is the agency's responsibility to show it has made reasonable efforts. These efforts should be clearly documented in the agency file, and the agency attorney should be able to explain what has taken place. This information includes treatment records, evaluations, and caseworker notes. The caseworker notes may include information on:

- ◆ frequency and quality of visitation,
- ◆ discussions with foster parents, teachers, relatives, mental health professionals and others important to the child's life,
- ◆ contacts with the parents,
- ◆ home visits, and
- ◆ the caseworker's contacts with the child.

Some of this information is relevant and admissible, but sometimes confidentiality or evidentiary concerns preclude sharing the information. Caseworkers should be prepared to testify about these efforts, or describe them in a report or affidavit. Although the agency shoulders this burden, it is appropriate to hear from other parties on the issue.

Asking the following questions will help determine whether the agency has made reasonable efforts to finalize a permanency plan for reunification.

### **What are the case facts?**

Understanding the nature of the case is essential to determine whether efforts to reunify are reasonable and sufficient. Before the permanency hearing, review the case file to *fully understand* the case facts. What events brought the child into care? Has the child been removed before?

What is the background and history of the allegations of abuse and/or neglect? What services were provided to prevent removal, and why were those services unsuccessful? Has the agency been involved with siblings in the past?

Become familiar with specific issues in the case, including the type of child maltreatment involved, and

other unique issues. For example, reasonable efforts in a sex abuse case will differ from reasonable efforts in a neglect case. Family counseling may not be appropriate in a sex abuse case, but may be critical in a neglect case. Thoroughly understanding abuse and neglect issues will lead to better assessments of reasonable efforts. Find out what other problems the family faces, (e.g., substance abuse, mental health issues, housing problems.) Review information about relatives who may be involved in the child's life, thinking about issues of concurrent planning and its role in reasonable efforts in this case.<sup>3</sup>

### **What is the child's position concerning return home?**

The child's advocate should inform the judge of the child's position on reunification and the basis for that position. A good advocate will have spent time with the child learning how the child feels about returning home. The child's advocate should also conduct an independent investigation, including interviewing caseworkers, teachers, mental health professionals, relatives, and others involved in the case. Depending on the child's age and emotional development, the judge might wish to hear directly from the child on some issues. This will provide a better idea whether returning home is in the child's best interest, and the degree to which the child is benefiting from provided services.

### **What does the case plan include, and how was it developed?**

When assessing reasonable efforts, first examine how the plan was developed. Case planning involves assessing a number of well-being and safety factors. Unfortunately, sometimes case plans are a boilerplate set of services, without much attention to a family's unique needs and circumstances. Much progress has been made to develop family-focused, child-centered services.

In addition to knowing what is in the case plan, find out whether services have been customized to the family's needs. Evaluate the elements of the case plan and determine whether services have or will improve family functioning. Will they reduce the risk of further abuse or neglect so the child can return home safely? What are the most effective services for specific problems? Who are the most successful providers of these services? What problems and needs cannot be addressed currently? Which problems should be prioritized?

### **Did the agency involve the parent in case planning and support the parent's participation?**

Parents should be involved in developing the plan. The degree to which the parent participates in case planning bears on the plan's success. The more motivated the parent is to gain the skills needed to live safely with the child, the greater the likelihood of success. Also, including parents at the outset of the case builds trust. If at some point reunification becomes unlikely, then the parent is in a better position to provide input towards another resolution that will benefit the child, including placement with another family.

The agency should support and encourage parents to participate in case planning and other decision making regarding the child. The agency should have invited the parents to the case plan meetings and offered transportation if needed. Cooperation by all parties leads to better results.

### **What services are included in the case plan?**

The following services are most frequently included in the case plan and will vary depending on the case circumstances and the reasons the child entered care. Some services focus on getting the child home, while others (such as day care) are critical to ensuring the child's safety and well-being once the child has returned home.

*Level and quality of placement for the child.* Placement changes can traumatize the child and affect successful reunification. The quality of care the child receives is critical. The agency must assure the child's safety and protection as it seeks to place the child in the most appropriate setting. Some children are placed in overly restrictive facilities, and others in settings that are not restrictive enough. Generally, the preferred placement is one that is least restrictive while still meeting the child's emotional, cognitive, and developmental needs. The agency should also do what it can to minimize the risk of disruptions, as every disruption in care affects the child. Additional treatment for the child may be critical to complement the appropriate level of care.

*Counseling.* Often counseling will be ordered for the parent and child. If the child is dealing with significant emotional or mental health needs, the child may need more specialized treatment and care than periodic psychotherapy. Usually evaluations are required to assess

the child's therapeutic needs. A trained mental health professional should determine the need for evaluations, including psychological, psychiatric, educational, and neurological. The evaluation(s) should recommend the form and frequency of counseling.

The parent may also need to undergo similar evaluations, and any recommended follow-up treatment. Mental health counseling for the parent must be time-limited, with the parent working to achieve sufficient rehabilitation by a set date. Each of the treating mental health professionals should work together to determine the appropriateness of family counseling. Usually family counseling will be recommended after the individuals have had an opportunity to resolve some of their own issues.

*Parenting classes.* Parenting classes are typically part of a core services package offered by the agency. While many parents benefit from these programs, they must be tailored to individual needs. For example, it serves little purpose to have a parent of a special needs toddler attend parenting classes geared towards parents of infants. Similarly, parenting teenage children differs greatly from parenting younger children. Often the specific type of parenting class needed is not available, and some effort must be made to find a class that addresses the parent's needs. Sometimes providing an in-home parent aide is an effective way to model proper parenting techniques. Occasionally the foster parent acts as a mentor for the parent and helps the parent learn to address the child's particular needs. Rather than merely referring the parent to a standard parenting class, the social worker should precisely determine the parent's specific needs, and provide services to address them.

*Anger management.* Anger management classes may be ordered along with counseling. The benefit of anger management classes is that they are usually conducted with a group. This permits participants to learn from and support each other in resolving anger issues in healthy, constructive, nonviolent ways.

*Drug treatment.* Substance abuse is a factor in most child abuse and neglect cases. A parent suspected of abusing substances should be ordered to undergo a substance abuse evaluation as soon as the issue arises. It is helpful when facilities are located inside the courthouse where drug testing can take place. It is critical that recommen-

## How ASFA's Reasonable Efforts Determination Affects a Decision to Return the Child Home

The reasonable efforts determination is separate from the decision to return the child home. Because the reasonable efforts finding is a new requirement under ASFA, there has been some confusion. Be aware that a determination regarding the agency's efforts to finalize a permanency plan for reunification does not directly affect the decision regarding the child's return home. That is, if a finding is made that the agency failed to make reasonable efforts, that determination does not mean the child must return home due to the agency's lack of effort. The potential impact of a reasonable efforts determination is strictly financial; if reasonable efforts have *not* been made, federal IV-E funding for that child's stay in foster care is affected until a positive finding of reasonable efforts is made. The decision to return the child home must be made separately, applying the appropriate standard used in each jurisdiction for such determinations (e.g., best interests of the child) and factoring in the danger the child would face if returned home.

dations be followed, and that the parent participates in drug treatment, including regular drug/alcohol screening, as appropriate.

*Housing concerns.* Frequently, parents experience housing problems which further compound the difficult task of reunification. Sometimes housing problems can be a symptom or result of other problems such as drug abuse or unemployment. While many agency workers will note that there often are insufficient resources to address ongoing poverty or housing issues, these issues nonetheless need to be addressed before reunification can occur. The caseworker is required to make some effort to handle these problems, such as referring the parent to Section 8 housing programs, helping the parent apply for other benefits, or providing employment assistance. Consider medical benefits, disability benefits, or financial benefits through the Temporary Assistance to Needy Families (TANF) program. Referral to private, community-based agencies are also helpful.

*Employment concerns.* Caseworkers can work with

parents to address employment problems by providing job counseling or referring the parent to educational training programs that can lead to employment.

*Day care.* Many parents need help with day care, especially if they are recently employed, attending inpatient drug treatment, or complying with other treatment plan provisions such as counseling and parenting skills classes. If parents have children at home, other than the ones in care, they may need help with day care right away. If there are no children living at home, then day care concerns may need to be addressed once the children return home. Sometimes caseworkers have access to vouchers that will help subsidize day care costs.

### **How have these services affected the parent's behavior or skills?**

What impact have the services had on family functioning? Has there been progress? If so, is the case progressing at a rate where reunification seems feasible within a reasonable timeframe? Because reunification services are time-limited, it is important to stay focused on the results of services. For example, a parent may be attending counseling and anger management classes for several months, but still appear unable to handle stress without resorting to violence. If the services are ineffective, determine whether the case plan needs to be reassessed.

### **What services are not in place, and why?**

1. *The services may not be available.* If so, ask what efforts the agency has made to locate or identify alternative resources.
2. *The services may be available, but no referral has been made.* Some services are provided directly from the agency, and some are contracted out. When a service is not provided by the public agency, ask where the parent might access such a service. Interagency collaboration and support is critical to successful reunification efforts.
3. *The services may be available and a referral made, but the parent is not participating.* If this is the case, has the caseworker explored barriers that may be preventing the parent from participating? Can the agency enhance availability of a service by, for example, providing transportation, scheduling parenting classes around the parent's work schedule, or providing day care vouchers?

### **What has the court ordered regarding visitation, and what is the status of visitation?**

Visitation between parents and children in out-of-home placements is vital. Studies show visitation is the most important factor in the reunification process.<sup>4</sup> If visitation is not occurring regularly, ask why and determine if the agency should provide more assistance? If necessary, defer to the treating mental health professional to structure the nature and duration of the visits. Sometimes visits may need to be supervised by a relative, or if more serious concerns are at stake, the visits may need to be supervised by a caseworker.

The caseworker should be aware of any traumatic effects that visits may be having on the child, and should consult regularly with the foster parent, the child's therapist, and parent. As the child responds in a positive manner to visits, their frequency and duration may increase. Sometimes trial home visits can be used to place the child home temporarily until it is appropriate to transfer full care and custody back to the parent.

In addition to assisting in visitation, the caseworker should be making consistent efforts to facilitate a meaningful relationship between parent and child. This includes regularly informing the parent about the child's progress, and including the parent in health and educational decisions.

### **Is sibling and extended family visitation taking place?**

Maintaining and strengthening ties with extended family members, including siblings, can be a key part of reasonable efforts. As the family heals from the damage of abuse or neglect, familial ties should not be ignored. Whether sibling visitation is formally in the court order, the agency should be exploring the issue, and making efforts to strengthen family ties. Judges can hear evidence on the issue and incorporate visitation orders into the court order. Even if an alternative permanency option will be pursued later, many children will want to explore fundamental questions about their birth relationships and heritage.

### **Have agency caseworkers been diligent in implementing the agency's case plan?**

In addition to identifying and providing access to services, the caseworker should diligently follow up on the case plan. The caseworker should explain to the parent what each service is intended to accomplish, and how the parent accesses each service. A timeframe for

each service should be established. Regular communication between the caseworker and the service provider can ensure the service is being provided and parents are participating. The caseworker should explain to the parent the importance of meeting the time requirements and consequences of failing to meet them. Judges should hear evidence, including testimony if necessary, on this issue. In addition to information provided by the agency, judges should hear from the parent's and child's counsel on the issue.

### **Have the parents been diligently following through on the case plan?**

To what degree have the parents complied with the treatment program? A lower degree of compliance by the parent may diminish the department's obligation to extend significant efforts. If this is the case, ask whether reunification continues to be the appropriate plan?

### **What has happened since the case came into the system and the case plan was developed?**

The case plan may have been reasonable and appropriate when it was drafted. If circumstances have changed, it may need to be modified to meet the family's current needs. It may be that reunification is no longer appropriate. If so, explore alternative permanency options, a process which is faster and less painful for the family if concurrent planning has been implemented in the case.

### **What is different now?**

Look at the family situation when the child first entered care. What has changed? Is a safe return, possibly with additional services, now possible?

### **What needs to happen to make return home possible?**

What specific goals should be met to achieve reunification? Far too many children stay in foster care while casework activities flounder without results. The more clearly articulated the goals are from the beginning, the better the family will respond, and the sooner reunification can happen.

### **What has the agency put in place to reduce the likelihood of disruption after the child is returned?**

The family will need ongoing support once the child has returned home. Sometimes there is an adjustment period, depending on such factors as length of time the child was out of the home, number of children in the sibling group and whether they were placed together, or changes in schools for the child. Often additional services will be needed to preserve the family, such as respite care, day care, counseling, drug rehabilitation, and medical care.

### **How much effort is reasonable?**

The reasonable efforts requirement does not mandate supporting family reunification at all costs. Determining how much effort is reasonable must occur on a case-by-case basis, and include many factors. Consider the family history: Is this the third or fourth time the family has been involved with social services, or the first? Are there substance abuse or mental health issues, and if so, what is the parent's treatment history? What is the cost-effectiveness of services? Would this family benefit from an in-house parenting specialist, and if so, what is the likelihood of that service preserving the family?

### **Endnotes**

1. 45 C.F.R. § 1356.21(b)(2)(i) & (b)(3)
2. 45 C.F.R. § 1355.34(c)
3. Concurrent planning involves pursuing two permanency goals simultaneously. For example, social services may be working towards returning a child home, but also be seeking alternative permanent placement options, possibly even including adoptive homes. One main purpose of concurrent planning is to reduce the child's stay in out-of-home care, and minimize disruptions to the child.
4. Pecora, P.J., & A.N. Maluccio. "What Works in Family Foster Care." In *What Works in Child Welfare*. Edited by M. Kluger, G. Alexander & P. Curtis. Washington, D.C.: Child Welfare League of America, 1999.

## **SAMPLE COURT REPORT AND COURT ORDER FOR PERMANENCY HEARING:**

### **RECOMMENDATION FOR REUNIFICATION** *Prepared by Mark Hardin*

Use the following sample court report and court order forms for permanency hearings when the child protection agency recommends and the court approves the child's return home. The forms allow for two

possibilities: reunification within a specific deadline; or continued placement in foster care with a continued goal of reunification.

COURT REPORT, **PERMANENCY PLAN IS REUNIFICATION**

EREWON DEPARTMENT OF CHILDREN'S SERVICES  
AARON COUNTY

Child: Johnny J. Jones, D.O.B. 11/11/99

The Department of Children's Services recommends that Johnny J. Jones be returned to\_\_\_\_\_.

**When the recommendation is return home by a specified date, complete the following eight points:**

1. The Department requests that Johnny J. Jones be returned home by \_\_\_\_\_, 200\_\_.
2. The conditions or circumstances leading to the removal of the child have been corrected and it is now safe to return the child home because:
 

[Note: Specifically explain the reasons for your conclusion that the parent(s) have corrected the situation leading to prior abuse or neglect and why return home is now safe and appropriate for the child. Include available information about such things as success of treatment services, evaluations of the parent and child, and concrete changes in the parent's behavior.]
3. Recent visitation between the child and [name of the parent to whom the child is returning] supports this reunification recommendation. Visits have occurred on the following regular basis and with the following effects on the child:
 

[Note: Describe precisely what visitation has occurred since the last court hearing and how the child has reacted to that visitation. Include when each visitation occurred, its duration, its location, whether it was supervised, what happened during the visit (if that information is available) and how the child reacted before and after the visit.]
4. The following is the Department's plan for the child's return home and for follow-up supervision after the child's return.
 

[Note: The plan should specify a schedule for the child's return home, including a schedule for phased-in extended visits, and any other steps needed to ease the transition back home. It should specify services to the family, terms for continued monitoring, and supervision of the home until its safety is certain.]
5. The following efforts were made, following the placement of the child into foster care, to finalize a permanency plan:
 

[Note: Briefly describe the problems causing continued separation of the child and parents, the services offered or arranged by the agency to address the problems, and the agency's efforts to arrange or provide the services.]
6. If the child is placed in a home in a different state than the home of the child's parents, the placement continues to be appropriate and in the child's best interests for the following reasons:
 

[Note: If the child is placed in the same state as one or both of the child's parents, leave this space blank. Otherwise, explain why it is necessary to place the child in a different state. Federal law requires the court to

make findings regarding the continuing necessity for out-of-state foster placements. 42 U.S.C. §675(5)(C).]

7. If the child is 16 or older, the child needs the following services to make the transition from foster care to independent living:

[Note: If the child is 16 or older, list and explain the services the child needs to transition from foster care to independent living. Federal law requires the court to make findings concerning the services needed to prepare the child for independent living. 42 U.S.C. §675(5)(C).]

8. The following information and recommendations are also of interest to the court:

[Note: This allows the agency to give the court any other information pertinent to its decision and any other recommended court actions or orders.]

**When the recommendation is continued foster care for up to six months with a goal of reunifying the family, complete the following ten points:**

1. The Department of Children's Services recommends that Johnny J. Jones be continued in foster care for \_\_\_\_ months with a goal of reunifying the family.

2. The parents have made substantial progress in correcting the conditions separating the family in that:

[Note: Describe, specifically, what progress parents have made. This should include descriptions of exactly how their behavior has changed; what, if any, skills they have learned; and why they are more willing or better able to safeguard the child's safety.]

3. Safe return of the child to parents is highly likely in the next [four] months because:

[Note: Explain why there is reason to believe the child can safely return home in a short time. For example, if there is strong reason to believe the parent will be capable of making the required adjustments necessary to ensure the child's safe return within a short time.]

4. The parent(s) and child have a strong and positive emotional relationship, which is well worth preserving because:

[Note: The evidence that the parent and child maintain a close and positive relationship would include such things as the frequency of visitation and telephone calls, the reaction of the child toward the parent during visits, and any expert evaluation of the relationship.]

5. It is too early to set a specific date as a deadline for the child's return home because:

[Note: It may not be easy to explain why, although parents have made substantial progress toward the child's return, it is not yet possible to set a specific date. Possible reasons might include logistical barriers (e.g., lack of a place to stay but realistic plans to obtain one in the near future) or that additional evaluation is needed to set a specific plan and schedule for the transition.]

6. The Department recommends the following plan to achieve reunification within [four] months:

[The plan should include specific goals, tasks, and timetables. At this point, the tasks and timetables should be for a plan already mostly completed. They should include final completion of services, transitional visitation, logistical steps to make possible the child's return, and plans for monitoring the placement after the child's return.]

7. The following efforts were made, after the child's placement into foster care, to finalize the child's permanency plan:

[Note: Briefly describe the problems causing continued separation of the child and parents, the services offered or



## COURT ORDER, **PERMANENCY PLAN IS REUNIFICATION**

IN THE DISTRICT COURT OF [COUNTY], [STATE]  
999TH JUDICIAL DISTRICT

IN THE INTEREST OF:  
JOHNNY J. JONES

CAUSE NO. 99CM0000

On the \_\_\_\_ day of \_\_\_\_\_, 200\_, a hearing was held in the 999th Judicial District Court, the Honorable \_\_\_\_\_ presiding.

### I. APPEARANCES

Parties and others present included the following:

- |   |  |
|---|--|
| <input type="checkbox"/> Mother _____               | <input type="checkbox"/> Attorney for Mother _____ |
| <input type="checkbox"/> Father _____               | <input type="checkbox"/> Attorney for Father _____ |
| <input type="checkbox"/> Father _____               | <input type="checkbox"/> Attorney for Father _____ |
| <input type="checkbox"/> Child _____                | <input type="checkbox"/> Advocate for Child _____  |
| <br>  |  |
| <input type="checkbox"/> Principal Caseworker _____ | <input type="checkbox"/> Other Caseworker _____    |
| <input type="checkbox"/> Casework Supervisor _____  | <input type="checkbox"/> Government Attorney _____ |
| <input type="checkbox"/> Foster Parent _____        | <input type="checkbox"/> Foster Parent _____       |
| <input type="checkbox"/> Relative _____             | <input type="checkbox"/> Relative _____            |

Others (list) \_\_\_\_\_

### II. FINDINGS AND ORDERS

**When the decision is to return the child home by a specified date, complete the following five findings:**

1. The conditions or circumstances leading to the removal of the child have been corrected and it is now safe to return the child home because:

[Note: The finding might describe how the relevant conditions or circumstances have been corrected or the finding might specifically incorporate or modify the Department's explanation why return home is now safe.]

2. Recent visitation between the child and [name of the parent to whom the child is returning] demonstrates the safety and appropriateness of the child's return home as follows:

[Note: The finding might incorporate or modify the Department's description of recent visitation and its effect on the child or the Department's explanation why recent visitation supports its recommendation that the child be returned home.]

3. The following efforts were made, following the placement of the child into foster care, to finalize the child's permanency plan:

[Note: The finding might incorporate or modify the Department's description of the state's efforts to reunify the family.]

The efforts were \_\_\_\_ were not \_\_\_\_ reasonable because \_\_\_\_\_.

4. If the child is placed in a home in a different state than the home of the child's parents, the placement continues to be appropriate and in the child's best interests for the following reasons:

[Note: If the child is placed in the same state as one or both of the child's parents, leave this space blank.

Otherwise, explain why it is necessary to place the child in a different state. The finding might incorporate or modify the Department's explanation. Federal law requires the court to make findings regarding the continuing necessity for out-of-state foster placements. 42 U.S.C. §675(5)(C).]

5. If the child is 16 or older, the child needs the following services to make the transition from foster care to independent living:

[Note: If the child is less than 16, leave this space blank. If the child is 16 or older, list and explain the services the child needs to make the transition from foster care to independent living. The finding might specify the services or might incorporate or modify the Department's statement about such services. Federal law requires the court to make findings concerning the services needed to prepare the child for independent living. 42 U.S.C. §675(5)(C).]

**When the decision is to extend the child's stay in foster care for a specified time with a goal of family reunification, complete the following seven findings:**

1. The parents have made substantial progress in correcting any conditions causing the separation of the family in that:

[Note: The finding might describe how the parent has progressed or the finding might very specifically incorporate or modify the Department's description of the parent(s)' progress.]

2. Safe return of the child to parents is highly likely in the next \_\_\_\_ months because:

[Note: The finding might incorporate or modify the Department's explanation of why it is highly likely that the child can safely be returned home in a short time.]

3. The parent(s) and child have a strong and positive emotional relationship, which is well worth preserving because:

[Note: The finding might incorporate or modify the Department's description of the parent-child relationship.]

4. It is too early to set a specific date for the child's return home because:

[Note: The finding might incorporate or modify the Department's explanation why it is too early to set a specific date for the child's return home, yet it is highly likely that the child can safely return within a short time.]

5. The following efforts were made, following the placement of the child into foster care, to finalize the child's permanency plan:

[Note: The findings might incorporate or modify the Department's description of the state's efforts to reunify the family and, if applicable, to arrange and finalize a new permanency plan for the child.]

The efforts \_\_\_\_ were reasonable \_\_\_\_ were not reasonable because \_\_\_\_\_.

6. If the child is placed in a home in a different state than the home of the child's parents, the placement continues to be appropriate and in the child's best interests for the following reasons:

[Note: If the child is placed in the same state as one or both of the child's parents, leave this space blank.

Otherwise, explain why it is necessary to place the child in a different state. The finding might incorporate or modify the Department's explanation. Federal law requires the court to make findings regarding the continuing necessity for out-of-state foster placements. 42 U.S.C. §675(5)(C).]

7. If the child is 16 or older, the child needs the following services to make the transition from foster care to independent living:

[Note: If the child is less than 16, leave this space blank. If the child is 16 or older, list and explain the services the child needs to transition from foster care to independent living. The finding might incorporate or modify the Department’s statement about such services. Federal law requires the court to make findings concerning the services needed to prepare the child for independent living. 42 U.S.C. §675(5)(C).]

THE COURT HEREBY ORDERS:

1. The child shall be returned to [name of the parent to whom the child is to be returned] (no later than) \_\_\_\_\_, 200\_\_.

OR

The child shall continue in foster care in the [custody] of the Department for \_\_\_\_\_ months.

2. The Department shall implement the following plan to ensure the safe and nondisruptive return of the child to [name of the parent to whom the child is to be returned].

[Note: The court-approved plan might incorporate or modify the Department’s proposed plan. It might order specific services to ensure the child’s safe return.]

3. The next hearing in this case shall be a [review] hearing and shall take place at \_\_\_\_ [a.m.] [p.m.] on \_\_\_\_\_, 200\_\_, Courtroom \_\_\_\_.

4. The court further orders that:

[Note: This allows the court to enter any additional necessary instructions or orders. If none, leave this space blank.]

SIGNED this \_\_\_\_\_ day of \_\_\_\_\_, 200\_\_.

\_\_\_\_\_  
[Insert Name]  
Judge



## TERMINATION OF PARENTAL RIGHTS CHECKLIST

**ARE THERE ANY PUTATIVE FATHERS AND DO THEY HAVE ANY RIGHTS?**

**WHO IS ENTITLED TO NOTICE AND SERVICE OF THE TPR PETITION? HOW WILL THIS BE ACCOMPLISHED?**

- Missing parents
- Foster and preadoptive parents

**CAN PERMANENCY BE ACHIEVED WITHOUT A TPR TRIAL?**

- Voluntary Relinquishment
- Family Group Conferencing
- Mediation

**WHAT RECORDS AND/OR TESTIMONY WILL BE NECESSARY TO THE CASE?**

**WHAT CAN BE DONE TO AVOID TRIAL DELAYS?**

**HAVE ICWA MANDATES BEEN MET?**

*This chapter assumes the preferred permanency option, reunification, has been ruled out and the permanency plan is termination of parental rights with adoption.*

## REASONABLE EFFORTS TO FINALIZE A PERMANENCY PLAN OF ADOPTION TERMINATION OF PARENTAL RIGHTS, THE FIRST STEP *by Cecilia Fiermonte*

3

When the child's permanency plan is termination of parental rights (TPR) and placement for adoption, the parent's rights should be terminated in a timely manner. ASFA does not specify how long it should take to terminate parental rights. However, to comply with the spirit of ASFA to move children quickly toward permanency, the termination proceeding should be completed within a reasonable period.

At the permanency hearing, a determination must be made whether the agency is making reasonable efforts to finalize the plan, which includes efforts to terminate parental rights, the first step toward adoption. The permanency hearing can also be used to move the TPR forward. Asking the questions below will help evaluate the agency's reasonable efforts to finalize the TPR and move the case forward.

Chapter Four discusses the next step, adoption, and offers questions to ask to ensure that part of the process is proceeding smoothly toward permanency for the child.

### **Are there any putative fathers and do they have any rights?**

A putative father may be entitled to notice, and/or limited or full participation in a TPR proceeding. Failing to resolve the legal status of putative fathers could allow the parent an opportunity to later contest an adoption, thus disrupting the child's life and depriving her of permanency.

Identifying putative fathers at the beginning of the case allows ample time to explore whether any identified people have rights that could be asserted. Failing to do so could slow or stop the adoption process. Identification should occur as early as possible, when the child first enters foster care, or, if missed, at a dispositional hearing. Early identification is in the child's best interests because it protects against later delays and ensures the child has access to any resources the putative father and his family may offer.

At the permanency hearing, the agency should provide information about any putative fathers, and its

position on his rights. Find out if the agency has checked the birth certificate and attempted to contact the father, if listed. Has the agency discussed the father's identity with the mother, other relatives, or anyone else who might have knowledge of the child's paternity? Some states have a putative father registry, which can be checked. Be careful not to rely solely upon the word of the mother. She may wish to keep a father's identity hidden to frustrate the plan for adoption, avoid contact, or for other reasons.

The agency should have made reasonable efforts to identify any putative fathers, and establish contact if appropriate. If the agency has not considered whether there might be a putative father, the judge should order the agency to explore the matter and report to the court.

If one or more putative fathers are identified, get enough information to decide their legal status. If the agency has not fully explored the putative father's status and insufficient information exists to determine his rights, the judge may wish to order further action by the agency.

It may help to use a checklist containing factors which affect a father's rights. The checklist will vary based on state law, but common considerations are:

- ◆ nature and extent of contact with the child;
- ◆ monetary support for the child;
- ◆ attempts at contacting the mother, the child, or the agency;
- ◆ filing of or attempt to file a paternity action in court; and
- ◆ listing with a putative father registry.

Once adequate information is collected, the record should document that the father's rights were considered. The court may take testimony from caseworkers or other witnesses, or ask the agency to prepare affidavits.

Gathering information on the putative father's status could help the process by eliminating surprise should a putative father appear during the TPR or

adoption proceedings. It could also immunize a later adoption from attack by a father who was not given adequate notice or opportunity to appear at the TPR stage.

### **Who is entitled to notice and service of the TPR petition? How will this be accomplished?**

TPR actions often stall while the agency attempts to notify and serve appropriate parties. It is common for the agency to overlook a party when there are large sibling groups with different parents and different foster or preadoptive families.<sup>1</sup>

*Missing Parents.* A troublesome issue arises when a parent who has not appeared in the dependency court proceedings or has stopped participating before the permanency hearing must be served. Efforts to locate the parent should occur early in the case. If that hasn't occurred, attempts to locate the parent should begin promptly. Ask whether anyone knows the whereabouts of that parent. The agency should have made reasonable efforts to locate and work with the parent. If the parent's whereabouts are unknown, the judge should order the agency to undertake reasonable efforts to locate an address. Computer systems run by the child support division may be used to locate addresses. Employment or motor vehicle information may also be obtained. In addition, law enforcement agencies or other state agencies may be able to assist.

If the parent cannot be personally served, ordering an alternate form of service, such as publication, may be necessary. If alternate service must be made, the judge may order the agency to promptly provide any information or affidavits necessary to support the order. Publication of service can cause considerable delay because the notice must usually be published in the place of the last known address, which may take the agency some time to track down. Another reason for delay is that finding an appropriate publication is challenging in distant or foreign locations. Judges can assist the process by asking in court if anyone knows the party's whereabouts and ordering these individuals to place the last known residence on the record. Judges can also set a time limit for publication, and ask the agency to report its progress at specific intervals.

*Foster and preadoptive parents.* Foster parents and preadoptive parents may be entitled to notice of the

proceeding. ASFA requires that foster parents, preadoptive parents, and current caregivers of the child receive notice of and opportunity to be heard at the permanency hearing.<sup>2</sup> State law may expand those rights or confer greater rights on additional individuals, such as *former* foster parents. The parties may disagree about interpretation of those laws. For instance, it might not be clear whether *former* foster parents should be included or whether preadoptive parents are included *only* if an adoption agreement has been signed. To eliminate confusion, the judge may need to direct the agency to notify/serve appropriate individuals.

### **Can permanency be achieved without a TPR trial?**

Once the permanency hearing determines that TPR and placement for adoption is the best plan for the child, the parent may reconsider previous unwillingness to voluntarily relinquish parental rights, engage in mediation, or work with the agency on involving family members. Considering these options could lead to a swifter resolution than that achieved through a contested TPR trial.

*Voluntary relinquishment.* A voluntary relinquishment of parental rights may provide a satisfactory result for all parties. The parent may be able to negotiate for some ongoing contact with the child while still allowing the child to be adopted into a safe, permanent home. Contact between the biological parent and child does not have to be face-to-face. Other types of ongoing contact include phone calls, sending/receiving cards, gifts or pictures. Voluntary relinquishment should not be explored solely to avoid a TPR trial. It should be a means to achieve a desired result in the safest, fastest way possible for the child.

*Family Group Conferencing.* Family group conferencing involves bringing family members together with the agency to formulate a plan that they feel is best for the child. It allows the parent to have some say in the child's placement and retain a sense of control over their family's future. Ideally, this process should happen earlier in the case, if the parent is willing to cooperate. State law may address conditions for family group conferencing.

If a family group conference has not been held, it may be worth doing after the permanency hearing if there is no adoptive placement for the child. Consider

any bond the child may have to a preadoptive family in deciding whether to proceed with family group conferencing later in the case.

*Mediation.* When a TPR trial is imminent, mediation may allow the parent an opportunity to reconsider contesting the TPR. Even when the case is not resolved, mediation can identify the important issues in the case which can lead to a shorter, more directed trial.

### **What records and/or testimony will be necessary to the case?**

If all necessary parties are present, and state law does not bar it, the judge should schedule the TPR at the permanency hearing. This ensures the issues are identified and hearing dates are scheduled promptly. The judge can set the time for the agency to file a petition, and schedule either preliminary motions, or the hearing itself.

Depending on what basis the agency plans to file the petition, certain records or reports may be necessary to prove the grounds for TPR. If failure to progress forms the basis for the TPR, updated service reports from all providers should be ordered. Some records, such as mental health records, are governed by state law and their release to the court are conditioned on compliance with certain procedural requirements, including specific findings by the court. The agency should provide any supporting documentation needed to comply with procedural requirements.

Federal law protects the confidentiality of substance abuse records. Strict procedural requirements must be met.<sup>3</sup> Records requests must be initiated by anonymous motion, on notice to the parties and the substance abuse agency holding the record. The court must make specific findings in compliance with federal law. Those findings include determining whether the need for the records outweighs the need for confidentiality in that case. To make that finding, the judge will probably need to review the records *in camera*. If testimony is requested, the judge will need to have an offer of the proposed testimony. Time limits should be set for filing and hearing the motion. Documentation should be reviewed to decide which records are necessary to the TPR action, as required by federal law, and to ensure necessary parties have received notice. (A sample motion and court order for requesting disclosure of substance abuse records appears at the end of

this chapter).

Once a specific finding is made that mental health records or substance abuse records and testimony are necessary and the procedural requirements have been met, the judge should sign any orders or subpoenas immediately and either arrange for service, or have the agency arrange for service. Treatment providers can be difficult to schedule as witnesses because of their busy schedules. Voluminous records will take time to compile, especially if copies must be made for each party. The earlier service of the subpoenas occurs, the easier it will be to meet trial deadlines.

If the ground for TPR will be based on the conviction of a crime, or a prior termination of parental rights, the judge can move the process forward by ordering the agency to obtain the necessary documents. The agency's request may receive greater priority if accompanied by a court order.

### **What can be done to avoid trial delays?**

Many things that cause trial delays can be anticipated and addressed before the TPR proceedings begin. Identifying and dealing with those issues early in the case, at the permanency hearing if possible, will minimize surprises and resulting adjournments or continuances.

*Proceeding without the parent.* Parents whose rights are being terminated will often try to frustrate the court process by failing to appear for court dates. Or, especially in a failure to progress case, they may not keep scheduled appointments. The judge should order the agency to arrange for transportation to court, if possible, to avoid excuses. It should be clear that court proceedings will proceed whether the parent is present or not, if legally possible. Of course, care should be taken to safeguard the parent's rights according to state law, as an appeal further down the line could considerably slow the adoption process. The judge must ensure the parent receives adequate notice of proceedings and that counsel is appointed when feasible.

Practice varies on how to proceed if the parent fails to appear in court. Generally, if the parent's attorney is present, the court may hold a hearing in the absence of the parent. It is very important that counsel is assigned to the parent to protect the parent's rights if the need to proceed in her absence arises.

The other option which may be available is to enter

a default order against the parent. A default order may be risky, however, if the parent has the right to reopen the case, which could lead to further delays. Judges should be clear about the legal considerations so decisions can be made quickly on how to proceed when parents do not appear for TPR proceedings. Adjournments or continuances should not be granted because of uncertainty about the law.

If a parent is incarcerated or institutionalized, arrangements should be made for the parent to be brought to court. It may take some time to gain the cooperation of the agency responsible for the parent. If the parent may not appear in court, there are other ways to ensure the parent's rights are preserved. Due process does not require physical appearance.<sup>4</sup> Depending on state law, it may be possible to have the parent participate by testifying by telephone, giving a deposition, or using other means allowed in your jurisdiction. Be sure proper procedures are explored and followed to reduce delays.

*Resolving pretrial issues.* Identifying and resolving common evidentiary issues before trial will help move the case along smoothly and prevent delays. Issues that can be discussed before trial include whether the child will testify, and, if so, under what conditions; determination of relevant time periods; and whether portions of the case are irrelevant to the TPR.

Motions seeking documents or potential evidence possessed by opposing parties may cause major delays. Because numerous parties are often involved in dependency actions, discovery motions can take long to settle. Parties can be held in check by restricting the time for bringing motions and setting schedules for oral arguments.

Schedules can also be set for other motions, depositions, and preliminary hearings. Adjournments or continuances should be denied except under the most necessary circumstances, such as unexpected illness.

After the agency introduces case records in support of the TPR, parents may object on several grounds: the case record contains inadmissible hearsay, the case record contains irrelevant information, or the case record contains confidential information.

Anticipating admission of case records will allow the judge to make decisions on admissibility quickly, without later interrupting the trial. The agency should be given a specific date by which it must notify the

court and all parties of any case records it wishes to admit. This will begin the process and allow time for objections, *in camera* review of the record, or other necessary steps.

Encouraging the parties to stipulate to issues can also minimize delays. Beginning the TPR case by finding common ground can set the tone for the rest of the proceedings by encouraging cooperation and keeping the proceedings focused on the child, not legal maneuvers. Some issues to which the parties may stipulate include admission of reports, whether to close the courtroom, and how to handle testimony of unavailable witnesses.

### **Have ICWA mandates been met?**

Complying with the mandates of the Indian Child Welfare Act (ICWA)<sup>5</sup> avoids delays that could interfere with permanency for an Indian child. Failure to take necessary steps could lead to delays while the agency works to remedy noncompliance. The tribe may seek revocation of a termination of parental rights where ICWA mandates have not been met. The basic requirements affecting a TPR are outlined here, but practitioners should be thoroughly familiar with the law, given the considerable delays and harsh results caused by noncompliance.

*Identify early in the case whether ICWA applies.* The agency should have identified if ICWA applies to the child at the beginning of the case. ICWA applies when the child is a member of a tribe, eligible for membership in a tribe, or the biological child of a member of a tribe.

*Be sure notice is provided to the appropriate parties.* Once the child is identified as an Indian child, the agency needs to comply with the notice provisions of ICWA. The tribe, or any Indian custodian of the child is entitled to notice of any proceeding affecting the child's placement. If the tribe is unknown, notice must be provided to the Secretary of the Interior. All notice must be sent by registered mail, return receipt.

Only authorized parties may accept notice on behalf of the tribe. If notice is not addressed to the correct party, the tribe could claim it was inadequately served. The agency and the court should communicate and collaborate with local tribes so they are notified early and have ample opportunity to participate in case planning for the child. Minimally, the tribe is statuto-

rily entitled to 10 days notice of a TPR proceeding and 20 days to prepare.

*Know the tribe's rights to intervene.* The tribe may intervene in the proceedings any time. The tribe typically intervenes to transfer the case to tribal court. A transfer can only be denied when:

- ◆ the parent opposes intervention;
- ◆ the tribe declines jurisdiction of the case; or
- ◆ the court finds good cause to retain jurisdiction.

Tribal intervention can interrupt a TPR proceeding, and perhaps end the court's jurisdiction at any time. This fact underscores the need to notify and involve the tribe as soon as possible. If the tribe has been given ample opportunity to intervene and plan for the child, but declined, there may be good cause to deny tribal jurisdiction at the TPR stage of the case.

*Understand the heightened standards for TPR.* Particular standards must be applied in a TPR proceeding involving an Indian child. They involve a higher burden of proof, a specific finding of damage or potential damage to the child, and the active efforts<sup>6</sup> requirement.

Testimony by a qualified expert will help you make the necessary finding that, beyond a reasonable doubt, custody of the child with the parent or Indian custodian is likely to result in serious physical or emotional damage to the child. There must also be a finding that active efforts have been made to reunite the child with the family and that the efforts were unsuccessful. The agency must have made active efforts even if state law does not require that reunification efforts be made to TPR. Note also that active efforts is a higher standard than the reasonable efforts required by most state TPR statutes.<sup>7</sup>

## Endnotes

1. Some state statutes may grant the right to notice to foster or preadoptive families, sometimes called resource families.

2. 45 C.F.R. § 1356.21(o).

3. 42 U.S.C. § 290dd-2; 42 C.F.R. § 2.1, 2.2, 2.3.

4. *In re L.V.*, 482 N.W.2d 250 (Neb. 1992). See also, *State of West Virginia ex rel. Jeannette H. v. Honorable David M. Pancake*, 529 S.E. 2d 865 (W. Va. 2000).

5. Pub. L. No. 95-608, 92 Stat. 3069 (November 8, 1978).

6. The agency or other moving party must show that active efforts were made to reunite the Indian child with his family. This may be a higher standard of effort than is required in the state statute.

7. According to the BIA (Bureau of Indian Affairs) Guideline D.2, active efforts involve and use resources of extended family, the tribe, Indian Social Services and Indian caregivers. Efforts should take into account prevailing social, cultural conditions and way of life of the tribe.

## **SAMPLE AFFIDAVIT AND COURT ORDER**

### **SEEKING DISCLOSURE OF CONFIDENTIAL SUBSTANCE ABUSE TREATMENT RECORDS**

The following sample affidavit and court order were developed for use in New York to request disclosure of substance abuse records under federal and New York law. Modifications may be necessary to comply with local laws and practices in other jurisdictions. These forms are provided here because substance abuse records

are often necessary to determine the parent's compliance with treatment. The forms can also be used at any stage of the proceeding when it is necessary to determine the parent's compliance with treatment. These forms were developed in part by John Sylvester, Esq., Livingston County, NY.

**SAMPLE AFFIDAVIT IN SUPPORT OF A MOTION SEEKING DISCLOSURE OF SUBSTANCE ABUSE TREATMENT RECORDS**

FAMILY COURT OF \_\_\_\_\_ Docket No. \_\_\_\_\_

In the Matter of:  
                                Petitioner  
                                against

AFFIDAVIT IN SUPPORT OF  
A MOTION SEEKING  
DISCLOSURE OF SUBSTANCE  
ABUSE RECORDS

Respondent

STATE OF \_\_\_\_\_  
COUNTY OF \_\_\_\_\_

[Agency Attorney] being duly sworn, deposes and says:

1. That I am an attorney for the [child welfare agency name] and as such I am personally familiar with the matters hereinafter set forth in this affidavit.
2. I make this affidavit in support of an Application for an order pursuant to 42 C.F.R. Part 2 with regard to the disclosure of certain information from [substance abuse treatment program].
3. Upon information and belief, the Respondent, John Doe,\* has allegedly received treatment and counseling for alcoholism and/or substance abuse at [substance abuse treatment program].
4. That said program, upon information and belief, has in its possession records, evaluations, and other documentation essential to this neglect proceeding for the following reasons:

Petitioner respectfully submits that in this particular situation there is no other competent source for such information and the requested disclosure should be granted for the following reason: The child of John Doe\*, has been in the custody of the [child welfare agency] for \_\_\_\_ months. The agency has been working with John Doe\*, the Respondent throughout this time to help her address a number of issues identified at the time the child came into care which stood in the way of the child being returned to her mother's custody. First and foremost of the areas identified as requiring treatment is the issue of the Respondent's chronic and severe alcoholism/substance abuse. As alleged in the pleadings currently before the Court, the history of the Respondent in this case is one of treatment and relapse. It is the position of the Petitioner that the Respondent's continuing problems with alcohol/substance abuse continue to stand as an impediment to the child's return home. All records pertaining to the Respondent's treatment and relapse are in the possession of the service providers, including the [substance abuse treatment program.] Petitioner has no way of obtaining these records from any source other than the Respondent and/or the service provider. Without these records being made available to the Court on trial of this matter, Petitioner will not be able to prove a substantial portion of the allegations of the petition. Failure of the Petitioner to prove its case could potentially result in the child being returned to her Respondent which will put child at risk of neglect.

5. That the disclosure of alcoholism patient records is limited and controlled by federal law, 42 U.S.C. § 290dd-2, and the regulations promulgated thereunder, 42 C.F.R. Part 2.

6. New York State law is in conflict with some of the provisions of the aforementioned federal statute and its regulations. The consequence of this conflict is that federal statute and regulations prohibit disclosure in the present circumstances and subject the person making unauthorized disclosure to civil fines.

7. On the other hand, the inability of local Department of Social Services to have access to these records, documents, or information directly relating to alleged child abuse or maltreatment impedes its statutory duties pursuant to Section 424 of the Social Services Law (NY statute) with respect to investigation of reports of suspected child abuse or maltreatment. In addition, the inability to obtain disclosure gives rise to the potential or actual threat to the health and safety of the child suspected to be abused or maltreated.

8. In order to acquire appropriate disclosure in accordance with 42 U.S.C. § 290dd-2(b)(2)(C), this Court must show that good cause has been demonstrated for the disclosure. Furthermore, 42 C.F.R. Part 2, § 2.64(d)(2) requires that the Court weigh the need for the disclosure and the public interest against the possible injury to the Respondent, to the Respondent's patient-physician relationship and to the treatment program.

9. Federal law also requires that any order issued by this Court must specify the limitations of the disclosure. This Court should indicate those sections of the records which it deems are "essential" to fulfill the objective for which the order was granted. 42 C.F.R. Part 2, § 2.64(e)(1). Additionally, only those persons who need to know the information should be set forth in the order as the recipients of the disclosure.

10. In order to comply with 42 U.S.C. § 290dd-2, your deponent requests the production of the following records covering any treatment of the Respondent from the period of [Month, Year] to the present:

- a. records of diagnosis and recommended treatment;
- b. admission records;
- c. progress notes;
- d. discharge records, summaries and recommendations;
- e. records of respondent's failure or unsatisfactory performance or discharge from the program;

11. The Petitioner further requests that only the below listed individuals be provided with such disclosure and said individuals are not to redisclose said information without subsequent appropriate court order or the Respondent's consent.

- a. Counsel for [child welfare agency]
- b. The court and necessary employees of the court at the trial or appellate level;
- c. Counsel for the Respondent;
- d. Child's Representative.

12. For evidentiary purposes, and employee of [substance abuse treatment program] is requested to be present and be prepared to testify at the hearing to be scheduled by this Court for the above-captioned matter regarding the disclosure sought in the instant proceeding.

13. Pursuant to 42 C.F.R. § 2.64 (e)(3) your deponent also requests that the disclosed information be retained by this Court and maintained in a sealed record.

WHEREFORE, your deponent prays for an order by this Court demonstrating that good cause has been shown for the disclosure of certain objective data pertaining to the Respondent's treatment at [substance abuse treatment program] for the purpose of having said information before this Court at a hearing to be scheduled in the above-captioned matter; that the facts and circumstances necessitating disclosure of said information outweigh the possible adverse effects upon the successful treatment or rehabilitation of the Respondent, the physician-patient relationship and the treatment program; that this Court name the parties who are entitled to this information; that this Court

determine those parts of the Respondent's record which are essential in this proceeding; and that an appropriate employee of [substance abuse treatment program] be present and prepared to testify at said hearing.

\_\_\_\_\_  
[Agency Attorney]

Sworn to before me this \_\_\_\_ day of \_\_\_\_\_, 200\_.

\_\_\_\_\_  
Notary Public

\* Under federal law, "[a]n application must use a fictitious name, such as John Doe, to refer to any patient and may not contain or otherwise disclose any patient identifying information unless the patient is the applicant or has given a written consent (meeting the requirements of these regulations) to disclosure or the court has ordered the record of the proceeding sealed from public scrutiny." 42 C.F.R. § 2.64

**COURT ORDER, DISCLOSURE OF SUBSTANCE ABUSE RECORDS**

Family Court of \_\_\_\_\_

Docket No. \_\_\_\_\_

In the Matter of \_\_\_\_\_

**ORDER FOR DISCLOSURE  
OF SUBSTANCE ABUSE RECORDS**

Present: Hon. \_\_\_\_\_

Petitioner

[Family Court Judge]

against

Respondent

Before this Court is an application by [Agency] for an Order directing disclosure and testimony regarding confidential treatment records pertaining to the Respondent.

NOW, on the motion of [attorney's name] attorney for [Agency], and in accordance with federal law, 42 U.S.C. § 290dd-2 and Subpart E of 42 C.F.R. Part 2 this Court finds:

(a) That the record demonstrates good cause as required for the disclosure of certain objective data specified below pertaining to the Respondent for the purpose of having said information before this Court at a hearing to be scheduled in the above-captioned matter and

(b) The facts and circumstances necessitating disclosure of said information for use in said hearing outweighs the possible adverse effects upon the successful treatment, or rehabilitation of the Respondent, or the physician-patient relationship, or the treatment program; and

ORDERED that the [substance abuse treatment program] is hereby authorized pursuant to 42 C.F.R. § 2.61 - 2.64 to disclose to this Court and/or to the following named parties who have a need to know this information:

- a. \_\_\_\_\_
- b. \_\_\_\_\_, and it is further

ORDERED that disclosure shall be limited to those parts of the Respondent's record below listed which are deemed essential to fulfill the objective for which this order is granted pursuant to 42 C.F.R. Part 2, § 2.64 (e):

- a. \_\_\_\_\_
- b. \_\_\_\_\_
- c. \_\_\_\_\_, and it is further

ORDERED that the above-named individuals may not redisclose said information without appropriate court order or the Respondent's consent, and it is further

ORDERED that an appropriate employee of [substance abuse treatment program] be present and prepared to testify at the hearing to be scheduled of the above-captioned matter regarding the above-listed information, and it is further

ORDERED that to the extent the disclosed information is to be retained by this Court in accordance with 42 C.F.R. § 2.64(e)(3), it will be kept in a sealed record.

\_\_\_\_\_

Hon.

\_\_\_\_\_

Date

## ADOPTION CHECKLIST

### BACKGROUND

- What is the child's placement history?
- What are the child's wishes regarding adoption?
- Is the child's consent required?
- Are the current caregivers and/or relatives appropriate as adoptive parents, and if so, are they interested in adopting?
- If an adoptive resource has not been identified, what is the agency doing to recruit, identify, and process adoptive families?

### AGENCY'S EFFORTS TO IDENTIFY AND RECRUIT AN ADOPTIVE RESOURCE

- Has the agency placed the child with adoption listings and exchanges locally, regionally, and nationally?
- Has the agency made the child visible to other public and private adoption agencies, including special needs adoption agencies?
- Has interstate adoption been considered?
- Are there any special issues that would make the child hard to place?
- Has information been provided to prospective adoptive parents concerning available adoption subsidies and other benefits?
- If any families have started the approval process and been rejected, what are the reasons for the rejection?

### AGENCY'S EFFORTS TO APPROVE ADOPTIVE PARENTS

- Has an orientation been provided?
- Is the home study complete? If not, by when?
- Have criminal and child abuse backgrounds been checked?
- Has the agency collected the required documents from those individuals who have passed the preliminary hurdles?
- Has the agency shared all relevant information about the child with the adoptive family?
- What remains to be done, and what is the timeframe for accomplishing these tasks?

### POST-ADOPTION SERVICES

- What types of post-adoption services are being arranged?

### POST-ADOPTION CONTACT WITH BIOLOGICAL FAMILY MEMBERS

- Should an "open adoption," or other formal legal arrangement be pursued?
- Are there state laws on the issue?
- Would a visitation agreement affect the parent's or child's feelings about adoption?
- Is post-adoption contact with members of the child's birth family in the child's best interest?

*This chapter assumes the preferred permanency option, reunification, has been ruled out and the permanency plan is termination of parental rights with adoption.*

## REASONABLE EFFORTS TO FINALIZE A PERMANENCY PLAN FOR ADOPTION *by Jennifer Renne*

4

When a child cannot safely return home, adoption is the preferred legal permanency option under ASFA. Adoption gives the child a sense of belonging to a stable family and offers the child physical and emotional security that lasts a lifetime. Adoption is least likely to be challenged in the future and ends the state's oversight over the case.

Understanding the adoption process is critical to gain a meaningful understanding of what "reasonable efforts" really means. The purpose of the reasonable efforts inquiry is to (1) ensure the agency is working diligently to secure a child's adoption, and (2) ensure the adoption process is thorough to reduce the risk of disruption later.

ASFA places added pressure on agencies to finalize adoptions. As a result, more children are being placed into preadoptive homes after shorter stays in foster care. The agency has incentives to finalize adoptions. And there is often a "honeymoon period" between the adoptive family and the child, with all parties hoping the adoption succeeds. It is important for the stability and well-being of children and their families that the adoption process is not only timely, but also thorough to help ensure the adoption will last a lifetime as intended.

Asking the following questions will help determine whether the agency has made reasonable efforts.

### **Background Information**

#### **What is the child's placement history?**

Find out where the child is now placed. Ask how long the child has been there, and whether any disruptions in the continuity of care have occurred (e.g., placement in residential care, or elsewhere during the child's current placement). Having a full picture of the child's placement history is key to understanding the child's unique needs, preferences, and best interest.

#### **What are the child's wishes regarding adoption?**

The child's position on termination of parental

rights (TPR) and adoption is critical information. Some children favor being adopted while others may resist adoption. Many children have concerns, fears, and confusion about adoption that counseling can address. Depending on age and other circumstances, most children will benefit from counseling, regardless of their position on adoption. It may also be in the child's best interest to involve other family members, especially those who will continue to have contact with the child after the adoption is complete.

#### **Is the child's consent required?**

It is good practice to consider the child's position regardless of whether the child's consent to adoption is legally required. Some states' laws require the child's consent, depending on the child's age. When a child's consent is required, ask whether or not the child is consenting, and if not, what are the appropriate next steps? Sometimes a child needs time to develop a trusting relationship with prospective adoptive parents. Often a child will benefit from ongoing counseling. Be aware of the unique circumstances for each child, and ensure the agency is providing efforts to support the child's safety and permanence.

#### **Are current caregivers and/or relatives appropriate as adoptive parents? If so, are they interested in adopting?**

If the current caregivers are willing to adopt, ask what efforts have been made to have them approved (see below). If the current caregivers are not willing to adopt, consider whether their resistance to adoption is an informed and final decision. Sometimes caregivers initially express unwillingness or an inability to adopt. Although it would be unwise and inappropriate to pressure someone into becoming an adoptive parent, often the person's reasons and concerns can be addressed.

Perhaps the caregiver is a relative, which can present a unique set of issues. For example, the relative may not want to interfere with the child's relationship with a

biological parent, especially if the relative believes there is a chance the child may return home. Determine why the caregiver resists adoption, and whether the agency has attempted to address the underlying concerns. By discussing the issues, current caregivers can often work through their reluctance to adopt. Sometimes the current caregiver or a relative remains the preferred permanency option despite their unwillingness to adopt. This is discussed in Chapter 5 on guardianship and Chapter 6 on relative placement.

If, after counseling, and after being informed of all available benefits of adoption (discussed below), the caregivers or relatives are unwilling to adopt, then the agency must make efforts to locate an adoptive resource for the child.

### **Agency’s Efforts to Identify and Recruit an Adoptive Resource**

#### **If an adoptive resource has not been identified, what is the agency doing to recruit, identify, and process adoptive families?**

Under ASFA, when the permanency plan has been changed to adoption, the agency is required to identify, recruit, and process prospective adoptive homes.<sup>1</sup> The agency must document all its efforts in this regard. What should these efforts entail? The following sections offer guidance.

#### **Has the agency placed the child with adoption listings and exchanges locally, regionally, and nationally?**

Once the agency has determined the child’s current foster parents or relative caregiver will not adopt her or commit to permanency in any other form, the agency should develop a child-specific recruitment plan. This plan must include locating and contacting other relatives to determine their interest in adopting the child.

This plan may also include placing the child on adoption lists and exchanges locally, regionally, and nationally soon after the child becomes free for adoption.<sup>2</sup> The agency may also place newspaper and television ads about the child. These efforts also include matching programs, and other community outreach programs. Adoption exchanges and matching programs help agencies keep each other informed. These exchanges are designed to match the characteristics of children waiting for an adoptive family with families waiting for a child.

Many states have photolisting of foster children that include specific information about children awaiting adoption with their photographs. The Internet is another valuable tool to help recruit adoptive families and provide information to prospective families. Some agencies host “adoption parties” where prospective adoptive parents and children awaiting adoption meet at an informal gathering. It is important to always be sensitive to the child’s experience, and realize that some of these impersonal photolisting or “adoption parties” can embarrass and upset some children.

#### **Has the agency made the child visible to other public and private adoption agencies, including special needs adoption agencies?**

It can be challenging to find another public agency (or branch of the child welfare agency) that is willing to provide a family it has recruited, approved, and prepared. The other agency (e.g., a mental health agency) may be reluctant to give up a family it may need later. Also, the agency that actually places the child usually gets credit for the placement, and future staff allocations may be based on placement numbers. Private agencies, on the other hand, may be more willing to provide an appropriate family when a match is made, but the public agency may be unable or unwilling to pay the private agencies’ placement costs. Attorneys and GALs for children can be helpful in ensuring placements are in the best interests of the child. These options should be explored and pursued when feasible. Numerous regional, national, or international nonprofit organizations connect adoptive families with children waiting to be adopted.

#### **Has interstate adoption been considered?**

Out-of-state placements may be difficult to secure, but they should be pursued, particularly if the family is related to or has a significant tie to the child. Barriers related to interstate placements may result from requirements of the Interstate Compact on the Placement of Children (ICPC), and the management of Medicaid services.

The ICPC ensures the home study will comply with the laws of both states involved in the adoption, and the child will receive appropriate supervision. All states are members of this compact. Judges should find out if the agency needs an order to speed the home study process under the ICPC. (For more information on the ICPC, see Chapter 8.)

Some states have addressed interstate Medicaid coverage through the Interstate Compact on Adoption and Medical Assistance (ICAMA). This agreement ensures the interstate provision of medical services and adoption subsidies for special needs children who are placed across state lines.

### **Are there any special issues that would make the child hard to place?**

Finding adoptive homes for children in the child welfare system has always been a challenge. Some children are more difficult to place than others because of such factors as age, disability, ethnic background, membership in a sibling group, or special costs related to their care. The agency should identify any special issues and how they are being addressed.

Other issues to consider are those raised by the Multiethnic Placement Act (MEPA) and the Interethnic Adoption Provision Act of 1996 (IEPA). MEPA/IEPA were designed to ensure greater permanence for children. Many minority children wait in the foster care system because of policies discouraging minorities from becoming foster or adoptive parents, thus preventing minority children from being placed in permanent homes. MEPA/IEPA prohibit agencies from delaying or denying a child an adoptive placement based on the child's or the prospective parent's race, ethnicity, or national origin. MEPA/IEPA include provisions to help recruit and retain more foster and adoptive parents who reflect the racial and ethnic diversity of the children in the state who need foster and adoptive homes. If a placement has been delayed because the agency is looking for a "same race" placement, the judge should order the agency to conduct a broader search.

If the child is Native American, become familiar with the Indian Child Welfare Act (ICWA), and include, as appropriate, the tribe and the tribal court in decision making.

### **Has information been provided to prospective adoptive parents concerning available adoption subsidies and other benefits?**

If eligible, prospective adoptive parents—including current foster parents and relatives—should be informed about the availability of adoption subsidies. If the current caregivers are foster parents, they may be concerned about losing the agency's services and support after adoption. They may not be aware that adoption subsidies exist.<sup>3</sup> Caregivers need to be informed that the

adoption subsidy is an entitlement program. If the child is considered "special needs" and meets certain Title IV-E eligibility criteria, the child qualifies for an adoption subsidy, regardless of the income of the prospective adoptive family.

A child is considered "special needs" due to the difficulty of placing her in an adoptive home without the subsidy. She may be "special needs" by virtue of her race, disability, membership in a sibling group, or other specific factor or condition. Adoption subsidies not only make it easier to find an adoptive home for the child, but they also reduce the likelihood of disruption.

Adoption subsidies are negotiated, and can include:

- ◆ regular monthly payments made on a long-term basis;
- ◆ medical coverage, possibly including residential care;
- ◆ respite care;
- ◆ "special costs," such as wheelchair or accessibility ramp;
- ◆ costs for special services, such as speech and language instruction, physical therapy, tutoring;
- ◆ family or individual counseling;
- ◆ one-time legal and court costs for the adoption.

Prospective adoptive parents also need to be advised that these subsidy agreements can be renegotiated later with a change in circumstances. (For more information on adoption subsidies, see Chapter 9).

### **If any families have started the approval process and been rejected, what are the reasons for the rejection?**

Ask about the reasons for the rejection, and whether any concerns can be remedied. If the family's house doesn't meet licensing requirements due to square footage, this is less serious than if a household member has a prior criminal history. Both concerns can possibly be addressed. In some cases, the square footage requirement can be waived. Perhaps the household member with a criminal background can leave the home permanently. If the concerns cannot be remedied, and the family is the child's current caregiver, determine whether the child is safe in the home.

If the agency has no prospective candidates, ask why. Ask whether candidates have expressed interest, but have been rejected. Have candidates been excluded categorically? Perhaps the criteria being used to select adoptive parents for this particular child is too restrictive. Adoption workers handling recruitment, screening, and matching may need to be included in the

permanency hearing and subsequent reviews to provide information regarding search efforts. Child advocates can also seek families through informal networks of church, school, and community contacts.

## **Agency's Efforts to Approve Adoptive Parents**

### **Has an orientation been provided?**

Individuals or couples who contact an agency about adopting a child are usually invited to attend an orientation session to learn about the agency's procedures and available children. If they choose to apply, the agency screens the applications, and begins the home study process for those that are approved. Some states have a single licensing process for foster-adopt homes, so no new home study is necessary when a foster home is transitioning to an adoptive home.

### **Is the home study complete? If not, by when?**

The format for the home study is controlled by state law and agency policy. Therefore, the structure and content of the home study will vary by agency and jurisdiction. Generally, the home study will contain the following elements:

*Autobiographical statement.* The adoptive parents will write an autobiographical statement about their lives, which may include information about their family of origin, the nature of their relationship with their parents and siblings, educational background, and employment history. They will likely be asked to describe their activities and interests, their experiences with children, and their plans for the child's day care and other child-rearing issues (education, discipline, religious practice). If the adoptive parents are a couple, they will probably be asked about their relationship and how decisions are made.

*Health and income verification.* Agencies will require certification of the prospective adoptive parents' health. Conditions that can be controlled and do not significantly affect life expectancy will probably not preclude approval. In addition, agencies will ask prospective parents to verify income and other financial information that reflects financial stability.

*References.* The agency will probably ask for several references to help get a complete picture of the person or couple wishing to adopt.

*Interviews.* The agency will interview the prospective adoptive parent(s), usually in their home. The agency will delve more deeply into the information already collected and will assess the home environment for safety and efforts to accommodate the new child. If children are already in the home, they may be interviewed about several issues, including child-rearing experiences and their thoughts and feelings about having another sibling.

### **Have criminal and child abuse backgrounds been checked?**

Agencies conduct criminal record and child abuse record clearances for prospective adoptive parents. Some jurisdictions rely only on state records, while others must rely on national searches conducted by the FBI—a time-consuming, but more thorough process.

### **Has the agency collected the required documents from individuals who have passed the preliminary hurdles?**

These documents include birth certificates, marriage certificates, financial statements, medical reports, employer's letter, and reference letters.

### **Has the agency shared all relevant information about the child with the adoptive family?**

The process of sharing information about the child with the adoptive family should be continuous, and is critical to the long-term success of the adoption. Parents should have opportunities to ask questions to determine whether adoption is appropriate and whether a particular child or children are right for them.

To make informed decisions, adoptive parents must be provided detailed information about the child's history, including a complete social and medical history. Adoptive parents should be aware of factors in the child's past that may affect the child's health, behavior, and ability to attach. Failing to disclose critical information can result in serious emotional and financial consequences for the entire family, and may lead to a disrupted adoption. If the foster parent is transitioning to become an adoptive parent, the agency may need to pass on additional information to the foster parent. Usually the foster parent has not been privy to certain information regarding the child's background and family history due to confidentiality issues and laws.

Ask what relevant information still needs to be

considered and discussed. This inquiry can be streamlined if the agency has provided evidence that such information has been provided to the adoptive parents. The child's social and medical history may include the following information:

- ◆ if the child is in foster care, reasons for the initial placement;
- ◆ number of placements and lengths of stay;
- ◆ reasons for the child being moved from one placement to another, if applicable;
- ◆ any knowledge regarding the birth mother's pregnancy, prenatal care, and her general health;
- ◆ complete medical history of the child;
- ◆ any attachments the child may have formed;
- ◆ any attachments the child may have to biological relatives, including parents and siblings;
- ◆ adjustment problems the child may have experienced; and
- ◆ the child's educational record.

Sometimes the agency is unaware of medical or psychological impairments, and other potentially helpful information is unavailable. In this case, an independent, professional evaluation may be appropriate. The more the adoptive family knows and understands the child's history, the better prepared the family will be to handle issues that may arise and manage future problems.

## **Post-Adoption Services**

### **What types of post-adoption services are being arranged?**

Recognizing that adoption is a complex, lifelong process, agencies are providing comprehensive services, from the early stages of preparing the child and family for adoption and continuing after finalization. These services are particularly important for children who have experienced traumatic abuse or neglect and those with special physical and emotional needs.

Become familiar with available post-adoption services. These services include subsidies, counseling, peer support groups for older children, networking for adoptive parents, respite care, and training on special education issues, if indicated. Depending on the circumstances, the adoptive parents might incur significant additional expenses due to the child's medical or psychological condition. Be sure to ask what, if any, financial assistance is being provided to the

prospective adoptive parents.

In addition to the adoption subsidy, discussed above, the child may be eligible for other state and federal benefits such as Temporary Assistance to Needy Families (TANF), Social Security benefits, or Medicaid. Providing sufficient support services, both financial and nonfinancial, to adoptive families reduces the likelihood of adoption disruption later.

These services can be negotiated as part of the contract on the adoption subsidy. Many prospective adoptive parents don't realize they can negotiate these contracts, and instead feel that they need to accept whatever the agency offers. Adoptive parents should know they have a right to negotiate for post-adoption services and the agreement can be renegotiated and changed as the child gets older.

## **Post-Adoption Contact with Biological Family Members**

### **Should an open adoption or other formal legal arrangement be pursued?**

An open adoption is an adoption that contemplates continuing contact with the biological parent(s). It typically involves exchanging names, addresses, and phone numbers between the birth parent(s) and adoptive family. It may also involve visits between the birth parent(s) and the adopted child and ongoing communication between the two sets of parents about the child. If your state permits open adoptions, determine if such an arrangement would be in the child's best interest.

### **Are there state laws on the issue?**

Many states have laws addressing post-adoption contact between the child and certain biological family members. Some states have statutes regarding open adoption, which involves post-adoption contact between the child and her biological parent(s). Some states have laws specifically addressing sibling visitation and grandparent visitation.

Even if no state statute exists, biological and adoptive parents often have informal agreements that outline the nature of any continuing relationship between the biological parent and child. Allowing parties to express their expectations and concerns helps families enjoy a more stable transition and prevents tensions or conflicts that may lead to later problems or disruption.

### **Would a visitation agreement affect the parent’s or child’s feelings about adoption?**

Sometimes a parent who is reluctant to voluntarily relinquish parental rights or a child who is reluctant to agree to adoption will come around if post-adoption visitation rights and contact are arranged. Especially with older children, contact with biological parents can be important to the child and parent, and is often in the child’s best interest. These contacts, in many cases, may be infrequent. In some cases, a parent may be limited to getting periodic pictures or other information about the child. Discussing and possibly mediating this issue might lead to an agreement that satisfies all parties.

### **Is post-adoption contact with members of the child’s birth family in the child’s best interest?**

Ask whether ongoing contact with birth parents, siblings, and other relatives would be in the child’s best interest. Consider information beyond that provided by the agency social worker, parents, and child. Hear from mental health professionals who may be working with the child or family. Also consider information from the interested relative, or sibling, either directly or through counsel, to determine whether such contact is essential for the child’s well-being and adjustment.

#### Endnotes

1. 42 U.S.C. § 675(5)(E).
2. Through the *Standards for Adoption Exchanges*, the Adoption Exchange Association (AEA) recommends children be registered within 60 days of becoming legally free for adoption.
3. For more information on adoption subsidy, see Cole, Elizabeth S. “Advocating for Adoption Services.” In *Foster Children in the Courts*. Edited by Mark Hardin. Boston: Butterworth Legal Publishers, 1983, 472; Hollinger, Joan. *Adoption Law and Practice*. New York: Matthew Bender & Co., 2000.

## **SAMPLE COURT REPORT AND COURT ORDER FOR PERMANENCY HEARING: RECOMMENDATION FOR TERMINATION OF PARENTAL RIGHTS FOLLOWED BY ADOPTION**

*Prepared by Mark Hardin*

Use the following sample court report and court order forms for permanency hearings when the agency recommends and the court orders a petition for termination of parental rights to be followed by adoption. The agency should submit this court report form before

the permanency hearing when the agency has decided to seek termination but is not quite ready to file a termination petition. If the agency has already filed a termination petition, there may be no need for a separate permanency hearing.

## COURT REPORT, **PERMANENCY PLAN IS ADOPTION**

EREWHON DEPARTMENT OF CHILDREN'S SERVICES  
AARON COUNTY

Child: Johnny J. Jones, D.O.B. 11/11/99

The Department of Children's Services recommends that termination of parental rights proceedings be initiated for Johnny J. Jones no later than \_\_\_\_\_, 200\_\_. In support of this recommendation, the Department presents the following explanation:

1. It is not and will not be safe to return the child home because:

[Note: Briefly describe the Department's reasons for concluding the child cannot now or in the near future safely return home. Include such information as the Department's and other agencies' efforts to assist the family and the failure of the parent to benefit from treatment services or other information relevant to grounds for termination of parental rights.]

2. Placing the child for adoption is an appropriate and practical plan because:

[Note: Specifically explain why adoption is an appropriate plan for the child. Include such information as the age of the child, the nature of the child's relationship with parents, and the child's need for a new permanent and secure parent-child relationship. If appropriate, include observations about the likely impact of parent-child contacts after the child is placed in a new permanent home.

To explain why adoption is a practical plan, outline the Department's projected efforts to place the child for adoption and why it expects success. If the child is to be adopted by a foster parent or relative, state that the foster parent or relative is willing to adopt and describe the child's relationship with the foster parent or relative. In unusual cases where rights are to be terminated without a plan for adoption, explain why continuing parental rights is harmful, explain why adoption is not appropriate, and describe the permanent plan for the child.]

3. The following is the Department's timetable to petition for termination of parental rights and its plan for the child's adoption.

[Note: The plan should set forth specific tasks, times, and dates, to prepare for and initiate termination of parental rights proceedings.]

4. The following efforts were made, following the placement of the child into foster care, to finalize the child's permanency plan:

[Note: Briefly describe the problems causing continued separation of the child and parents, the services offered or arranged by the agency to address those problems, and the government's efforts to provide the services. Also describe the government's efforts, if any, to identify and finalize a new permanency plan for the child.]

5. If the child is placed in a home in a different state than the home of the child's parents, the placement continues to be appropriate and in the child's best interests for the following reasons:

[Note: If the child is placed in the same state as one or both of the child's parents, leave this space blank. Otherwise, explain why it is necessary to place the child in a different state. Federal law requires the court to make findings regarding the continuing necessity for out-of-state foster placements. 42 U.S.C. § 675(5)(C).]



**COURT ORDER, PERMANENCY PLAN IS ADOPTION**

IN THE DISTRICT COURT OF [COUNTY], [STATE]  
999TH JUDICIAL DISTRICT

IN THE INTEREST OF:  
JOHNNY J. JONES

CAUSE NO. 99CM0000

On the \_\_\_\_ day of \_\_\_\_\_, 200\_, a hearing was held in the 999th Judicial District Court, the Honorable \_\_\_\_\_ presiding.

**I. APPEARANCES**

Parties and others present included the following:

- |   |  |
|---|--|
| <input type="checkbox"/> Mother _____               | <input type="checkbox"/> Attorney for Mother _____ |
| <input type="checkbox"/> Father _____               | <input type="checkbox"/> Attorney for Father _____ |
| <input type="checkbox"/> Father _____               | <input type="checkbox"/> Attorney for Father _____ |
| <input type="checkbox"/> Child _____                | <input type="checkbox"/> Advocate for Child _____  |
| <input type="checkbox"/> Principal Caseworker _____ | <input type="checkbox"/> Other Caseworker _____    |
| <input type="checkbox"/> Casework Supervisor _____  | <input type="checkbox"/> Government Attorney _____ |
| <input type="checkbox"/> Foster Parent _____        | <input type="checkbox"/> Foster Parent _____       |
| <input type="checkbox"/> Relative _____             | <input type="checkbox"/> Relative _____            |

Others (list) \_\_\_\_\_

**II. FINDINGS AND ORDERS**

THE COURT FINDS:

1. It is not and will not be safe to return the child home because:

Note: The finding might describe why returning the child home is not and will not be possible or appropriate. The finding might specifically incorporate or modify the Department’s explanation.

2. Placing the child for adoption is an appropriate and practical plan because:

Note: The finding might incorporate or modify the Department’s explanation why adoption is an appropriate plan for the child and why and why adoption appears to be a practical goal if parental rights are terminated. Include such information as the age of the child, the nature of the child’s relationship with parents, and the child’s need for a new permanent and secure parent-child relationship. If appropriate, include observations about the likely impact of parent-child contacts after the child is placed in a new permanent home.

3. The following is the timetable of the Department of Children’s Services to petition for termination of parental rights and its plan for the child’s adoption.

Note: The plan should set forth specific tasks, times, and dates, to prepare for and initiate proceedings to terminate parental rights.

4. The following efforts were made, following the placement of the child into foster care, to finalize the child's permanency plan:

Note: The finding might incorporate or modify the Department's description of the state's efforts to reunify the family.

The efforts were \_\_\_ were not \_\_\_ reasonable because\_\_\_\_\_.

5. If the child is placed in a home in a different state than the home of the child's parents, the placement continues to be appropriate and in the child's best interests for the following reasons:

Note: If the child is placed in the same state as one or both of the child's parents, leave this space blank. Otherwise, explain why it is necessary to place the child in a different state. The finding might incorporate or modify the Department's explanation. Federal law requires the court to make findings regarding the continuing necessity for out-of-state foster placements. 42 U.S.C. §675(5)(C).

6. If the child is 16 or older, the child needs the following services to assist the child make the transition from foster care to independent living:

Note: If the child is less than 16, leave this space blank. If the child is 16 or older, list and explain the services the child needs to make the transition from foster care to independent living. The finding might incorporate or modify the Department's statement about such services. Federal law requires the court to make findings concerning the services needed to prepare the child for independent living. 42 U.S.C. §675(5)(C).

THE COURT HEREBY ORDERS:

1. The Department of Children's Services shall file a petition to terminate parental rights by \_\_\_\_\_, 200\_\_.

Note: When the goal is adoption, federal law authorizes the judge to direct the state to file a petition for termination of parental rights. 42 U.S.C. §675(5)(C).

2. The child shall remain in the [custody] of the Department.

OR

[Custody] of the child shall be transferred to \_\_\_\_\_.

3. The next hearing in this case shall be a [preliminary hearing concerning termination of parental rights] and shall take place at \_\_\_\_ [a.m.] [p.m.] on \_\_\_\_\_, 200\_\_, Courtroom \_\_\_\_\_.

Note: Where the proceeding to terminate parental rights will be initiated in a different court, this paragraph would schedule a review hearing to take place perhaps soon after the petition to terminate parental rights is supposed to be filed. This paragraph would specify that the review hearing will be taken off the calendar when this court receives written notice that a termination petition has been filed.

4. The court further orders that:

Note: This allows the court to provide additional instructions or orders. If none, leave this space blank.

SIGNED this \_\_\_\_\_ day of \_\_\_\_\_, 200\_\_.

\_\_\_\_\_  
[Insert Name]

Judge

## **LEGAL GUARDIANSHIP CHECKLIST**

**WHAT ARE THE CHILD'S UNIQUE NEEDS, PREFERENCES, AND BEST INTERESTS?**

**ARE THERE CONVINCING REASONS WHY THE CHILD CANNOT OR SHOULD NOT BE ADOPTED?**

**IS THIS THE BEST PERMANENT GUARDIAN FOR THE CHILD, AND IS THE GUARDIAN COMMITTED TO STAYING INVOLVED WITH THE CHILD THROUGH THE CHILD'S LIFE?**

**HAS THE AGENCY SHARED ALL RELEVANT INFORMATION ABOUT THE CHILD WITH THE PROSPECTIVE GUARDIANS?**

**HAS THE AGENCY CONDUCTED THE NECESSARY BACKGROUND CHECK?**

**DOES THE CAREGIVER NEED LEGAL HELP?**

**DOES THE GUARDIAN NEED FINANCIAL ASSISTANCE TO PAY COURT FEES?**

**IF THE GUARDIAN WILL NEED FINANCIAL HELP TO CARE FOR THE CHILD, HAS THE AGENCY MADE SUCH ASSISTANCE AVAILABLE?**

**HAS THE AGENCY MADE SURE THE PROSPECTIVE GUARDIANS FULLY UNDERSTAND THEIR RIGHTS AND RESPONSIBILITIES?**

**DO THE CAREGIVERS HAVE ANY QUESTIONS ABOUT THE LEGAL GUARDIANSHIP?**

**WILL THERE BE ONGOING CONTACT WITH THE CHILD'S PARENTS, SIBLINGS, OR OTHER FAMILY MEMBERS?**

**WILL THE AGENCY BE MONITORING THE FAMILY, OR PROVIDING ANY SERVICES IN THE FUTURE?**

*This chapter assumes reunification and adoption have been ruled out, and the permanency option under consideration is legal guardianship.*

## REASONABLE EFFORTS TO FINALIZE A PERMANENCY PLAN FOR LEGAL GUARDIANSHIP *by Jennifer Renne*

5

Legal guardianship is a more preferred, permanent option than relative placement. It is more permanent than foster care, and gives the guardian full control over caring for the child without child welfare agency involvement. Legal guardianship also legally recognizes many informal arrangements where relatives care for children. This permanency option may be appealing for children in kinship foster care because it allows relative caregivers to provide permanency and stability without ongoing state oversight.

If reunification and adoption have been ruled out, the agency should be pursuing a plan of legal guardianship, if feasible. Because legal guardianship is underused, agencies may not be familiar with the process. It is important to pursue this avenue when the prospective caregiver is a relative of the child, a long-term care provider, or both. Preserving the placement is often essential for the child. Reducing the risk of disruption and multiple placements is critical to the well-being of children. Often children placed in legal guardianships maintain ties to siblings, extended family members, and even parents. These relationships provide psychological benefits to the child.<sup>1</sup>

Understanding the nature of legal guardianships will help you assess whether the agency has provided reasonable efforts to finalize a permanency plan of legal guardianship. This chapter provides basic information about legal guardianships and outlines questions you should ask to help ensure the agency is working to create the strongest legal relationship possible between the child and guardian.

### Background

#### What is legal guardianship?

A legal guardianship is a formal legal arrangement which transfers custody of a minor child from the natural parent to a relative or other caregiver. The guardian stands in the place of the parent. ASFA defines legal guardianship as “a judicially-created relationship between child and guardian which is intended to be permanent and self-sustaining as evi-

denced by the transfer to the guardian of certain parental rights with respect to the child.”<sup>2</sup> These parental rights include: (1) protection; (2) education; (3) care and control of the person; (4) custody of the person; and (5) decision making.<sup>3</sup>

Two key features of a legal guardianship are that it is permanent and self-sustaining. The legal relationship between the guardian and child does not end and may outlive the jurisdiction of the court. However, unlike an adoption, where a parent’s right to custody is completely and permanently terminated, legal guardianship suspends the parent’s custodial rights, but allows the parent to continue to play a role in the child’s life. While guardians often have a blood relationship with the child, ASFA explicitly states that a guardian need not be a relative.

Legal guardianship is intended to establish a permanent relationship between the guardian and child. Some states, call this arrangement “custody.” The term “legal guardianship” is used in different ways, and sometimes doesn’t encompass the array of legal rights intended by ASFA. Because legal guardianship does not terminate parental rights, a legal relationship between child and biological parent continues. The implications of this are discussed throughout the article.

#### How is a legal guardianship established?

Most jurisdictions handle legal guardianships through probate court. Often, the individual(s) seeking legal guardianship initiates the pleadings. The petition for legal guardianship, stating the reasons for the motion, is served on the parents, and in some jurisdictions, the child.<sup>4</sup> Many states allow a child of a specific age, such as 12 or 14, to petition the court for legal guardianship; this can be useful because the child’s attorney in the dependency case generally may file the pleadings in probate court on the child’s behalf.

The Department of Social Services will sometimes do a background check, including a criminal records check and a home study. If the matter is not contested, the probate judge may grant the order absent a hearing.

## Pros and Cons of Guardianships

In the hierarchical scheme of permanency options outlined by ASFA, legal guardianship is less desirable than reunification or adoption, but more preferred than permanent relative placement, or another planned permanent living arrangement. Some advantages and disadvantages are:

### Pros:

- ◆ Legal guardianship is sometimes better for relative caregivers when termination of parental rights is inconsistent with cultural or family traditions.
- ◆ The child may not want parental rights to be terminated; legal guardianship provides permanence while maintaining ties to biological family.
- ◆ It is also sometimes easier to find a relative to care for sibling groups, special needs children, or older children who may be difficult to place.\*
- ◆ There is no ongoing state supervision.

### Cons:

- ◆ Because the guardian is not the child's legal parent, the guardian's ability to make permanent, binding decisions on behalf of the child is limited.
- ◆ Lack of permanency may cause some concern to the child.
- ◆ The biological parents' rights are not necessarily terminated, therefore the parent can come back to court to attempt to undo the arrangement unless specifically disallowed in state law.
- ◆ Legal guardianships are inherently less stable and less permanent than adoption.

\* See Susan L. Brooks. "The Case For Adoption Alternatives." *Family and Conciliation Courts Review*, January 2001.

If the case is contested by a parent, another relative, or social services, then a hearing may be scheduled. The probate judge will issue a decision based upon the best interest of the child. In some states, if a parent objects to a legal guardianship, then the court cannot order it.

In a few states, the dependency court can order a full probate guardianship in the dependency case. In other states, the legal guardianship case is separate, but can be formally consolidated with the dependency case. In other states, the legal guardianship petition is a separate action, filed in a separate court. If there is no formal link between the two cases, make sure the legal guardianship petition alleges the facts in the dependency case, or ensure the probate judge takes judicial notice of the dependency case. If a parent or other individual challenges the legal guardianship in the future, the underlying basis of the dependency action will be known to the parties and the court hearing the legal guardianship case.

### How permanent is legal guardianship, and what can you do to reduce the risk of disruption?

A legal guardianship order remains effective until a court terminates it, or until the child is either adopted, turns 18, or is married. As discussed earlier, legal guardianship is more permanent than foster care, but less legally secure than adoption. Based on a change in circumstances, the legal guardian, the child, or the parent can ask the court to terminate the legal guardianship. In some states, any interested party may petition the court to have the guardian removed. Usually this requires a showing of good cause. For example, a guardian may be experiencing health problems that make ongoing care of the child difficult. Or, the biological parent may have successfully completed drug treatment or a jail sentence and is now able to provide a safe home for the child. The court will hear evidence, and decide whether continuing legal guardianship is in the child's best interest.

Be sure you know your state law regarding how legal guardianships are terminated; how this is achieved varies widely. If you are in a jurisdiction with a strong presumption and preference for biological parents, courts will return custody to a parent unless the parent is found "unfit." This is particularly true when the legal guardianship was established with the parent's consent. In other states, if a parent seeks to terminate the legal guardianship, the judge will focus on what is in the best interest of the child, without necessarily giving prefer-

ence to the parent. You should know the legal process for modifying or changing the legal guardianship. To what degree is it “permanent” and “self-sustaining?” Does it transfer to the guardian all the parental rights enumerated in the definition? Does it include visitation orders with regarding parents or others?<sup>5</sup>

### **Assessing Reasonable Efforts**

Because legal guardianships are often brought by the prospective guardian, not the agency, assessing whether the agency has provided reasonable efforts to finalize the legal guardianship can be tricky. Caseworkers should investigate individuals who may be interested in and eligible to seek legal guardianship. They should be aware of the financial and legal aspects of a legal guardianship, and anticipate barriers. Caseworkers should help the child and parent understand what legal guardianship means for the family, and advise them about post-guardianship contact between the biological family and child. When the legal guardianship is handled in probate court, the judge’s role may broaden to include directly informing the guardian of certain issues, such as their legal rights and responsibilities, access to potential services and financial benefits, and what they need to do to request court review in the future.

### **What are the child’s unique needs, preferences, and best interests?**

Review the case record, or ask the agency to provide basic background information including the child’s placement history, current placement situation, family dynamics, status of parents, and so forth. Usually when legal guardianship is the permanency plan, the child has lived with the guardian a long time. Ask how long the child has lived with the guardian, and whether any disruptions in continuity of care have occurred. Find out how the child feels about the guardian, and about contact with the parent and other relatives, including siblings. Having a full picture of the child’s placement history will help you assess the child’s best interests.

### **Are there convincing reasons why the child cannot or should not be adopted?**

Ask why legal guardianship, not adoption, is being pursued. If the agency has denied the guardian’s request for adoption, find out the agency’s concerns, and determine whether this is an appropriate placement for the child. If the guardian is unwilling to adopt, find out why, and whether the agency attempted to address any

concerns about adoption. For example, has the agency informed prospective guardians about possible adoption subsidies, including financial support, medical coverage, and respite care. Would this information make a difference in their decision? Sometimes a relative is uncomfortable becoming a legal parent for a grandchild or niece or nephew. Also, in some cultures, such as Native American tribal communities, termination of parental rights conflicts with cultural norms or beliefs.<sup>6</sup> Another reason legal guardianship may be preferred over adoption is that some children may oppose termination of parental rights. Older children, in particular, often want a continued relationship with a parent. Therefore, terminating their parents’ rights is often painful.

### **Is this the best permanent guardian for the child, and is the guardian committed to staying involved with the child through the child’s life?**

Ask if the agency has explored more permanent placement options for the child. For example, are other relatives willing to adopt? Although the guardian’s legal obligation ends when the child reaches majority, legal guardianship is still in many ways a lifelong commitment. Has the agency taken steps to ensure the potential guardian is committed to serving as guardian throughout the child’s minority, and throughout the child’s life? If concerns exist about the guardian’s long-term commitment to the child, this may not be the best placement. Such concerns may well need to be viewed in light of the impact of change of placement for the child.

### **Has the agency shared all relevant information about the child with the prospective guardians?**

Has the agency shared all information it possesses about the child? The agency should share information about the child’s mental or physical health, past behavior, or life events with the guardians. Failing to disclose critical information can result in emotional and financial consequences for the entire family, and may even lead to a disrupted placement. Even if the guardian has known the child a long time, the agency still has a responsibility to share information the guardian may lack. This includes information about resources to assist the guardian and child cope with problems that may arise later.

## Establishing a Guardianship

Generally, two avenues exist to establish a legal guardianship:

### (1) Juvenile court

- ◆ Juvenile court assumes custody over abused or neglected child.
- ◆ In some jurisdictions, juvenile court judge can appoint a guardian and establish a guardianship.
- ◆ In other jurisdictions, juvenile court judge establishes the court's jurisdiction over the child and then transfers the case to probate court where a probate guardianship is established.

### (2) Probate court

- ◆ Juvenile court assumes jurisdiction over the child and enters a motion to authorize guardianship proceedings.
- ◆ Prospective guardian initiates guardianship proceedings in probate court.
- ◆ Juvenile court order is filed in probate court transferring custody of the child from the juvenile court to the guardian upon approval of the guardianship by the probate court.
- ◆ Must be notice of the proceeding provided to parents, agency, and other parties.
- ◆ Probate court reviews the guardianship. If the guardianship is approved, the juvenile court's jurisdiction ends and the guardianship takes effect, transferring custody of the child to the guardian.
- ◆ Certified copy of the probate court's decision is entered in the juvenile court record.

## Terminating a Guardianship

States have a variety of avenues to end legal guardianships. Typically, the basis for terminating a guardianship is linked to the standard used for establishing it in the first place. For example, if a grandparent gets guardianship based upon the parent's absence, the parent can move to end the guardianship upon her return. There are three typical avenues for terminating guardianships:

### (1) By the agency

- ◆ Must be a judicial proceeding to remove child from the guardian.
- ◆ Agency may intervene if child is found to be "in danger" (i.e., abused/neglected).
- ◆ Upon such a finding, agency must initiate proceedings in juvenile court to reestablish the juvenile court's jurisdiction over the child and allow the agency to assume custody.

### (2) By biological parents

- ◆ Parent must initiate a new proceeding to regain custody over the child.
- ◆ Specific statutes govern the parent's right to end a guardianship. Standards range from strong preference to return child to his/her natural parents to determining placement based on the best interests of the child, without regard for the child's natural parents. In states where there is a threshold finding of parental "unfitness," there is a presumption that continued guardianship is in child's best interest.

### (3) By the guardian

- ◆ Guardian may resign with court approval. -To end the guardianship, the guardian must file a motion with the court requesting termination. If the guardian is in a state in which the court regularly reviews the guardianship, the guardian may request the termination at the review, instead of filing a motion.

### **Has the agency conducted the necessary background check?**

Requirements for gathering background information about prospective guardians vary across states. If a formal home study is required, ask whether one has been completed. Even if the agency knows the caregiver, regulations often require a criminal records check, or other safety requirements.

### **Does the caregiver need legal help?**

Since the caregiver seeking legal guardianship is usually proceeding pro se, the agency should have made reasonable efforts to educate and support the guardian in finalizing this process. This includes asking guardians whether they need help preparing and filing the legal guardianship petition. Referrals to pro bono attorneys, legal services organizations, the local bar association, or other low-cost or free legal assistance providers may be appropriate. Sometimes judges have discretion to appoint a lawyer if it will help protect the child.

### **Does the guardian need financial assistance to pay court fees?**

Often the prospective guardian can apply to waive court fees and costs. Guardians receiving financial assistance under some programs, such as Temporary Assistance to Needy Families (TANF), food stamps, or Social Security, may be eligible for a waiver of the filing fees.

### **If the guardian will need financial help to care for the child, has the agency made such assistance available?**

ASFA does not provide funding for legal guardianships. The U.S. Department of Health and Human Services has no legal authority to authorize Title IV-E funding to subsidize legal guardianships. However, some states *do* subsidize legal guardianships, either through state funds, or demonstration waiver projects which allow Title IV-E funds to be used for subsidized legal guardianships. The lack of subsidy for most legal guardianships is a sticking point; without the subsidy, many kinship care providers prefer to be licensed as foster parents so they receive financial support to help care for the child. Foster care is a lesser preferred permanency option, so the agency should explore avenues of financial support for the guardians.

The guardians are eligible to apply for benefits, such

as Temporary Assistance to Needy Families (TANF), medical insurance, food stamps or Social Security, on behalf of the child. Another source of financial support for the child may be the parent. It is unusual, but not unprecedented, for the court to order the parent to pay child support to the guardian.<sup>7</sup>

### **Has the agency made sure the prospective guardians fully understand their rights and responsibilities?**

Do the guardians understand they are responsible for the care, custody, and control of the child? This includes the right to make educational and medical decisions, and the responsibility to support the child financially. No one, including the parents, can legally take the child without the guardian's permission. The guardians have the right to receive public benefits on behalf of the child (see discussion above). In some states, if the child comes into funds through inheritance, death benefits, SSI benefits, a legal award, or other circumstances, the guardians can seek legal guardianship of the child's property. Sometimes the "legal guardianship of a person" and the "guardianship of property" are handled separately, so the guardian should know what she needs to do should this become necessary. The guardian should also be informed that she could be responsible to others for the "bad acts" of the child.

### **Do the caregivers have any questions about the legal guardianship?**

Efforts should be made to address any questions or concerns the guardians have about guardianship. Because the probate judge often issues a legal guardianship without a hearing, and the guardians are often unrepresented, the guardians may not have an opportunity to resolve their questions. For instance, the guardians should know the parent does not have the right to remove the child without court permission. The parent must go to the court that approved the legal guardianship and ask that the legal guardianship order be terminated. The probate judge will consider evidence regarding the parent's ability to provide a good home for the child, and will decide the issue based on the child's best interests and wishes.<sup>8</sup> The agency plays an important role identifying and responding to such issues and concerns.

### **Will there be ongoing contact with the child’s parents, siblings, or other family members?**

The guardian is responsible for determining whether and under what circumstances the child will have contact with the parent. Usually, after the legal guardianship is issued, there is little or no oversight from either the court or social services. On one hand, this allows the child to thrive in an environment free from the constant reminder that the court and social services play a significant role in the child’s life. On the other hand, full responsibility and decision-making authority can be a lot for a guardian to handle. Before finalizing the legal guardianship, ask the guardians what issues they anticipate facing regarding contact with the child’s parents. If state law permits, the judge may issue an order outlining visitation parameters, including requiring supervised visits.

Resources exist for guardians and social services can provide referrals or other support in these matters. Guardians should be aware that if circumstances change, they can petition the court to modify the existing visitation order, and that if a parent is abusive

or threatening, they have other legal avenues to pursue (i.e., filing for a restraining order against the parent).

### **Will the agency be monitoring the family, or providing any services in the future?**

Usually when a legal guardianship is executed, the dependency case is terminated and the agency’s formal role in the case ends. Sometimes, however, a family will need ongoing agency support, or the agency may have a concern about the placement, warranting ongoing supervision. While post-adoption services are routinely offered for adoptions, they are typically lacking for other permanent arrangements such as legal guardianship.<sup>9</sup> Post-guardianship services may be needed for respite care, day care, and mental health services for children. Many children placed in legal guardianships have special needs that are not being addressed.<sup>10</sup> The agency should ask what services the child needs, and should refer guardians appropriately. Guardians should also be aware that they can call social services in the future and get voluntary services without the case returning to court.

### **Endnotes**

1. O’Laughlin, Megan M. “A Theory of Relativity: Kinship Foster Care May Be the Key to Stopping the Pendulum of Terminations vs. Reunification.” *Vanderbilt Law Review*, October 1998, 1451.
2. 42 U.S.C. § 675(7).
3. Note that the ASFA definition does not distinguish between physical and legal custody of the child.
4. This type of legal guardianship should not be confused with legal guardianship which is awarded to the agency after parental rights have been terminated.
5. Wallace, Gerald. “Grandparents Parenting Grandchildren: A New Family Paradigm.” *Children’s Law Institute*. New York City: Practising Law Institute, August 2000.
6. *Guardianship: Another Place Called Home*. Houston, TX: Cornerstone Consulting Group, 2001, 3.
7. Uniform Guardianship and Protective Proceedings Act (1997). Amendment to the Uniform Probate Code, Article V, Parts 1-4. (This Act applies in jurisdictions that have adopted the Uniform Probate Code. Several jurisdictions that have not adopted the Uniform Probate Code have substantially adopted this act, however. Practitioners should consult their state’s version of the act).
8. *Ibid*.
9. *Guardianship: Another Place Called Home*, 2001, 18.
10. *Ibid.*, 10.

**SAMPLE COURT REPORT AND COURT ORDER FOR PERMANENCY HEARING:  
LEGAL GUARDIANSHIP (PROBATE GUARDIANSHIP OR CUSTODY TO INDIVIDUAL(S) WITHOUT  
TERMINATION OF PARENTAL RIGHTS)** *Prepared by Mark Hardin*

Use the following sample court report and court order forms for permanency hearings when the agency recommends and the court orders legal guardianship.

## COURT REPORT, **PERMANENCY PLAN IS LEGAL GUARDIANSHIP**

EREWHON DEPARTMENT OF CHILDREN'S  
SERVICES, AARON COUNTY

Child: Johnny J. Jones, D.O.B. 11/11/99

The Department of Children's Services recommends that proceedings be initiated to make \_\_\_\_\_ the [permanent custodians] [permanent guardians] of Johnny J. Jones by \_\_\_\_\_, 200\_\_. In support of this recommendation, the Department presents the following explanation:

1. It is not and will not be safe to return the child home because:

[Note: Briefly describe the Department's reasons for concluding that the child cannot now or in the near future safely return home. Include available information about such things as the Department's and other agencies' efforts to assist the family and the failure of the parent to benefit from treatment services or other information relevant to grounds for the termination of parental rights.]

2. Termination of parental rights or adoption is not an appropriate and practical plan because:

[Note: Specifically explain why adoption is not an appropriate plan for the child. For example, this might be the case because the prospective guardians or custodians have very close parent-child ties with the child but are related to the parents and, even after counseling, are unwilling to adopt the child. It may be that an older child strongly objects to termination of parental rights or adoption, even after efforts to provide counseling.]

3. The identified individual or couple are appropriate permanent caregivers of the child because:

[Note: To explain why the individual or couple are appropriate caretakers of the child, the report might include information about the nature and duration of their relationship (e.g., kinship or length of time the child has been in their home). The report might also include background summaries concerning the caregivers and a recitation of any background checks, home visits, etc. The report should also explain that the caregivers' commitment to care for the child on a permanent basis.]

4. The following is the Department's plan to ensure the stability and safety of the placement.

[Note: If the same court is not empowered under state law to order permanent custody or guardianship, the plan should set forth specific tasks, times, and dates, to prepare for and initiate proceedings in another court.

The plan also should set forth whether the parents pose a possible threat to the child or to the stability of the placement and, if so, what steps the agency has taken to ensure the caregivers can protect the child from the parents. For example, if the guardian or custodian is a relative of the child, the report should explain why the agency believes the relative will keep the child safe from the parent and what help is available to the guardian or custodian if problems arise. It should also address whether it is likely that the parent(s) will seek to regain custody later and, if so, how that will be handled.]

5. The following efforts were made, following the placement of the child into foster care, to finalize the child's permanency plan:



**COURT ORDER, PERMANENCY PLAN IS GUARDIANSHIP**

IN THE DISTRICT COURT OF [COUNTY], [STATE]  
999TH JUDICIAL DISTRICT

IN THE INTEREST OF:  
JOHNNY J. JONES

CAUSE NO. 99CM0000

On the \_\_\_\_ day of \_\_\_\_\_, 200\_, a hearing was held in the 999th Judicial District Court, the Honorable \_\_\_\_\_ presiding.

**I. APPEARANCES**

Parties and others present included the following:

- |   |  |
|---|--|
| <input type="checkbox"/> Mother _____               | <input type="checkbox"/> Attorney for Mother _____ |
| <input type="checkbox"/> Father _____               | <input type="checkbox"/> Attorney for Father _____ |
| <input type="checkbox"/> Father _____               | <input type="checkbox"/> Attorney for Father _____ |
| <input type="checkbox"/> Child _____                | <input type="checkbox"/> Advocate for Child _____  |
| <input type="checkbox"/> Principal Caseworker _____ | <input type="checkbox"/> Other Caseworker _____    |
| <input type="checkbox"/> Casework Supervisor _____  | <input type="checkbox"/> Government Attorney _____ |
| <input type="checkbox"/> Foster Parent _____        | <input type="checkbox"/> Foster Parent _____       |
| <input type="checkbox"/> Relative _____             | <input type="checkbox"/> Relative _____            |

Others  
(list) \_\_\_\_\_

**II. FINDINGS AND ORDERS**

THE COURT FINDS:

1. It is not and will not be safe to return the child home because:

[Note: The finding might describe why returning the child home is not and will not be possible or appropriate. The finding might specifically incorporate or modify the Department's explanation.]

2. Termination of parental rights is not an appropriate and practical plan because:

[Note: The finding might incorporate or modify the Department's explanation why termination of parental rights is not an appropriate or practical plan for the child. If appropriate, include observations about the desirability of parent-child contacts after the child is placed in a new permanent home.]

3. The identified individual or couple are appropriate permanent caregivers of the child because:

[Note: The finding might incorporate or modify the Department's explanation of why the individual or couple is an appropriate caregiver of the child.]

4. The following is the timetable of the Department of Children's Services to petition for [insert local term for legal guardianship] and plan to ensure the safety for the child's adoption.

[Note: If additional proceedings are needed to transfer permanent guardianship or custody (e.g., action by another court), the order should set a specific deadline to do so. In addition, it might include specific findings to assist the other court before which the guardianship or custody proceeding will be brought. These might include, for example, findings that because of the past abuse or neglect of the child, a new permanent placement is required and that there should be no plan for the child's eventual return home.]

5. The following shall be the Department of Children's Services' plan to ensure the stability and safety of the child's placement with the [insert local term for legal guardians]:

[Note: The findings might incorporate or modify the Department's plan and its supporting explanation of the plan. For example, this might include findings concerning visitation and support arrangements.]

6. The following efforts were made, following the placement of the child into foster care, to finalize the child's permanency plan:

[Note: The finding might incorporate or modify the Department's description of the state's efforts to reunify the family.]

7. The efforts were \_\_\_\_\_were not \_\_\_\_\_reasonable because \_\_\_\_\_.

8. If the child is placed in a home in a different state than the home of the child's parents, the placement continues to be appropriate and in the child's best interests for the following reasons:

[Note: If the child is placed in the same state as one or both of the child's parents, leave this space blank. Otherwise, explain why it is necessary to place the child in a different state. The finding might incorporate or modify the Department's explanation. Federal law requires the court to make findings regarding the continuing necessity for out-of-state foster placements. 42 U.S.C. §675(5)(C).]

9. If the child is 16 or older, the child needs the following services to make the transition from foster care to independent living:

[Note: If the child is less than 16, leave this space blank. If the child is 16 or older, list and explain the services the child needs to transition from foster care to independent living. The finding might incorporate or modify the Department's statement about such services. Federal law requires the court to make findings concerning the services needed to prepare the child for independent living. 42 U.S.C. §675(5)(C).]

**THE COURT HEREBY ORDERS:**

1. The Department of Children's Services shall file a petition to establish establish [insert local term for legal guardianship] by \_\_\_\_\_, 200\_\_.

[Note: If another court is involved, this order might also specify that a certified copy of this order be prepared and attached to the petition for permanent custody or guardianship. Of course, this order is not required if the court hearing the permanency hearing can order permanent custody or guardianship at the permanency hearing.]

2. Custody of the child shall remain with the Department.

3. The next hearing in this case shall be to establish [insert local term for legal guardianship] and shall take place at \_\_\_\_\_[a.m.] [p.m.] on \_\_\_\_\_, 200\_\_, Courtroom \_\_\_\_\_.

[Note: This order is not needed if the court can order permanent custody or guardianship at the permanency hearing. When the proceeding for permanent custody or permanent guardianship will be heard in another court, this paragraph would schedule a review hearing to take place perhaps soon after the petition for permanent

guardianship or custody is supposed to be filed. This paragraph would specify that the review hearing will be taken off the calendar when the court receives written notice that the petition has been filed.]

4. The court further orders that:

[Note: This allows the court to provide additional instructions or orders. If none, leave this space blank.]

SIGNED this \_\_\_\_ day of \_\_\_\_\_, 200\_.

---

[Insert Name]

Judge



## RELATIVE PLACEMENT CHECKLIST

### WHAT WILL THE LEGAL STATUS OF THE PLACEMENT BE?

- Will the child remain in foster care?
- What custody arrangement provides the appropriate level of supervision?
- Should the relative adopt or do a guardianship?

### IS THIS THE RIGHT PLAN?

- Does the child have a bond with this family?
- Are nonrelatives willing to adopt or accept guardianship?
- Will this placement help preserve family identity?
- Will this placement help preserve a sibling bond?
- What is the child's position?

### IS THIS THE RIGHT FAMILY?

- Does the agency have a complete picture of the family's situation?
- Do family dynamics compromise the relative's ability to safeguard the child?
- Has the agency observed the interaction between the child and relative?
- Have relatives received counseling when appropriate?
- What is the relative's commitment to the child?
- Is the placement stable and long-term?
- Has the agency collected and reported to the court sufficient information about the relative's home?

### HAS THE AGENCY COMPLIED WITH THE ICPC WHEN THE RELATIVE LIVES OUT OF STATE?

### HAVE NECESSARY SERVICES BEEN PROVIDED?

This chapter assumes reunification has been ruled out and the permanency option under consideration is relative placement.

## REASONABLE EFFORTS TO FINALIZE A PERMANENCY PLAN FOR RELATIVE PLACEMENT *by Cecilia Fiermonte*

6

Relative placements have advantages for children. They preserve family bonds, reduce the trauma of removal, and preserve the child's cultural identity and heritage. But there are also drawbacks. Sometimes the relative can't care for the child long-term, but feels pressured to take the child anyway. Or, the relative may be unable to shield the child from a neglectful or abusive parent.

ASFA reflects the widely held belief that relative placements are positive for children. ASFA specifically lists placement with a "fit and willing" relative as one of the permanency options.<sup>1</sup> ASFA does not define the terms "relative" or "fit and willing," or create a separate legal authority for relative placements.<sup>2</sup> ASFA also provides that relative placement is an exception to the requirement to file a termination of parental rights action when the child has been in foster care for 15 of the most recent 22 months.<sup>3</sup> And states must consider giving preference to a relative when they meet all the safety standards.<sup>4</sup>

The agency's obligation to finalize the permanency plan means more than just putting the child in a relative's home to meet ASFA's requirements at a permanency hearing.<sup>5</sup> The reasonable efforts inquiry helps ensure the agency has made a well thought-out choice and addressed any barriers to permanency. The relative home should be a means to achieve permanency, not merely a stopgap solution. The agency must make reasonable efforts not only to place the child, but to make the placement as permanent as possible.

How do you decide whether relatives are a good resource for the child? How do you balance the need for permanency with the desire to maintain family ties? How do you determine which legal arrangement is best? What efforts to finalize the plan on the agency's part are reasonable?

This chapter helps you identify the issues raised by permanent relative placements. Asking the following questions will help you determine if the agency has made reasonable efforts to finalize the plan for relative placement, and ensure the placement is safe and secure.

### **What Will the Legal Status of the Relative Placement Be?**

Most state statutes do not have a specific legal category for relative placements, so they must fall under some other legal authority, such as foster care, custody, or adoption/guardianship. When a relative becomes a foster parent, the child remains in the state's custody. Or, the relative may obtain custody of the child through the dependency proceeding, with the agency usually maintaining some oversight. The relatives may also choose either to adopt or obtain guardianship of the child; this raises legal issues addressed in the previous chapter. No matter what the arrangement, the agency must make reasonable efforts to finalize the plan for the child.

### **Will the child remain in foster care?**

Foster care has several advantages. The relative receives a monthly foster care payment which is generally higher than public assistance grants.<sup>6</sup> The higher stipend may relieve some financial stress on the relative, making the placement more stable.

There is a higher safety standard if the child remains in foster care. Relative foster parents must meet the same safety requirements as nonrelative foster parents to be eligible for IV-E funds.<sup>7</sup> (States may choose not to use IV-E funds.) Only nonsafety requirements, not defined by ASFA, may be waived. The ASFA regulations list square footage of bedrooms as an example of a waivable nonsafety requirement.<sup>8</sup> Agency caseworkers are required to make a certain number of contacts, usually specified in state law, when a child is in foster care.

Foster care may also make it easier for the relative to access services, such as respite care, day care, or transportation. Medical services not available under Medicaid may also be more available when the child is in the agency's care and custody.

One advantage of foster care for the agency is the discretion to remove the child from the relative. However, relatives who are foster parents may have

**LEGAL STATUS OF RELATIVE PLACEMENTS**  
(Excludes Adoption/Guardianship)\*

<b>CUSTODY</b>			
	<b>Custody to the relative with protective supervision</b>	<b>Temporary custody to the relative</b>	<b>Foster care</b>
<b>Agency has supervisory role</b>	yes	maybe	yes
<b>Relative has decision-making authority</b>	yes, limited	yes	no
<b>Court conducts ongoing review hearings</b>	maybe	yes	yes
<b>Financial assistance</b>	Child-only TANF grant	Child-only TANF grant	Monthly foster care payment
<b>Services provided by agency</b>	Varies widely	Agency likely to provide services	Agency required to provide services

*\* These are common ways states structure relative placements. Of course state statutes vary and these arrangements may not apply in each jurisdiction.*

greater due process rights to the custody of the child, which would trigger the need for greater procedural protections. Courts have recognized that relative caregivers have unique status in the lives of the children for whom they have provided a home. The courts weigh several factors in deciding whether a relative caregiver has a liberty interest at stake which would trigger the right to due process:

- ◆ the family tie between the caregiver and child;
- ◆ whether the arrangement arose solely out of a contract with the government;
- ◆ whether the rights of the caregiver conflict with any rights of the biological parents.<sup>9</sup>

A preadoptive agreement may also create a liberty interest in the placement.<sup>10</sup> Even when the relative has a liberty interest in the placement of the child, the agency may still remove the child, as long as it ensures due process, which generally means a meaningful opportunity to be heard.<sup>11</sup>

Under ASFA, continued foster placement is no longer a permanency option. However, a long-term foster care arrangement with a relative is similar to “another planned permanent living arrangement” (discussed in the next chapter) in that it provides for a *specific* home for the child, as opposed to a nonspecified foster placement which is more likely to disrupt.<sup>12</sup> Of course, there is no guarantee that a relative placement will be permanent. A thorough permanency hearing can ensure all barriers to permanency were addressed.

### **What custody arrangement provides the appropriate level of supervision?**

When a relative obtains legal custody of a child, the agency may retain some court-ordered supervision, but the supervision is less than that provided to foster families. In some jurisdictions, the agency may continue to provide casework counseling and some services. This arrangement gives the relative much control over the child.

Generally, the arrangement may not be changed without returning to court. Relatives usually obtain custody this way when they cannot meet state foster care licensing standards and have a preexisting tie to the child, but the agency has ruled out any serious concerns.

Freedom from agency oversight may be appropriate in some cases, but undesirable in others. For example, when the agency has worked with the family and is

confident the child is safe, and the family is financially able to support the child without assistance, foster care may be unnecessary.

Some financial assistance may be available to non-foster parent relative caregivers. Most states make available child-only TANF grants to relatives with custody. Though the amount is generally less than a foster care stipend, it may make a big difference for families of modest means. The agency should be helping the family apply for TANF or other grants on behalf of the child.

Keep in mind that the agency may be able to provide services to a relative caregiver who is not a foster parent. Many states have programs where services can be provided to relatives who have custody.<sup>13</sup> Determine whether the child or the family needs services to make the placement safe and stable, and how those services will be accessed.

### **Should the relative adopt or do a guardianship?**

When a child is placed with a relative, the agency should make the relative aware that adoption and guardianship are options. The family may be able to obtain a subsidy which can provide not only cash assistance but specific services as well. Some states now have subsidized guardianship programs.<sup>14</sup> The family should know if it qualifies for any subsidies, and what its best legal option is.

Consider the need for services when making determinations related to the legal basis for the placement. Studies show relative caregivers receive fewer services than nonrelatives.<sup>15</sup> A child may require services apart from the family’s need, such as mental health counseling, or independent living services. The family may need day or respite care, especially if the family has other children or the child has emotional problems making him difficult to control or discipline. Having the relatives in court at least once lets you question them directly, which will give you a clearer picture of the placement issues. Ask the agency, the child or his advocate, and the relatives if available, to ascertain the need for services. Good services can ensure the placement is effective and long-lasting.

While relatives fall under the same legal categories as nonrelatives, caseworkers may treat them differently in practice. They may contact relatives less often or offer them fewer services.<sup>16</sup> At the permanency hearing, reinforce the need to offer the relative any reasonable

assistance necessary to make the placement last.

### **Is This The Right Plan?**

In addition to the advantages for the child described in the accompanying sidebar, other advantages make relative placement an attractive placement choice to the agency. Procedurally, placing the child with relatives can be simpler because it obviates the need to terminate parental rights at 15 of the last 22 months to comply with ASFA.<sup>17</sup> It may also be easier for the agency to place the child with a relative than continue the child in its care and custody and continue to search for resources. Some state statutes may create a presumption favoring relatives.<sup>18</sup> However, it is not appropriate to allow the plan to be used as “a path of least resistance.” Ask specific questions to determine the nature and quality of the plan and how it will affect the child.

### **Does the child have a bond with this family?**

Relatives may become known or show interest at various points in a case. If a relative has had a child since the start of the case, the inquiry is simpler. The agency will have had the chance to assess the interaction between the relative and child and decide if there is a significant bond. However, things can become complicated when the child is placed with a nonrelative and then relatives express an interest. The parent often prefers to have the child placed with a relative because the child remains part of the family and maintaining contact can be easier. Be careful not to automatically assume relative placement is best for the child. If the child has a significant bond to a nonrelative, weigh the strength and importance of that bond against the advantages of relative placement. As discussed previously in this book, more permanent options for the child must be ruled out first.

### **Are nonrelatives willing to adopt or accept guardianship?**

A nonrelative placement may offer more stability and permanence for the child than a relative placement. If a child is placed with caregivers who are committed to adoption or guardianship, that commitment may be stronger than the commitment of a relative who has not shown consistent interest in the child, or is being pushed by the parent to take the child. As much information as possible should be collected about the relative’s motivation before the child is removed from a stable placement. The agency may be motivated by

financial or workload concerns to move the child quickly out of foster care. Be sure the agency fully explores the nature and quality of the relative’s interest in the child.

### **Will this placement help preserve family identity?**

When a child has failed to bond with his nonrelative caregivers, or when the child has had a number of disrupted placements, a relative can provide some needed commitment and caring. Especially in cases involving older children, who are more attached to their family identity, a relative placement is often a good resolution for the child.

### **Will this placement help preserve a sibling bond?**

A relative placement may also be preferable when the child has siblings in various placements, and the relative is willing to take all the children. Maintaining sibling bonds is often important to foster children, and can be a positive influence throughout the child’s life. Children who have been separated from their sibling(s) may worry about them or fear losing their affection.<sup>19</sup>

### **What is the child’s position?**

Consider the child’s preferences. Hearing from the child provides invaluable insight into the relationship with the proposed caregivers. Often, the child’s voice can get lost among the wrangling of the adults. If you feel the child should not be in the courtroom, consider conducting an *in camera* exam, or ask the guardian ad litem, child’s attorney, or CASA to provide you with the child’s perspective.

### **Is This The Right Family?**

#### **Does the agency have a complete picture of the family’s situation?**

A relative placement may sound good for a child, but without a complete picture of the family situation, it is impossible to be sure whether the placement is appropriate. First, determine if the agency has made reasonable efforts to identify and contact all relatives who might be a resource for the child. The agency should have been working to find resources for the child from the start of the foster care placement. Identifying relatives early allows the agency and the court to gather enough information about the family to determine whether the child should be placed with them. Even if the goal had been return to parent, reasonable efforts by the agency should have included facilitating contact

between the child and relative; and monitoring that contact to determine how the child is bonding, and whether the relatives are able to keep the child safe and provide proper supervision and discipline.

### **Do family dynamics compromise the relative's ability to safeguard the child?**

Family dynamics can complicate placing a child with relatives. A family member's ability to keep the child safe can be compromised by loyalty to the parent. Relatives may resent agency or court involvement and blame the child, or they may be unable to admit abuse or neglect occurred for fear of tarnishing an idealized family image. The agency should explore the family history and present to the court a full assessment of the relative's ability to keep the child safe. Make sure the relative understands the risks the parent may pose to the child and is able and willing to confront the parent and set boundaries to protect the child from physical and emotional harm.

### **Has the agency observed the interaction between the child and relative?**

Find out from the agency any information it has on the contact between the child and the relative. Visitation should initially be observed by an agency case-worker or other professional. Any concerns should be documented and addressed. The agency should address any concerning incidents reported by the child after a visit. Visitation should be frequent and last long enough to accurately reflect the relative's parenting skills. If those skills need improvement, the agency should provide or make a referral for parenting education.

### **Have relatives received counseling when appropriate?**

Counseling may be necessary to help the relative understand the child's needs, or to help the child recover from past maltreatment or adjust to a new family setting. The agency may need to assess the need for counseling if that hasn't been done already. The child's advocate may be able to provide insight into the matter. If counseling has been provided, be sure to get an updated assessment.

### **What is the relative's commitment to the child?**

The agency should know the relative's motivations for caring for the child and should present evidence of the relative's demonstrated interest in the child.

## **Pros and Cons of Relative Placements**

Relative placements are unique by virtue of the biological tie between the caregiver and the child. That tie can provide important benefits to the child, or pose certain risks. Consider the following pros and cons when evaluating relative placements.

### **Pros**

- ◆ Relatives often have a sense of familial responsibility and are often more committed to keeping the child on a long-term basis.
- ◆ It is easier to preserve the bond the child has to his biological family, including siblings.
- ◆ Relatives may reduce the trauma of being removed from the home.
- ◆ Relatives preserve the child's cultural identity and heritage.
- ◆ The child is often able to adjust to living with kin more easily than living with strangers.

### **Cons**

- ◆ Relatives often receive fewer services than nonrelatives.
- ◆ The most appropriate relative is often a grandparent who may have limitations due to age.
- ◆ Relatives may protect the parent or deny the maltreatment occurred, thus engaging in behavior that could put the child at risk.
- ◆ Relatives may be loyal to the parent and unwilling to adopt because it would sever the parent's rights.
- ◆ Relatives themselves may be abusive or neglectful because they come from the same troubled family background that led the parent to mistreat the child.
- ◆ Relatives and parents may be hostile toward one another, making it harder for the agency to work with the parent than if the child had been placed with an unrelated caregiver.

Sources: Crumbley, Robert & Robert L. Little. *Relatives Raising Children*. Washington, D.C.: CWLA Press, 1997; *A Conceptual Framework of Identity Formation in a Society of Multiple Cultures*. Baltimore, MD: Annie E. Casey Foundation, April 2002. <[http://www.casey.org/cnc/documents/conceptual\\_framework.pdf](http://www.casey.org/cnc/documents/conceptual_framework.pdf)>; Hardin, Mark. "Benefits, Risks, and Drawbacks to Placing an Abused or Neglected Child With a Relative." Washington, DC: ABA Center on Children and the Law, November 1994. (Handout prepared for presentation at the Cook County Juvenile Court, Chicago, IL).

Consistently contacting the child and agency, participating in treatment or case planning conferences, and cooperating with the agency’s plan are good indicators of interest. Sometimes relatives will freely acknowledge they cannot commit to a child, either because of their own limitations or because of the child’s special needs.

When the commitment to a child is weak, decide whether the placement is consistent with the best interests of the child. That means carefully weighing all placement options against the advantages of relative placement. Also thoroughly review whether additional services would strengthen the relative’s commitment to the child. Respite care, financial assistance, or counseling may influence the feelings a family has about accepting the child into its home, and may encourage a stronger commitment.

If the child is placed with a family whose motivation or commitment level is weak, consider continuing agency and court involvement. Ongoing reviews can ensure the placement is not failing and the agency is continuing to provide necessary services.

### **Is the placement stable and long-term?**

Determine whether the placement is the most stable and long-term solution. Relatives may feel family pressure to take in a child they do not really want. They may accept the child to prevent a TPR, but lack the required commitment to make the placement succeed. The agency should explore the relatives’ motivation level with the relative and share that information with the court.

### **Has the agency collected and reported to the court sufficient information about the relative’s home?**

When the agency presents a plan for relative placement, it should provide as much information about the household as possible to the court. Some agencies have a formal home study procedure, while others do not. A

thorough home study will detail family composition, a description of the residence, financial status, employment, mental health history, health concerns, including physical limitations, educational background, religious affiliation, and so forth.

The agency should conduct a home study interview to probe attitudes and beliefs about child development, abuse and neglect, and family function. The interview can be a good way to spot red flags requiring further questions.

### **Has the agency complied with the ICPC when the relative lives out of state?**

If the relative is out of state, it is harder to gain as much knowledge about the family. When a child is placed across state lines, the Interstate Compact on the Placement of Children (ICPC) must be applied. A caseworker in the receiving state will be required to provide a home study to the agency. If concerns are raised, they should be communicated to the agency performing the ICPC home study. (Chapter 8 details the ICPC and how it affects permanency.)

### **Have necessary services been provided?**

To make the plan work, the agency must phase in additional contact between the child and caregiver and provide the services needed to make the placement work. As part of the reasonable efforts inquiry, decide whether the agency has provided adequate services, including phasing in extended visitation over time. If the agency does not offer a service directly, such as employment or housing assistance that would improve the relative’s home or income, it should be working with the relative to obtain the service from another community or private agency. For example, relative caregivers are often elderly and may benefit from services meant to serve senior citizens.

## Endnotes

1. 42 U.S.C. § 675 (C), 45 C.F.R. § 1356.21(h).
2. States must define “relative,” as it is used in the context of permanency planning under ASFA. Title IV-E does incorporate a definition of “relative” from the former AFDC (federal welfare) program, for the narrow purpose of limiting eligibility, but there is no indication that it should be applied in other contexts.
3. 42 U.S.C. § 675(5)(E), 45 C.F.R. § 1356.21(i)(2)(i).
4. States claiming federal foster care matching funds for foster care and adoption assistance must have a “state plan” which “provides that the State shall consider giving preference to an adult relative over a nonrelated caregiver when determining a placement for a child, provided that the relative caregiver meets all relevant State child protection standards.” 42 U.S.C. § 671(a)(19). The preamble to the ASFA regulations

clarifies that compliance with this state-plan requirement is not considered a denial of opportunity for adoption or placement based on race. 65 Fed. Reg. 4046.

5. Regarding whether the relative placement must be permanent, note that the court must choose a “permanency plan” at a “permanency hearing.” “The 1997 amendments to the former language of 42 U.S.C. § 675(5)(C) were designed to impel the court to approve a new permanent living arrangement for the child. Those amendments changed the term “dispositional hearing” into “permanency hearing.” They added the term “permanency plan” and eliminated options of continuing a child in foster care for indefinite periods or “continuing a child in foster care on a permanent or long-term basis.” Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 302 (1),(4).

6. “Kinship Care: When Parents Can’t Parent.” Urban Institute Panel Discussion, Tuesday, April 3, 2001.

7. 45 C.F.R. § 1355.20(a)(2).

8. Title IV-E Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews Final Rule, 65 Fed. Reg. 4033 (January 25, 2000).

9. *Rivera v. Marcus*, 533 F. Supp. 203 (D. Conn. 1982), *aff’d*, 696 F.2d 1016 (2d Cir. 1982).

10. *Spielman v. Hildebrand* 873 F.2d 1377 (10th Cir. 1989).

11. See *Rivera*, cited above, for discussion of procedures that meet due process standard.

12. Title IV-E requires the placement and care of the child to be the responsibility of the agency. The Children’s Bureau of the Department of Health and Human Services has clarified that the court MAY ORDER a specific placement as long as the court hears relevant testimony and works with the agency to make appropriate decisions. See the Children’s Bureau Web site, [www.acf.dhhs.gov/programs/cb](http://www.acf.dhhs.gov/programs/cb), Question 13.

13. Leos-Urbel, Jacob, Roseanna Bess & Rob Geen. “State Policies for Assessing and Supporting Kinship Foster Parents.” Discussion Paper, July 2000.

14. *Ibid.*

15. Ehrle, Jennifer, Rob Geen & Rebecca Clark. “Children Cared for by Relatives: Who Are They and How Are They Doing?” *New Federalism*, February 2001.

16. *Ibid.*

17. ASFA requires the agency to file a TPR petition when the child has been in foster care for 15 of the most recent 22 months unless an exception or compelling reason exists. 42 U.S.C. § 675(5)(E), 45 C.F.R. § 1356.21(i).

18. See, e.g., Okla. Stat. Ann. tit. 10, § 7202 (4)(a) (West 2000); Cal. Fam. Code § 7950(a)(1) (Deering 1995); Ark Stat. Ann. § 9-9-102(a) (1997).

19. Elstein, Sharon G. “Making Decisions About Siblings in the Child Welfare System.” *ABA Child Law Practice* 18(7), September 1999, 97.

**SAMPLE COURT REPORT AND COURT ORDER FOR PERMANENCY HEARING:  
RECOMMENDATION FOR PERMANENT PLACEMENT WITH RELATIVES  
(EXCLUDING ADOPTION AND GUARDIANSHIP)** *Prepared by Mark Hardin*

The following sample court report and court order are for permanency hearings where the child protection agency recommends and the court orders permanent foster placement with specific relatives. Besides adoption and legal guardianship, this is the next most common form of permanent placement.

There are, however, other possibilities. In some states, courts can give relatives temporary custody. In

others, courts can give relatives custody subject to the supervision of the public agency. In other states, “legal custody” or “guardianship” awarded by the same court that hears the abuse or neglect proceedings is not legally fully permanent. Unless the custodian or guardian is both permanent and free from agency supervision, the placement arrangement does not meet the federal definition of “legal guardianship.”

## COURT REPORT, **PERMANENCY PLAN IS PLACEMENT WITH RELATIVES**

EREWONHON DEPARTMENT OF CHILDREN'S SERVICES  
AARON COUNTY

Child: Johnny J. Jones, D.O.B. 11/11/97

The Department of Children's Services recommends that Johnny J. Jones be permanently placed with his/her relatives \_\_\_\_\_. In support of this recommendation, the Department presents the following explanation:

1. It is not and will not be safe to return the child home because:

[Note: Explain why return home would be dangerous or harmful to the child or is otherwise impractical.]

2. Termination of parental rights is not in the best interests of the child because:

[Note: Explain why termination of parental rights would not benefit the child. For example, this might include an explanation that an adolescent will not consent to adoption and will resist other placements if parental rights are terminated.]

3. It is not in the best interests of the child to permanently place the child with an individual or couple serving as [permanent custodian] [permanent guardian] because:

[Note: Explain why it is not possible to permanently place the child with an individual or couple with full and unsupervised legal responsibility for the child. For example, this might be an explanation why these relatives cannot or will not become permanent custodians or guardians. The report might say that the foster parents are willing to adopt or take on full legal responsibility, but that the child has a range of expensive special medical and therapeutic needs that the caregivers cannot financially afford. If the relatives in question have only recently taken the child, the report should explain why more committed relatives or other caregivers are not available.]

4. The agency has fully counseled the relatives concerning available financial assistance and the availability of more permanent and legally secure placement options.

[Note: Before determining that adoption and legal guardianship are not in the best interests of the child, it is important to make sure that relatives have a full understanding of more permanent and secure legal placement options.]

5. The relatives \_\_\_\_\_ are fully capable of and committed to permanently caring for the child because:

[Note: Explain why, despite the fact that the relatives are not able or willing to be adoptive parents or permanent legal caregivers without agency supervision, the Department nevertheless believes that they will be good caregivers and permanently committed to the child.]

6. The child will be safe from further harm by the child's parents because:

[Note: Explain why you believe the relatives understand the nature of the parents' maltreatment of the child and will protect the child from unsafe contacts with the parents and other dangers.]



## COURT ORDER, **PERMANENCY PLAN IS PLACEMENT WITH SPECIFIC RELATIVES**

IN THE DISTRICT COURT OF [COUNTY], [STATE]  
999TH JUDICIAL DISTRICT

IN THE INTEREST OF:  
JOHNNY J. JONES

CAUSE NO. 99CM0000

On the \_\_\_\_ day of \_\_\_\_\_, 200\_\_, a hearing was held in the 999th Judicial District Court, the Honorable \_\_\_\_\_ presiding.

### I. APPEARANCES

Parties and others present included the following:

- |   |  |
|---|--|
| <input type="checkbox"/> Mother _____               | <input type="checkbox"/> Attorney for Mother _____ |
| <input type="checkbox"/> Father _____               | <input type="checkbox"/> Attorney for Father _____ |
| <input type="checkbox"/> Father _____               | <input type="checkbox"/> Attorney for Father _____ |
| <input type="checkbox"/> Child _____                | <input type="checkbox"/> Advocate for Child _____  |
| <br>  |  |
| <input type="checkbox"/> Principal Caseworker _____ | <input type="checkbox"/> Other Caseworker _____    |
| <input type="checkbox"/> Casework Supervisor _____  | <input type="checkbox"/> Government Attorney _____ |
| <input type="checkbox"/> Foster Parent _____        | <input type="checkbox"/> Foster Parent _____       |
| <input type="checkbox"/> Relative _____             | <input type="checkbox"/> Relative _____            |

Others (list) \_\_\_\_\_

### II. FINDINGS AND ORDERS

THE COURT FINDS:

1. It is not and will not be safe to return the child home because:

[Note: The finding might describe why return home would endanger or harm the child or is otherwise impractical or the finding might incorporate or modify the Department's explanation.]

2. Termination of parental rights is not in the best interests of the child because:

[Note: The finding might incorporate or modify the Department's explanation.]

3. It is not in the best interests of the child to permanently place the child with an individual or couple serving as [permanent custodians] [permanent guardians] because:

[Note: The finding might incorporate or modify the Department's explanation.]

4. The agency has fully counseled the relatives concerning available financial assistance and the availability of more permanent and legally secure placement options.

[Note: The finding might incorporate or modify the Department's explanation.]

5. The foster parents are fully capable of and committed to permanently caring for the child because:

[Note: The finding might incorporate or modify the Department’s explanation.]

6. The child will be safe from further harm by the child’s parents because:

[Note: The finding might incorporate or modify the Department’s explanation.]

7. The following efforts were made, following the placement of the child into foster care, to finalize the child’s permanency plan:

[Note: The finding might incorporate or modify the Department’s description of the state’s efforts to reunify the family.]

The efforts were \_\_\_\_\_ were not \_\_\_\_\_ reasonable because \_\_\_\_\_.

8. If the child is placed in a home in a different state than the home of the child’s parents, the placement continues to be appropriate and in the child’s best interests for the following reasons:

[Note: If the child is placed in the same state as one or both of the child’s parents, leave this space blank. Otherwise, explain why it is necessary to place the child in a different state. The finding might incorporate or modify the Department’s explanation. Federal law requires the court to make findings regarding the continuing necessity for out-of-state foster placements. 42 U.S.C. §675(5)(C).]

9. If the child is 16 or older, the child needs the following services to make the transition from foster care to independent living:

[Note: If the child is less than 16, leave this space blank. If the child is 16 or older, list and explain the services the child needs to transition from foster care to independent living. The finding might incorporate or modify the Department’s statement about such services. Federal law requires the court to make findings concerning the services needed to prepare the child for independent living. 42 U.S.C. §675(5)(C).]

**THE COURT HEREBY ORDERS:**

1. The child shall remain in the [custody] of the Department and be placed in foster care on a permanent basis with his/her relatives \_\_\_\_\_.

2. The Department of Children’s Services shall implement the following plan to ensure the stability of the foster placement:

[Note: The court-approved plan might incorporate or modify the Department’s proposed plan.]

3. The next hearing in this case shall be a [review hearing] and shall take place at \_\_\_\_\_ [a.m.] [p.m.] on \_\_\_\_\_, 200\_\_, Courtroom \_\_\_\_\_.

4. The court further orders that:

[Note: This allows the court to provide additional instructions or orders. If none, leave this space blank.]

SIGNED this \_\_\_\_\_ day of \_\_\_\_\_, 200\_\_.

\_\_\_\_\_  
[Insert Name]  
Judge



## **ANOTHER PLANNED PERMANENT LIVING ARRANGEMENT CHECKLIST**

**DID THE AGENCY CONDUCT A TIMELY ASSESSMENT AND PROVIDE RELEVANT SERVICES WHEN THE CASE FIRST CAME IN?**

**HAVE OTHER PERMANENCY OPTIONS BEEN FULLY CONSIDERED AND RULED OUT FOR VALID REASONS?**

**WHAT EFFORTS HAS THE AGENCY MADE TO IDENTIFY AND RECRUIT A PERMANENT PLACEMENT FOR THE CHILD?**

**WHAT ARE THE CHILD’S PREFERENCES?**

**WHAT ARE THE COMPELLING REASONS WHY A MORE PREFERRED PERMANENCY PLAN IS NOT BEING SELECTED?**

**IS THE PROPOSED PLAN ACTUALLY A “PERMANENT LIVING ARRANGEMENT?”**

**WHAT SUPPORT STRUCTURES ARE BEING PUT IN PLACE?**

**DOES THE CHILD HAVE ANY SPECIAL NEEDS, AND WHAT SERVICES IS THE AGENCY PROVIDING?**

**WHAT EFFORTS HAS THE AGENCY MADE TO ASSESS THE SAFETY, QUALITY, AND STABILITY OF THE APPLA?**

This chapter assumes reunification, adoption, legal guardianship, and relative placement have been ruled out, and the permanency option under consideration is “another planned permanent living arrangement.”

## REASONABLE EFFORTS TO FINALIZE A PERMANENCY PLAN FOR ANOTHER PLANNED PERMANENT LIVING ARRANGEMENT *by Jennifer Renne*

7

ASFA created “another planned permanent living arrangement” (APPLA) as a final permanency option for children. While the ASFA statute is clear that APPLA is the least preferred permanency option, the term is somewhat ambiguous, and has generated many questions within the child welfare community. This chapter provides a framework for understanding the term and what it means to finalize an APPLA, and suggests questions to ask to assess whether the agency has provided reasonable efforts to finalize this plan.

### What is an “APPLA?”

“Another planned permanent living arrangement” is not a catchall for whatever temporary plan is needed when none of the preferred permanency plans are practical. Rather an APPLA is a truly permanent arrangement that is the goal for the child. The ASFA regulations define the term as “any permanent living arrangement not enumerated in the statute.”<sup>1</sup> APPLA is intended to be planned and permanent. “Planned” means the arrangement is intended, designed, considered, premeditated, or deliberate.<sup>2</sup> “Permanent” means enduring, lasting, or stable.<sup>3</sup> In other words, the agency must provide reasons why the living arrangement is expected to endure. The term “living arrangement” includes not only the physical placement of the child, but also the quality of care, supervision, and nurture the child will receive. While “living arrangement” may not necessarily be a specific residence or facility, it does imply certain stabilizing features.

The preferred permanency plans described in previous chapters contemplate something more than a specific physical place for a child to stay, and so does APPLA. The preferred permanency plans involve a specific adult or couple (as opposed to an organization) who will be in charge of the young person, exercise certain powers and responsibilities, and likely live with the young person. Further, the caregiver’s familial relationship with the child will continue beyond the life of the dependency case. Therefore it follows that an APPLA either will involve a permanent adult caregiver

of the child or at least adult parent figures playing permanent and important roles in the child’s life. (Some examples of APPLAs appear in the sidebar).

Permanency plans should include services that meet the child’s immediate needs, but should also focus on building relationships between the child and those adults who will be a network of support for the child. An APPLA can certainly include family foster care, but it will usually be foster care with a particular family or individual. The court order should reflect that the arrangement is permanent, and should include all the elements that make it permanent.

### What does not qualify as an “APPLA?”

*Long-term foster care.* The statute explicitly prohibits long-term foster care as a permanency option. The ASFA statute struck the term “long-term foster care,” and the preamble to the ASFA regulations explained that “[F]ar too many children are given the permanency goal of long-term foster care, which is not a permanent living situation for a child. The [compelling reason] requirement is in place to encourage States to move children from foster care into the most appropriate permanent situation available.”<sup>4</sup> Long-term foster care is not stable and may disrupt often, leading to frequent moves for the child and instability.

*Emancipation.* Emancipation is unfortunately what sometimes happens when children leave foster care. It is not a permanency goal because it lacks certain permanency features contemplated by APPLA. Emancipation has specific relevance for some older children who are close to aging out of the foster care system, discussed later in this chapter.

### Assessing Reasonable Efforts When Approving an APPLA

#### Did the agency conduct a timely assessment and provide relevant services promptly?

Permanency planning should begin when children are placed in out-of-home care. Although reasonable

## Case Studies: Sample APPLAs

**A 14-year-old child, Angela, is in a residential treatment facility.** She spends some weekends and holidays with a family friend, Mrs. S., who she has known for years. Mrs. S. is unwilling to adopt Angela because she is concerned that the adoption subsidy would not adequately address Angela’s significant mental health needs. Mrs. S. is open to the idea of adopting Angela after she turns 18, and possibly being the representative payee for Angela’s SSI benefits. In addition to addressing her mental health needs, Angela’s permanency plan would include a structure of regular visitation with Mrs. S., and would include Mrs. S. in Angela’s treatment and therapy, as appropriate.

**A 16-year-old boy, Robert, lives in a supervised apartment** and is receiving independent living services. He stays with his aunt and uncle every other weekend. They are unwilling to allow him to live there full-time because they have three children under age 9. Robert has also had problems with drugs in the past, and they are concerned that he will be a negative influence on their young children. They do help him with school issues, and are in the process of helping him fill out applications for college. Robert’s permanency plan would not only include the independent living services he needs, but would also address issues between him and his aunt and uncle so that those relationships are strengthened and nurtured.

**Termination of parental rights will not be pursued for an 8-year-old Native American child.** This is because the agency does not think it can meet the burden of proving beyond a reasonable doubt that continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child. Consistent with tribal custom, the tribe has placed the child with the (nonrelative) tribe member, who will care for the child on a permanent basis.

**A sibling group, ages 6, 9, and 14, have been in foster care with Mr. and Mrs. J. for three years.** They visit regularly with their biological mother. The agency is not pursuing termination of parental rights. The children are bonded with Mr. and Mrs. J. who have committed to caring for the children on a permanent basis. This APPLA could be approved as “permanent foster care with Mr. And Mrs. J.”

efforts to finalize a permanency plan are assessed 12 months after foster care entry, the inquiry should include whether the agency conducted early assessment and planning when the child was placed. Often children are placed on an emergency basis with foster parents who are not willing to adopt or commit to providing long-term care. There is sometimes a lack of conscious planning as the agency leaves the child in an arrangement originally intended as an emergency placement.

Permanency planning becomes more complicated as the child becomes attached to the foster parents. For example, at the 12-month permanency hearing when the agency requests approval of its APPLA and a finding that reasonable efforts to finalize the APPLA have been made, it might be discovered that the agency provided few services early in the case. Thus, what might have been a successful reunification case, or relative placement case, has now become an APPLA because the agency was delinquent in its efforts upfront.

The agency’s “reasonable efforts” should include early assessment and planning to reduce the likelihood of a child being in a nonpermanent long-term arrangement by default instead of a more permanent one by design.

### Have other permanency options been fully considered and ruled out for valid reasons?

Earlier chapters discussed the four preferred permanency options under ASFA: reunification, adoption, legal guardianship, and permanent placement with relatives. At every permanency hearing and each six-month review, be sure to ask whether a more preferred permanency option is possible. Because circumstances change, a child’s permanency plan must be revisited at subsequent hearings. Remember that when “APPLA” is selected as the permanency goal, this sometimes will turn out to be temporary in spite of the best efforts to make it permanent.

In addition, sometimes a more permanent living arrangement will become possible. The permanency plan must be revisited at least annually at the required permanency hearing. You are free to review the issue more regularly. Circumstances change in a young person’s life, and sometimes a more preferred permanency option can be achieved later in the case. For example, at one hearing, the plan might be an APPLA but by the following hearing, a relative may have come forward and expressed a willingness to care for the child on a long-term or permanent basis.

### **What efforts has the agency made to identify and recruit a permanent placement for the child?**

Determine whether the agency has thoroughly searched for relatives. Has the agency asked current and former caregivers, including former foster parents, if they are willing to commit to providing long-term care for the child? Are there any mentors, coaches, teachers, counselors, or employers who might be appropriate and willing to provide a permanent home for the child?

### **What are the child’s preferences?**

Often the child can identify a possible placement the caseworker has not thought about. The child can provide input not only on the issue of placement, but can suggest who might be good mentors or respite care providers. The notion of “permanency” should include cultivating lifelong relationships, especially for older teenagers. Sometimes the youth uncovers resources others have overlooked. Take the example of a 17 year old who was placed, and ultimately adopted by the cafeteria supervisor at his group home.

The agency’s reasonable efforts to secure an APPLA should include ongoing discussions with the youth about who might provide long-term care or support and guidance. The judge hearing the case should consider hearing from the child on these issues as well.

### **What are the compelling reasons why a more preferred permanency plan is not being selected?**

If the agency concludes, after considering reunification, adoption, legal guardianship, or relative placement, that the most appropriate permanency plan is an APPLA, the agency must document to the court the compelling reason for the alternate plan.<sup>5</sup> The judge presiding over the case must evaluate the compelling reasons why a more preferred option is not being pursued.<sup>6</sup> The term “compelling” means convincing and persuasive, and implies a strong burden of proof and persuasion.

The regulations give three examples of a compelling reason for establishing an APPLA as a permanency plan:

- ◆ an older teen who specifically requests that emancipation be established as his/her permanency plan;
- ◆ the case of a parent and child who have a significant bond but the parent is unable to care for the child because of an emotional or physical disability and the child’s foster parents have committed to raising the

child to the age of majority and to facilitate visitation with the disabled parent; or

- ◆ an Indian tribe has identified an APPLA.<sup>7</sup>

The regulations clearly state that no permanency option should be ruled out for an entire group of the foster care population. Therefore, these examples are not meant to create broad categories to be generally applied. For instance, all 15 year olds who are requesting emancipation cannot be treated the same. For one child, an APPLA might be appropriate, but for another, reunification might still be a possibility, or a relative willing to care for the child may have recently surfaced. The point is that permanency planning is based on the best interests, individual needs, and circumstances of each child.<sup>8</sup>

### **Is the proposed plan actually a “permanent living arrangement?”**

Ask how the proposed arrangement will be more stable and secure than ordinary foster care. Is this the most family-like arrangement for the child, and which adults will maintain a continuing, close parent-child relationship with the young person? Permanent placement with foster parents who agree to care for the child indefinitely is an acceptable APPLA, but permanent placement in the foster care system at large is not acceptable. Identifying a specific family who will commit long-term to the child is more permanent than when the child moves from home to home.

Sometimes a family network can provide permanence and stability for a child. For example, there might be long-distance relatives who want to share custody, or older relatives who don’t want to assume custody alone because they fear they may not be alive much longer so would prefer a shared custody arrangement.

### **What support structures are being put in place?**

An APPLA implies a permanency plan that is markedly more stable and family-like than a mere extension of foster care. Support structures that enhance the stability of a living arrangement are vital when a child is not living with a specified adult. Independent living is often the permanency plan for older children. This is distinct from emancipation because independent living contemplates an arrangement that is stable and secure, and the focus is on features of the plan which enhance stability and

## Understanding ASFA's Compelling Reasons Requirement

The ASFA regulations use the term “compelling reason” in two contexts. One is the issue addressed in this chapter: that when the four preferred permanency options are not selected, there must be a compelling reason why not. ASFA also uses “compelling reason” as an exception to the requirement that the agency file a termination of parental rights (TPR) action for all children who have been in foster care 15 of the most recent 22 months. 45 C.F.R. § 1356.21(i). There are three exceptions to the mandatory filing of the TPR:

1. The child is being cared for by a relative.
2. TPR is not required if the agency has failed to provide services.
3. “The State agency has documented in the case plan (which must be available for court review) a compelling reason for determining that filing such a petition would not be in the best interests of the individual child.” 45 C.F.R. § 1356.21(i)(2)(ii).

The issues of which permanency plan is appropriate for the child, and mandatory filing of a TPR petition are separate and distinct. There must be a documented compelling reason why TPR is not being pursued, and there must be a documented compelling reason why one of the four preferred permanency options is not being selected.

permanency, whereas “emancipation” implies a discharge from foster care by virtue of one’s age.

Often, independent living services focus on the child’s educational, vocational, or mental health needs, without identifying and working with adults with whom the young person can establish or strengthen a relationship. Consequently, many 18-21 year-old children leave foster care with no caregivers, no alternative homes or families. By considering alternative placements and services that allow them to maintain close ties with biological parents, relatives, foster parents, and perhaps even formal mentors, the agency locates potential supporters who can provide further assistance while the child is in foster care and beyond.

The following reasonable efforts by the agency could contribute to finalizing APPLAs for older children. These elements do not necessarily make the placement an APPLA, but they contribute to the stability and permanency of the living arrangement:

*Mentoring.* This arrangement provides adult supervision and guidance for the youth, and may include a formal, structured, subsidized arrangement. It allows shared parenting responsibilities when no single person can provide for them, and is appropriate for some older children. The teenaged youth may even live independently. Formal mentoring from a network of adults gives the youth the support system needed to function into adulthood. Another strength of this arrangement is it builds ties and relationships between the youth and mentors that last well beyond the dependency case. Mentors can provide educational or employment advice and assistance, and help prevent juvenile crime, unemployment, school dropout, and teen pregnancy. The child welfare system has not traditionally taken advantage of these programs, and resources for formal mentor programs are often lacking. The Big Brother/Big Sister program is an example of an effective mentoring program in existence since 1902. Less formal arrangements can be achieved by looking to the adults already involved in the youth’s life. These adults may include a foster parent of the youth’s siblings, for example.<sup>9</sup>

*Community-based programs.* In some cultures, the community in which children are raised offers various services and plays a prominent role in children’s upbringing. For example, much attention focuses on the disproportionate representation of African American children in foster care.<sup>10</sup> In crafting alternative permanency plans for African American children, the child welfare system could better use the informal, communal nature of extended families within the African American community.<sup>11</sup> Some advocates argue for a broader concept of parental rights that includes many community members beyond just biological and foster parents.<sup>12</sup> A network of supportive adults may be more valuable than a single supportive caregiver especially as children age out of the system. Therefore, sometimes it is necessary for the agency to explore and develop a network of community members to respond to the child’s needs.

One example of a community support network is a New York City independent living partnership where

young people and their adult mentors meet for weekend retreats and monthly support group sessions. The PRIDE (Personal and Racial/Ethnic Identity Development and Enhancement) program uses the time and talents of former foster children from the foster child's same cultural background to act as mentors and positive role models.<sup>13</sup>

### **Does the child have any special needs, and what services is the agency providing?**

The agency must continue to provide for the child's needs. Sometimes as the child deals with mental health issues and makes behavioral and educational progress, prospective caregivers are more willing to commit to providing a "permanent" home for the child. This is why it is key to revisit the issue of "compelling reasons" at every permanency hearing for the child.

For example, at the first permanency hearing, an APPLA might be accepted as the permanency plan, based on the compelling reasons that there are no identifiable caregivers, and that the child needs residential treatment to address severe emotional problems associated with a history of sexual abuse. As the child's special needs are met, and treatment is successful, the

case might be up for review 12 months later, and the child might have been discharged from residential treatment, living with a supportive aunt. APPLA would no longer be the appropriate permanency plan, as the agency could explore relative placement, legal guardianship, or even adoption with the aunt. To satisfy any permanency plan, including APPLA, make sure the child's special needs are being met.

### **What efforts has the agency made to assess the safety, quality, and stability of the APPLA?**

Once the APPLA has been identified, the agency must ensure the child will be safe and well cared for. This may involve a formal home study. Sometimes independent living services are delivered by a private provider, and the agency should verify that the living arrangements are safe and appropriate. Teenagers in foster care can be a challenging population to work with. Too often they are not provided proper care and supervision. Crafting a stable, planned, permanent arrangement can have a huge impact on their future success. The agency should therefore regularly assess the degree to which the placement is safe and appropriate.

## **Endnotes**

1. 65 Fed. Reg. 4036 (Jan. 25, 2000).
2. *Webster's New College Dictionary*. Boston: Houghton Mifflin Company, 1995.
3. *Ibid*.
4. 65 Fed. Reg. 4036 (January 25, 2000).
5. 45 C.F.R. § 1356.21(h)(3).
6. For more discussion of this topic, see Fiermonte, Cecilia. "ASFA's Compelling Reasons Requirement." *ABA Child Law Practice*, June 2001, 62.
7. 45 C.F.R. § 1356.21(h)(3)(i), (ii), & (iii).
8. 65 Fed. Reg. 4035 (January 25, 2000).
9. Mangold, Susan Vivian . "Legal Issues Facing Adolescents and Teens." *Buffalo Law Review* 48, 835, 2000.
10. Brooks, Susan L. "A Family Systems Paradigm for Legal Custody Decision Making Affecting Child Custody." *Cornell Journal of Law and Public Policy* 6, 1997, 1.
11. According to Brooks, 44% of African American families live in an extended family structure, as compared to 11% of Caucasian families.
12. Brooks, Susan L. "The Case for Adoption Alternatives." *Family Court Review* 39, 2001, 43.
13. Mallon, Gerald P. "After Care, Then Where? Outcomes of an Independent Living Program." *Child Welfare* 77, 1998, 61.

## Can Group Care be an APPLA?

Rarely is group care a living arrangement that is planned and permanent. Consider the following factors to determine if group care placement is a suitable APPLA:

### Temporary vs. Permanent

It helps to distinguish between a temporary group care arrangement and an APPLA. A child can be placed in a group home temporarily without that being the permanency plan. For example, a child temporarily placed in a group home may have a permanency plan of return home.

Group care should not be considered an APPLA if the child's release from group care is reasonably likely during the child's minority. Rather, group care is a step towards achieving the child's permanency plan of adoption, reunification, etc. Group care as an APPLA requires clear evidence that the young person will not be able to function in a family setting before reaching adulthood.

### Stability, Predictability, Continuity

Assuming that group care must last through a child's minority, this is not sufficient to make group care an APPLA. For reasons stated above, a plan for a single placement should not be an absolute requirement. It is also not enough. After all, if a single group placement was enough, an orphanage would be considered an APPLA. A plan to keep a child in a specific facility or program might, however, be a factor – if it helps demonstrate the stability, predictability, and continuity of the arrangement.

### Advocate or Guardian

An individual designated as the child's permanent "advocate" or guardian can help qualify a group care facility or program as an APPLA. To make an "advocate" or "guardian" a factor, there should be reason to believe that such a person will play a major and enduring role in the child's life. There must be (a) strong assurances that the advocate will continue indefinitely and (b) reasons to believe a close relationship exists between the advocate and child. The adult should be committed to helping the child through adulthood and, ultimately, until the child leaves group care.

### Designated Contacts

What if there is a long-term plan, for "transfers up" within a facility, when the child demonstrates progress in functioning in a family or in society? This alone, should not qualify the group care as an APPLA because it provides the child with no stable and enduring relationship with an adult or couple. The analysis might depend on whether there is some assurance that the young person will have a continuing and specific set of persons to relate to and work with. Can paid staff ever qualify to perform that role? Group care might, on the other hand, qualify as an APPLA if there are designated contacts with specific individuals, such as relatives.

## **SAMPLE COURT REPORT AND COURT ORDER FOR PERMANENCY HEARING: RECOMMENDATION FOR “ANOTHER PLANNED PERMANENT LIVING ARRANGEMENT” (APPLA)**

*Prepared by Mark Hardin*

Use the following court report and court order forms for permanency hearings when the child protection agency recommends and the court orders “another planned permanent living arrangement.” Note that this is *not* a preferred permanency option for foster children. Therefore, much of this court report should explain why preferred permanent placement options are

not recommended.

The form covers two important examples of APPLAs: permanent foster placement with a specific foster family, and continuing group or institutional foster care (permissible only in rare circumstances). In addition, it allows for any other type of APPLA.

**COURT REPORT, PERMANENCY PLAN IS ANOTHER PLANNED PERMANENT LIVING ARRANGEMENT**

EREWHON DEPARTMENT OF CHILDREN'S SERVICES  
AARON COUNTY

Child: Johnny J. Jones, D.O.B. 11/11/99

The Department of Children's Services recommends that Johnny J. Jones be placed in another planned permanent living arrangement.

**When the recommendation is permanent foster care with nonrelatives, complete the following 11 points:**

1. The Department requests that Johnny J. Jones remain in the Department's custody for permanent placement with his/her current foster parents \_\_\_\_\_ and that the court recognize the permanency of this living arrangement.

2. It will not be safe to return the child to his/her biological parents or former legal caregivers within the next six months because:

[Note: Explain why return home would endanger or harm the child or is otherwise impractical.]

3. Termination of parental rights and adoption are not in the best interests of the child because:

[Note: Explain why termination of parental rights and adoption would not benefit the child. This might include an explanation that an adolescent will not consent to adoption and will resist other placements if parental rights are terminated.]

4. It is not in the best interests of the child to permanently place the child with an individual or couple serving as [legal guardian or custodian] because:

[Note: Explain why it is not possible to permanently place the child with an individual or couple with full and unsupervised legal responsibility for the child. This might include an explanation why relatives or other committed caregivers are not available. For example, the report might say that the foster parents are willing to adopt or accept full legal responsibility, but that the child has a range of expensive special medical and therapeutic needs that the caregivers cannot financially afford.]

5. It is not in the best interests of the child to be permanently placed in foster care with a fit and willing relative because:

[Note: Describe previous efforts to locate and evaluate relatives and the results. Describe the current emotional bond between foster parents and child.]

6. The foster parents are fully capable of and committed to permanently caring for the child because:

[Note: Explain why the Department believes the foster parents will be good caregivers and are permanently committed to the child. The report might point out that the barriers to higher priority options do not include the foster parents' unwillingness to take on full responsibility. The report might also point out evidence that removal of the child from the foster home would be traumatic or harmful.]

7. The Department recommends the following plan to ensure the stability of the foster placement:

[Note: This might include a ceremony in which the foster parents, biological parents (if possible) and the child are present, in which the court determines the placement should be permanent. This would include prominent statements in the agency records that the placement is to be permanent. This might also include authorization for the foster parents to confer directly with teachers and doctors, travel with the child on out-of-state vacations, make education decisions, and arrange for minor medical care. Finally, it might involve the signing of a permanent placement agreement by the foster parents, agency, and child (if age-appropriate).]

8. The following efforts were made, following the placement of the child into foster care, to finalize the child's permanency plan:

[Note: Briefly describe the problems causing continued separation of the child and parents, the services, if any, offered or arranged to address the problems since the last findings of reasonable efforts, and the agency's efforts to arrange or provide the services. Describe the efforts, if any, to arrange and finalize a new permanency plan for the child.]

9. If the child is placed in a home in a different state than the home of the child's parents, the placement continues to be appropriate and in the child's best interests for the following reasons:

[Note: If the child is placed in the same state as one or both of the child's parents, leave this space blank. Otherwise, explain why it is necessary to place the child in a different state. Federal law requires the court to make findings regarding the continuing necessity for out-of-state foster placements. 42 U.S.C. §675(5)(C).]

10. If the child is 16 or older, the child needs the following services to make the transition from foster care to independent living:

[Note: If the child is 16 or older, list and explain the services the child needs to transition from foster care to independent living. Federal law requires the court to make findings concerning the services needed to prepare the child for independent living. 42 U.S.C. §675(5)(C).]

11. The following information and recommendations are also of interest to the court:

[Note: This allows the agency to provide the court any other information supporting its decision and any other recommended court actions or orders.]

**When the recommendation is continuing group or institutional foster care, complete the following seven points:**

1. The Department requests that Johnny J. Jones continue indefinitely in a group, residential, or institutional foster care placement.

2. The child cannot and will not be able to adjust or function in a family setting because:

[Note: Explain why the child will not be able to function in a family setting until adulthood, including the child's diagnosis and the sources of that diagnosis. Include the names and credentials of those making the diagnosis, the duration and circumstances of the evaluation, and the specific behavior or reactions of the child that make the child unable to function in a family environment.]

3. A plan to continue parental involvement while the child remains in foster care, including visitation with the child's parents and siblings, if possible. If not possible, a plan for the child to form and maintain a close relationship with another adult or adults, who will function as parents to the child.

[Note: Unless parental rights have been terminated (in rare cases), the plan should include a specific plan for parental visitation and active involvement in the child's care while in placement. If parents cannot or will not be involved, other adults should play this role.]

4. A plan to prepare the child to live in the least restrictive possible setting at the earliest appropriate time:

[Note: The plan should include goals, tasks, and timetables for moving the child into the least restrictive practical setting. The plan should also indicate the goal for the child after the child reaches adulthood (i.e., whether the child is to be returned home, adopted, etc.).]

5. The following efforts were made, following the placement of the child into foster care, to finalize the child's permanency plan:

[Note: Briefly describe the problems causing continued separation of the child and parents; the services, if any, offered or arranged to address the problems since the last findings of reasonable efforts; and the agency's efforts to arrange or provide the services. Describe the efforts to arrange and finalize a new permanency plan for the child.]

6. If the child is placed in a home in a different state than the home of the child's parents, the placement continues to be appropriate and in the child's best interests for the following reasons:

[Note: If the child is placed in the same state as one or both of the child's parents, leave this space blank. Otherwise, explain why it is necessary to place the child in a different state. Federal law requires the court to make findings regarding the continuing necessity for out-of-state foster placements. 42 U.S.C. §675(5)(C).]

7. If the child is 16 or older, the child needs the following services to make the transition from foster care to independent living:

[Note: If the child is 16 or older, list and explain the services the child needs to transition from foster care to independent living. Federal law requires the court to make findings concerning the services needed to prepare the child for independent living. 42 U.S.C. §675(5)(C).]

8. The following information and recommendations are also of interest to the court:

[Note: This allows the agency to provide the court any other information supporting its decision and any other recommended court actions or orders.]

**When the recommendation is some other type of APPLA, complete the following 11 points:**

1. The Department requests that Johnny J. Jones remain in the Department's custody and to approve another planned permanent living arrangement for the child as follows: \_\_\_\_\_

2. It will not be safe to return the child to his/her biological parents or former legal caregivers within the next six months because:

[Note: Explain why return home would endanger or harm the child or is otherwise impractical.]

3. Termination of parental rights is not in the best interests of the child because:

[Note: Explain why termination of parental rights would not benefit the child. This might include an explanation that an adolescent will not consent to adoption and will resist other placements if parental rights are terminated.]

4. It is not in the best interests of the child to be permanently placed with an individual or couple serving as [legal guardian or custodian] because:

[Note: Explain why it is not possible to permanently place the child with an individual or couple with full and unsupervised legal responsibility for the child. This might include an explanation why relatives or other committed caregivers are not available. For example, the report might say that the foster parents are willing to adopt or take full legal responsibility, but that the child has a range of expensive special medical and therapeutic needs that the caregivers cannot financially afford.]

5. It is not in the best interests of the child to be permanently placed in foster care with a fit and willing relative because:

[Note: Describe previous efforts to locate and evaluate relatives and the results of such efforts. Describe the current emotional bond between foster parents and child.]

6. The arrangement for the child is permanent rather than temporary because.

[Note: Describe the plan to ensure the permanency of the living arrangement. Explain why this living arrangement for the child is likely to be permanent.]

7. There will be stability, predictability, and continuity in the arrangement because:

[Note: Describe additional plans to create stability and predictability in the child's life. There may be special assurances that specific professionals and volunteers will continue to work with the child indefinitely. Such arrangements may make it possible to avoid needless changes in placement.]

8. The child will maintain permanent ties with parents, family members, or other adults functioning as advocates, parent figures, and mentors because:

[Note: Describe the child's existing ties and contacts with parents, family members, or other adults. Describe the plan to create or help sustain relationships with adults in which the adult will play advocacy, parent, and mentor roles.]

9. If the child is placed in a home in a different state than the home of the child's parents, the placement continues to be appropriate and in the child's best interests for the following reasons:

[Note: If the child is placed in the same state as one or both of the child's parents, leave this space blank. Otherwise, explain why it is necessary to place the child in a different state. Federal law requires the court to make findings regarding the continuing necessity for out-of-state foster placements. 42 U.S.C. §675(5)(C).]

10. If the child is 16 or older, the child needs the following services to make the transition from foster care to independent living:

[Note: If the child is 16 or older, list and explain the services the child needs to transition from foster care to independent living. Federal law requires the court to make findings concerning the services needed to prepare the child for independent living. 42 U.S.C. §675(5)(C).]

11. The following information and recommendations are also of interest to the court:

[Note: This allows the agency to provide any other information supporting its recommendations for court actions or orders.]

I CERTIFY THAT ALL ABOVE STATEMENTS ARE TRUE:

\_\_\_\_\_

Principal Social Worker

\_\_\_\_\_

Date

\_\_\_\_\_

Additional Social Worker

\_\_\_\_\_

Date

APPROVED

\_\_\_\_\_

Social Work Supervisor

\_\_\_\_\_

Date

**COURT ORDER, PERMANENCY PLAN IS ANOTHER PLANNED PERMANENT LIVING ARRANGEMENT**

IN THE DISTRICT COURT OF [COUNTY], [STATE]  
999TH JUDICIAL DISTRICT

IN THE INTEREST OF:  
JOHNNY J. JONES

CAUSE NO. 99CM0000

On the \_\_\_\_ day of \_\_\_\_\_, 200\_\_, a hearing was held in the 999th Judicial District Court, the Honorable \_\_\_\_\_ presiding.

**I. APPEARANCES**

Parties and others present included the following:

- |   |  |
|---|--|
| <input type="checkbox"/> Mother _____               | <input type="checkbox"/> Attorney for Mother _____ |
| <input type="checkbox"/> Father _____               | <input type="checkbox"/> Attorney for Father _____ |
| <input type="checkbox"/> Father _____               | <input type="checkbox"/> Attorney for Father _____ |
| <input type="checkbox"/> Child _____                | <input type="checkbox"/> Advocate for Child _____  |
| <input type="checkbox"/> Principal Caseworker _____ | <input type="checkbox"/> Other Caseworker _____    |
| <input type="checkbox"/> Casework Supervisor _____  | <input type="checkbox"/> Government Attorney _____ |
| <input type="checkbox"/> Foster Parent _____        | <input type="checkbox"/> Foster Parent _____       |
| <input type="checkbox"/> Relative _____             | <input type="checkbox"/> Relative _____            |

Others (list) \_\_\_\_\_

**II. FINDINGS AND ORDERS**

THE COURT FINDS:

**When the decision is to permanently place the child with nonrelative foster parents, complete the following eight findings:**

- It will not be safe to return the child home because:  
[Note: The finding might specify why return home would endanger or harm the child or is otherwise impractical or the finding might incorporate or modify the Department's explanation.]
- Termination of parental rights and adoption are not in the best interests of the child because:  
[Note: The finding might incorporate or modify the Department's explanation.]
- It is not in the best interests of the child to permanently place the child with an individual or couple serving as [legal guardian or custodian free of Department oversight or supervision] because:  
[Note: The finding might incorporate or modify the Department's explanation.]

4. It is not in the best interests of the child to place the child with relatives who will be permanent foster parents because:

[Note: The finding might incorporate or modify the Department's explanation.]

5. The current foster parents are fully capable of and committed to permanently caring for the child because:

[Note: The finding might incorporate or modify the Department's explanation.]

6. The following efforts were made, following the placement of the child into foster care, to finalize the child's permanency plan:

[Note: The finding might incorporate or modify the Department's description of the state's efforts to reunify the family.]

The efforts were \_\_\_\_\_ were not \_\_\_\_\_ reasonable because \_\_\_\_\_.

7. If the child is placed in a home in a different state than the home of the child's parents, the placement continues to be appropriate and in the child's best interests for the following reasons:

[Note: If the child is placed in the same state as one or both of the child's parents, leave this space blank. Otherwise, explain why it is necessary to place the child in a different state. The finding might incorporate or modify the Department's explanation. Federal law requires the court to make findings regarding the continuing necessity for out-of-state foster placements. 42 U.S.C. §675(5)(C).]

8. If the child is 16 or older, the child needs the following services to make the transition from foster care to independent living:

[Note: If the child is less than 16, leave this space blank. If the child is 16 or older, list and explain the services the child needs to transition from foster care to independent living. The finding might incorporate or modify the Department's statement about such services. Federal law requires the court to make findings concerning the services needed to prepare the child for independent living. 42 U.S.C. §675(5)(C).]

**When the decision is to continue the child in a group, residential, or institutional placement, complete the following six findings:**

1. The child cannot and will not be able to adjust or function in a family setting because:

[Note: The finding might specify why the child will not be able to function in a family setting or the finding might specifically incorporate or modify the Department's explanation. In either case, the explanation should describe specific behavior or reactions of the child that make the child unable to function in a family environment.]

2. The following is the plan for continuing parental involvement while the child remains in foster care, including visitation with the child's parents and siblings, if possible. If such involvement is not possible, the following is a plan for the child to form and maintain a close relationship with another adult or adults, who will function as parents to the child:

[Note: The finding might incorporate or modify the Department's plan for the child's continuing involvement and visits with parents and siblings, or with other adults.]

3. The following plan will prepare the child to live in the least restrictive possible setting at the earliest appropriate time:

[Note: The finding might incorporate or modify the Department's plan for moving the child into the least restrictive practical setting as well as the Department's goal for the child after the child reaches adulthood (i.e., whether the child is to be returned home, adopted, etc.).]

4. The following efforts were made, following the placement of the child into foster care, to finalize the child's permanency plan:

[Note: The finding might incorporate or modify the Department's description of the state's efforts to reunify the family and, if applicable, to arrange and finalize another permanent home for the child.]

The efforts were \_\_\_\_\_ were not \_\_\_\_\_ reasonable.

5. If the child is placed in a home in a different state than the home of the child's parents, the placement continues to be appropriate and in the child's best interests for the following reasons:

[Note: If the child is placed in the same state as one or both of the child's parents, leave this space blank. Otherwise, explain why it is necessary to place the child in a different state. The finding might incorporate or modify the Department's explanation. Federal law requires the court to make findings regarding the continuing necessity for out-of-state foster placements. 42 U.S.C. §675(5)(C).]

6. If the child is 16 or older, the child needs the following services to make the transition from foster care to independent living:

[Note: If the child is less than 16, leave this space blank. If the child is 16 or older, list and explain the services the child needs to transition from foster care to independent living. The finding might incorporate or modify the Department's statement about such services. Federal law requires the court to make findings concerning the services needed to prepare the child for independent living. 42 U.S.C. §675(5)(C).]

**When the decision is to approve some other type of APPLA, complete the following 10 findings:**

1. It will not be safe to return the child home because:

[Note: The finding might specify why return home would endanger or harm the child or is otherwise impractical or the finding might very specifically incorporate or modify the Department's explanation.]

2. Termination of parental rights and adoption are not in the best interests of the child because:

[Note: The finding might incorporate or modify the Department's explanation.]

3. It is not in the best interests of the child to permanently place the child with an individual or couple serving as [legal guardian or custodian free of Department oversight or supervision] because:

[Note: The finding might incorporate or modify the Department's explanation.]

4. It is not in the best interests of the child to place the child with relatives who will be permanent foster parents because:

[Note: The finding might incorporate or modify the Department's explanation.]

5. The arrangement for the child is permanent rather than temporary because.

[Note: The finding might incorporate or modify the Department's explanation.]

6. There will be stability, predictability, and continuity in the arrangement because:

[Note: The finding might incorporate or modify the Department's explanation.]

7. The child will maintain permanent ties with parents, family members, or other adults functioning as advocates, parent figures, and mentors because:

[Note: The finding might incorporate or modify the Department's explanation.]

8. The following efforts were made, following the placement of the child into foster care, to finalize the child's permanency plan:

[Note: The finding might incorporate or modify the Department's description of the state's efforts to reunify the family and, if applicable, to arrange and finalize another permanent home for the child.]

The efforts were \_\_\_\_\_ were not \_\_\_\_\_ reasonable because \_\_\_\_\_.

9. If the child is placed in a home in a different state than the home of the child's parents, the placement continues to be appropriate and in the child's best interests for the following reasons:

[Note: If the child is placed in the same state as one or both of the child's parents, leave this space blank. Otherwise, explain why it is necessary to place the child in a different state. The finding might incorporate or modify the Department's explanation. Federal law requires the court to make findings regarding the continuing necessity for out-of-state foster placements. 42 U.S.C. §675(5)(C).]

10. If the child is 16 or older, the child needs the following services to make the transition from foster care to independent living:

[Note: If the child is less than 16, leave this space blank. If the child is 16 or older, list and explain the services the child needs to transition from foster care to independent living. The finding might incorporate or modify the Department's statement about such services. Federal law requires the court to make findings concerning the services needed to prepare the child for independent living. 42 U.S.C. §675(5)(C).]

**THE COURT HEREBY ORDERS:**

1. The child shall remain in the Department's [custody] and be placed on a permanent basis with his/her current foster parents [names of foster parents] on a permanent basis.

Or

The child shall remain in the Department's [custody] and continue on a permanent basis in a group, residential, or institutional foster care placement, with the following plan to achieve permanency.

Or

The child shall remain in the Department's custody in another planned permanent living arrangement for the child as follows: \_\_\_\_\_

[Note: This might incorporate or modify the Department's proposed planned permanent living arrangement.]

2. The Department of Children's Services shall implement the following plan to ensure the continuity and stability of the planned permanent living arrangement:

[Note: The court-approved plan might incorporate or modify the Department's proposed plan.]

3. The next hearing in this case shall be a [review] hearing and shall take place at \_\_\_\_\_[a.m.] [p.m.] on \_\_\_\_\_, 200\_\_, Courtroom \_\_\_\_\_.

4. The court further orders that:

[Note: This allows the court to provide additional instructions or orders. If none, leave this space blank.]

SIGNED this \_\_\_\_\_ day of \_\_\_\_\_, 200\_\_.

\_\_\_\_\_  
[Insert Name]  
Judge

*section 3*  
**TENDING TO DETAILS**

## INTERSTATE PLACEMENTS CHECKLIST

**DOES THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN (ICPC) APPLY TO THIS SITUATION?**

**DID THE AGENCY COMPLY WITH BASIC ICPC PROCEDURE?**

**DOES REGULATION 7 APPLY?**

**IS THERE A WAY TO SPEED UP THE HOME STUDY?**

- Border agreements
- Do own home study
- Contract for home study
- Provide information for the receiving state
- Use fax and e-mail
- Designate special caseworkers for out-of-state home studies

**HOW CAN PROBLEMS BE RESOLVED?**

- Administrator to administrator
- Judge to judge
- Secretariat
- Researching the law
- Subpoena the agency
- Contempt proceedings
- Reconsideration

**WHO RETAINS JURISDICTION?**

## INTERSTATE PLACEMENTS: APPLYING THE ICPC TO ASSURE PERMANENCE FOR CHILDREN *by Cecilia Fiermonte*

When placing children across state lines, the Interstate Compact on the Placement of Children (ICPC) applies. The ICPC is a binding agreement that states enter to safeguard children who must be placed across state lines. All 50 states, the District of Columbia and the U.S. Virgin Islands have adopted the compact, which requires the state receiving the child to grant approval before the child can be sent there.

If you've ever had a case dealing with the ICPC, you know it's not always clear how the ICPC applies. Many times, the approval process is long and arduous, and may frustrate even the most diligent attempts to move children to permanency quickly. Mistakes in processing information can further cause delay and keep children from moving into more appropriate placements.

While there are no magic solutions to delays caused by the ICPC approval process, practitioners can take steps to minimize delays, keep things running smoothly, and remedy problems as soon as they arise. Read on to learn when the ICPC applies, what steps to take at each stage of the process, and what to do if the process is unnecessarily delaying a permanent placement. Understanding the agency's role in getting ICPC approval for a placement will help you make the required ASFA findings that the agency has made reasonable efforts to finalize the child's plan.

When implementing ASFA's more technical requirements, remember to follow the spirit of ASFA as well. Although the child welfare agency is generally not penalized for delays caused by ICPC, those delays can be significant in the child's life. The ICPC helps ensure placements are safe, as ASFA requires. But we must also not lose sight of the goal of swift permanency for children. You can keep cases on track by working with all parties involved and marshalling resources when problems arise.

### Why follow ICPC?

The ICPC ensures children are not sent across state lines to unsafe placements. It also establishes necessary services for children in their new home states. By

delineating responsibilities of the sending and receiving states, the ICPC also protects states from being overburdened by placements referred from other states.

Violating the ICPC can result in penalties affecting the professionals involved in the case. The result can be disciplinary action, including revoking a license, or returning the child to the sending state without considering her best interests.<sup>1</sup> The worst result from noncompliance is placing the child in a dangerous or unfit home.

A compact violation occurs when a party sends a child across state lines without following proper procedure. Be sure to avoid the following common violations:

- ◆ sending a child to an out-of-state placement before receiving approval from the compact administrator;
- ◆ extending an out-of-state visit for a period beyond that allowed under the compact;
- ◆ not invoking the compact at all when the child is sent to an out-of-state caregiver, usually a relative.

Depending where the fault lies, a child welfare agency, court, or individual is subject to penalties for noncompliance.

### Does the ICPC apply to this situation?

The ICPC applies when a child is sent across state lines by a "sending agency" for a placement. A "sending agency" includes state officials, courts, and individuals.<sup>2</sup> The compact will apply in almost every case involving dependency. Generally, once the dependency court becomes involved, even before any type of adjudication, the parent's rights are considered diminished, and any placement is considered an agency placement by the court that must be made through the ICPC. Unless the court dismisses the dependency action, without ANY CONTINUED OVERSIGHT, the ICPC applies.

*Relative Placements.* The ICPC *does not* apply when a placement is made between the following parties who are relatives of the child: parent, stepparent, grandparent, adult sibling, adult aunt or uncle, or nonagency

## About the ICPC

- ◆ The ICPC is a compact enacted by all 50 states, the District of Columbia, and the U.S. Virgin Islands. It is binding on the states and supercedes state laws to the contrary.
- ◆ The compact is made up of 10 articles.
- ◆ Regulations are promulgated by the Association of Administrators of the Interstate Compact on the Placement of Children (AAICPC).
- ◆ The compact is administered by the American Public Human Services Association (APHSA) by providing Secretariat services to the AAICPC.
- ◆ Opinions written by the secretariat of the AAICPC offer guidance on issues involving the ICPC.
- ◆ The secretariat provides legal, technical, and administrative services to states through APHSA.
- ◆ Compact administrators are assigned in each state to carry out the compact.

guardian.<sup>3</sup> However, according to the ICPC regulations, this exception will not apply if the rights of any of those parties have been diminished.<sup>4</sup> The sending party to whom the exception applies must have, before the child is placed, the full legal right to plan for the child, and that right must not have been terminated, severed, or diminished by any court action.

To bypass the ICPC, courts sometimes make “direct placements” with a relative, believing the compact need not be invoked. This situation typically arises when, for example, an offending parent is brought into court at a temporary shelter care hearing and the nonoffending out-of-state parent wishes to gain custody. A federal case, *McComb v. Wambaugh*,<sup>5</sup> held the ICPC does not apply to placement with a parent. However, the Association of Administrators of the Interstate Compact on the Placement of Children (AAICPC) contends that the *McComb* court applied unsound reasoning to reach its decision.<sup>6</sup>

*Placements with noncustodial parents.* If the court transfers the child to a noncustodial parent, the compact *does not* apply as long as the court has no evidence or **does not seek evidence** that the parent is unfit and the court

decides that retaining its jurisdiction is not necessary.<sup>7</sup> That is, when the court has no safety concerns that warrant seeking further information, the court may dismiss the case and release the child to the noncustodial parent without invoking the compact.

Courts should not refrain from seeking information simply to avoid the compact. If the court has no information on an out-of-state parent, discharging the child to that person could put the child in danger. Discharging the child and dismissing the court’s jurisdiction can only be accomplished once all issues of abuse and or neglect have been resolved by the court. Dismissing a case solely to avoid the compact may violate the compact if the dismissal puts the child at risk or leaves her without services.

Many courts apply the ICPC to placement of a dependent child with a noncustodial parent. For a thorough discussion, see *Arizona Department of Economic Security v. Hon. John S. Leonardo*,<sup>8</sup> where the Arizona Court of Appeals reversed a decision not to apply the ICPC to an interstate placement where the father had full custody, was charged with abuse, and the mother in another state requested that the children be placed with her. The court relied on Regulation 3, which went into effect in April 2000, after *McComb* was decided. The court found that Regulation 3 required that the ICPC be applied in that situation because the sending agency was the child protection agency and the receiving parent was a parent who lacked full rights to the child.

### Does the ICPC apply to guardianships?

As discussed above, Section VIII of the compact exempts transfers of children between certain relatives and nonagency guardians. Creating a guardianship merely to fit within the exception is recognized as an attempt to evade the ICPC.<sup>9</sup> Even when guardianship is the agreed plan, there must be a determination that it is in the best interests of the child, not merely an attempt to circumvent the ICPC. Some situations may be appropriate for guardianship, such as when the child is older and the proposed caretaker is known to the agency. There must be some assurance that the child will be protected and have her needs met under the guardianship arrangement. Avoiding the ICPC could put a child in an unsafe situation or deprive her of services.

Courts will also often order extended visitation with the out-of-state caregiver before the agency approves the placement. Whether a stay in the receiving state is

a visit instead of a placement is determined by the duration, purpose, and intent of the stay. The ICPC generally limits these visits to 30 days. The visit can exceed 30 days only if the whole visit takes place within the time period that constitutes the child's school vacation, as defined by the child's academic calendar. The 30-day visit may not be extended by interrupting the visit then ordering a new 30-day visit.<sup>10</sup>

### **Did the agency comply with basic ICPC procedure?**

Knowing ICPC procedure will help you understand what actions to take to move cases along. For judges, knowing ICPC procedure will help you draft court orders that provide clear direction to caseworkers.

Basic procedure in ICPC cases is as follows:

1. The agency in the sending state sends an information packet to the sending state compact administrator who reviews it for completeness and compliance with Article 3 of the ICPC.
2. The sending state compact administrator sends the packet to the compact administrator in the receiving state who checks for completeness and compliance with the laws of the receiving state and refers it to the local district office.
3. The local district then must complete a home study and advise whether the proposed placement appears contrary to the interests of the child.
4. The receiving state compact administrator makes a determination, based on the recommendation of the local district, of whether the proposed placement appears contrary to the interests of the child and sends notice of that determination to the receiving state compact administrator, the sending state compact administrator, and the local agency in the sending state.

Delays tend to occur for two reasons: the agency sends incomplete documentation, or the receiving state does not complete the home study promptly. The caseworker should be directed to send information via overnight mail, and include prepaid, preaddressed overnight delivery envelopes for the compact administrator to use when sending information to the receiving state.<sup>11</sup> The total recommended timeframe from referral to receipt of approval is about 30 business days for nonpriority placements.<sup>12</sup>

The receiving state's local agency should make a recommendation within 30 days of receiving the referral. That means the home study should have been

completed within that time. Judges should ask the agency to report to the court in six weeks whether that has been done, and recalendar the case if necessary. If no recommendation has been received, Regulation 7 may be used to speed the process. Judges should include in initial orders that the court expects information from the receiving state on its progress at regular intervals. The agency should come to court prepared to report on progress. Judges' orders should contain all necessary information and reach the local agency within two days.

Asking the following questions will help keep track of the case:

- ◆ Has the receiving state gotten all the information it needs to make a determination?
- ◆ If not, specifically what must be sent?
- ◆ How long has the receiving state had the completed referral?
- ◆ Has the receiving state started the home study?
- ◆ How much longer will it take the receiving state to complete the home study?
- ◆ Can the local agency provide any information that would help the receiving state agency reach a decision?

### **Does Regulation 7 apply?**

Regulation 7 can be used to speed placements that are considered "priority." It may be applied when the court has made specific findings in its order that:

- ◆ The proposed recipient is a relative of the child and belongs to the class of persons described in Article VIII(a) of the compact (parent, stepparent, grandparent, adult sibling, adult aunt or uncle, or nonagency guardian).

AND

- ◆ The child is under two years, OR
- ◆ The child is in an emergency shelter, OR
- ◆ The court finds the child has previously spent substantial time in the home of the proposed placement recipient, OR
- ◆ Within 30 days of the receiving state having a complete referral and supporting documentation, the sending agency has not received a determination.

Regulation 7 does not apply when the placement is for licensed or approved foster care or adoption. Under ASFA, relatives must be licensed under the same standards as nonrelatives; this can delay relative

placements. However, when placing a child with an out-of-state caregiver who wishes to become a foster parent the placement may be made under a different arrangement until the licensure is completed, as long as the caregiver agrees to accept the child without receiving foster care board payment right away. The agency should advise the caregiver of available financial assistance.

When using Regulation 7, ask the following questions to be sure its requirements are met:

- ◆ Does the court order refer to specific facts that support the finding that Regulation 7 should apply in this case?
- ◆ Does the order contain the name, address, phone, and fax number of the court?
- ◆ Was the court order sent to the agency within two business days?
- ◆ Within three days of receiving the court order, has the order, ICPC-100A (The Interstate Compact Placement Request) and supporting documents been sent by overnight mail with a cover notice calling attention to the priority status of the request for placement?
- ◆ Has the sending state compact administrator within two days sent the priority request to the receiving state compact administrator?

The receiving state compact administrator must fax, within 20 days of receiving the request, a determination to the administrator in the sending state. If the receiving state fails to do so, it is considered out of compliance. However, the receiving state is not out of compliance if either state compact administrator within two days of receiving the proposed placement requests additional information needed to process the requests.<sup>13</sup> When the receiving state is out of compliance, the court in the sending state may so inform the court of the receiving state, provide that court with relevant documentation, and request the court's assistance, as provided by Regulation 7.<sup>14</sup>

Some authorities find that the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) also provides a basis for courts to work together to resolve ICPC issues. One interpretation is that the court's ability under the UCCJEA to ask for procedural assistance is not limited to proceedings arising under the act, and that allowing courts to cooperate supports the statute's purpose, which is to promote resolution of proceedings involving children.<sup>15</sup> One example of the

type of cooperation that might take place is the receiving state judge, after being contacted by the sending state judge might ask a representative from the local district to explain to the court why the home study has been delayed.

### **Is there a way to speed up the home study?<sup>16</sup>**

States have devised strategies for getting home studies done. Some of the following procedures can be done case-by-case; others require long-term thought and planning. Judges may want to exercise their authority to institute some of these mechanisms.

*Border agreements.* Neighboring states sometimes enter border agreements, which allow caseworkers to conduct home studies in border states. The required paperwork must still be processed through the compact in the typical border state agreement, but the sending state caseworker can do the home study in a timeframe which is more acceptable to the sending state. Since the sending state caseworker has more information, the home study may get done faster. Of course, any state laws of the receiving state, such as licensure requirements, must be followed. For example, if caseworkers who perform home studies in the receiving state must be licensed social workers, the sending state must comply with that requirement.

*Do own home study.* An expensive option, but one which may make sense when a case is urgent, is to send the caseworker to the receiving state to do the home study. This would have to be done in collaboration with the receiving state. The compact administrator would have to find that there is merit to deviating from typical procedure. The compact administrator must also retain the legal duty to determine whether the placement can be made, even when it is the sending state that performs the home study. The sending state is bound by the determination of the receiving state.<sup>17</sup> Further, the sending state must comply with the laws of the receiving state, including any licensure requirements for those who perform home studies.<sup>18</sup>

*Contract for home study.* A sending state may wish to contract for a home study from a contractor in the receiving state. It is a good idea to first seek approval from the receiving state because it may not wish to be bound later in the case by a determination made outside its own agency. If this route is acceptable to both states,

## A Timetable for Placement

### Local Sending Agency

Public/private child welfare agency; court; individual

#### Step 1: 7-10 business days

- ◆ Completes ICPC-100A.
- ◆ Compiles needed accompanying documents.
- ◆ Prepares cover letter.
- ◆ Submits to sending state compact administrator.

#### Step 7: 7 business days

- ◆ If placement request is approved, child may be moved into receiving state.
- ◆ If placement request is denied, child may not be moved into receiving state.

### Sending State Compact Administrator

Appropriate public authority (Dept. of Public Welfare or its equivalent)

#### Step 2: 3 business days

- ◆ Reviews ICPC-100A for completeness.
- ◆ Reviews accompanying documents.
- ◆ Affixes signatures on ICPC 100-A.
- ◆ Forwards packet to receiving state compact administrator.

#### Step 6: 3 business days

- ◆ Receives information on placement approval/denial.
- ◆ Notifies local sending agency.

### Receiving State Compact Administrator

Appropriate public authority (Dept. of Public Welfare or its equivalent)

#### Step 3: 3 business days

- ◆ Reviews ICPC-100A for completeness.
- ◆ Reviews accompanying documents.
- ◆ Submits requests to local receiving agency for home study or evaluation.

#### Step 5: 3 business days

- ◆ Reviews recommendation.
- ◆ Assures state laws will not be violated.
- ◆ Approves/denies placement on ICPC-100A.
- ◆ Notifies local receiving agency and sending state compact administrator.

### Local Receiving Agency

Public/private child welfare agency; court; individual

#### Step 4: 30-60 business days

- ◆ Conducts home study or evaluation.
- ◆ Completes report.
- ◆ Makes recommendation.
- ◆ Submits recommendation to receiving state compact administrator.

Source: National Adoption Center and The Adoption Exchange Association. *Placing Children Across Geographic Boundaries: A Step-by-Step Guide for Social Workers*, undated booklet.

it is important to determine the quality of the contracting agency.

*Provide information for the receiving state.* Without actually doing the home study, the caseworker in the sending state can gather as much information as possible to provide to the receiving state to expedite the home study.

*Use fax and e-mail.* Fax and e-mail should be used to notify the receiving state's local agency of the need for a home study, check on progress, and provide information. Even when original materials must be sent by mail, e-mail and fax can make it possible to share information quickly to move things along.

*Special caseworkers for out-of-state home studies.* Ideally, states would have caseworkers designated to give priority to out-of-state home studies. At this point, no law or policy gives states an incentive to do this. Cook County, IL, which includes Chicago, has contracted with a private agency, Kmetko and Associates Ltd., to eliminate backlogs in out-of-state placements. Kmetko's services include performing home studies, writing quarterly reports, and supervising and supporting relative caregivers. According to Fred Dillon, MSW, an interstate services caseworker at Kmetko, these services can move children to permanency more quickly. (See the Resources appendix for more information.)

### **How Can Problems Be Resolved?**

*Administrator to administrator.* According to Dennis Eshman, Esq., secretariat of the Interstate Compact on the Placement of Children, compact administrators do very well at negotiating concerns. They are encouraged to collaborate and cooperate with fellow administrators. If your case is at an impasse, consider writing a specific letter to the compact administrator. *The Interstate Compact on the Placement of Children: A Manual and Instructional Guide for Juvenile and Family Court Judges*, published by the American Public Human Services Association (202/682-0100), contains a list of compact administrators with contact information. The list is also available on the AAICPC website at <http://www.icpc.aphsa.org>

*Judge to judge.* Regulation 7 expressly gives judges authority to contact judges in the receiving state. Judges should consider requesting assistance from the other

courts, even in nonpriority cases. For more on the ethical considerations, see *The Interstate Compact on the Placement of Children: A Manual and Instructional Guide for Juvenile and Family Court Judges*.

*Secretariat.* The secretariat usually helps resolve disputes over how to interpret the compact. According to Secretariat Dennis Eshman, most disputes are resolved satisfactorily by letter. The secretariat issues opinions when a state requests guidance on issues that apply generally. The secretariat responds to requests for guidance from compact administrators.

*Researching the law.* Case law in your state, or rationale from other states' cases may help you resolve your dispute. The American Public Human Services Association has published a manual on ICPC cases that may be a good place to begin your research.<sup>19</sup>

*Subpoena the agency.* States have reported that subpoenaing the compact administrator in the sending state to explain delays can get the attention of the receiving state and make things move more quickly.

*Contempt proceedings.* While not to be taken lightly, the court does have the option of contempt proceedings when court orders are not followed.

*Reconsideration.* The judge in the sending state is bound by the receiving state's determination of whether the placement appears contrary to the interests of the child.<sup>20</sup> The receiving state can deny a placement if the sending state's financial plan is not adequate. If you disagree with the determination, ask for a reconsideration, or ask that additional facts be considered. Consider asking the compact administrator to assist, as discussed above.

### **Who retains jurisdiction?**

Once the placement is made, the sending state retains jurisdiction and financial responsibility for the child. Retaining jurisdiction includes the ability to return the child. As long as the child is under your court's jurisdiction, it is important that reviews continue to be held as required by law. To review the case, the court will have to receive periodic reports. Ask the agency to provide reports in time for review hearings. Generally, these reports are generated quarterly, biannually, or annually.

The jurisdiction of the sending state can only be

terminated in one of the following instances:

- ◆ the child is adopted;
- ◆ the child reaches the age of majority;
- ◆ the child becomes self-supporting; or
- ◆ the child is discharged with the approval of the appropriate authority in the receiving state.<sup>21</sup>

It is tempting for the court to dismiss cases that are physically far-removed from the court, but disregarding the requirement to retain jurisdiction violates the compact.

## Endnotes

1. *Court Cases of the Interstate Compact on the Placement of Children: Briefs and Legal Analysis*. Washington, D.C.: Association of the Administrators of the Interstate Compact on the Placement of Children, an affiliate of the American Public Human Services Association, 2000, 6-9.
2. Interstate Compact on the Placement of Children (ICPC), Art. II (b).
3. ICPC, Art. VIII(a).
4. ICPC Reg. 3, 6 (a)(2).
5. *McComb v. Wambaugh*, 934 F.2d 474 (3d Cir. 1991).
6. *Court Cases of the Interstate Compact on the Placement of Children*, 2000, 5.
7. ICPC Reg. 3, 6(b).
8. 22 P.3d 513 (Ariz. Ct. App. 2001).
9. Secretariat Opinion, August 1998.
10. ICPC Reg. 9.
11. As suggested in *Placing Children Across Geographic Boundaries: A Step-by-Step Guide for Social Workers*. Philadelphia, PA: National Adoption Center, and Denver, CO: The Adoption Exchange Association, 2000.
12. Timeframes recommended by the Administrators of the Interstate Compact on the Placement of Children.
13. ICPC Reg. 7, 5(b)(2).
14. *Ibid.*
15. Conversation with Patricia M. Hoff, Esq. Montgomery County, MD, January 2001.
16. Much of this information was adapted from Seibel, Barbara (ed.) *The Interstate Compact on the Placement of Children: A Manual and Instructional Guide for Juvenile and Family Court Judges*. Washington, D.C.: American Public Human Services Association, and Reno, NV: National Council of Juvenile and Family Court Judges, 2001.
17. ICPC, Art. III(d).
18. ICPC, Art. III(a).
19. *Court Cases of the Interstate Compact on the Placement of Children: Briefs and Legal Analysis*, Association of the Administrators of the Interstate Compact on the Placement of Children, 2000.
20. ICPC, Art. III(d).
21. ICPC, Art. V(a).

## **SAMPLE COURT ORDER FOR INTERSTATE PLACEMENT**

**CALIFORNIA JUDICIAL COUNCIL FORM ICPC PRIORITY – FINDINGS AND ORDERS (JV-567)**

The following sample court order is used in California to handle interstate placements under Regulation 7 of the Interstate Compact on the Placement of Children.



shall transmit a copy of this order, a completed form ICPC-100A, and supporting documentation to the Compact Administrator of the sending jurisdiction with a cover notice of the priority status of this request for placement.

7. The Compact Administrator of the sending jurisdiction and all other persons to whom Article VII of the ICPC applies shall comply with Regulation 7 and shall fully implement the procedures for the request for priority placement.

8. (Sending agency): \_\_\_\_\_ shall:

\_\_\_\_\_ a. Take whatever additional steps are necessary, including follow-up contacts, to insure that the process is completed in a timely manner so as to protect the interests of the child; and

\_\_\_\_\_ b. Inform this court promptly and on a regular basis of the progress and results of this order.

9. Hearing for \_\_\_\_\_ progress report \_\_\_\_\_ further disposition \_\_\_\_\_ other (specify):

Note: Under Article V (a) of the ICPC, the sending agency shall retain jurisdiction over the child and the sending agency shall continue to assume financial responsibility for the support and maintenance of the child during the period of placement.

Date:

\_\_\_\_\_  
(PRINTED NAME OF JUDICIAL OFFICER)

\_\_\_\_\_  
JUDICIAL OFFICER



## **ADOPTION SUBSIDIES CHECKLIST**

**HAS THE AGENCY INFORMED THE CAREGIVER ABOUT THE POSSIBILITY OF AN ADOPTION SUBSIDY?**

**IF ADOPTION ASSISTANCE AND COMPREHENSIVE HEALTH SERVICES ARE ESSENTIAL ELEMENTS OF A POST-ADOPTION PLAN FOR THE CHILD, HAS THE AGENCY INFORMED THE CAREGIVER?**

**TO HELP ENSURE THAT THE ADOPTION WILL LAST, HAS THE AGENCY GIVEN THE CAREGIVER A REALISTIC UNDERSTANDING OF THE FINANCIAL RISKS AND COSTS OF CARING FOR THE CHILD? HAS IT EXPLAINED POSSIBLE SOURCES OF FINANCIAL ASSISTANCE TO THE FAMILY AFTER ADOPTION?**

**HAS THE AGENCY DETERMINED WHETHER THE CHILD IS ELIGIBLE?**

**HAS THE AGENCY EXPLAINED TO THE CAREGIVERS THAT THE CHILD'S ELIGIBILITY DOES NOT DEPEND ON THEIR INCOME AND FINANCIAL RESOURCES, BUT ONLY ON THE CHILD'S SITUATION?**

**IF THE AGENCY HAS DETERMINED THE CHILD IS NOT ELIGIBLE, HOW CAN THIS BE CONFIRMED?**

**IF THE CHILD IS NOT ELIGIBLE FOR THE FEDERAL SUBSIDY, HAS THE AGENCY ATTEMPTED TO SECURE A STATE SUBSIDY?**

**HAS THE AGENCY EXPLAINED TO THE CAREGIVERS WHAT IS COVERED IN THE ADOPTION ASSISTANCE AGREEMENT?**

**HAS THE CAREGIVER BEEN ADVISED THAT THE ADOPTION ASSISTANCE AGREEMENT IS NEGOTIABLE?**

**HAS THE REQUIRED DOCUMENTATION BEEN PROVIDED?**

**HAS THE AGENCY ANTICIPATED FUTURE NEEDS OF THE CHILD AND SERVICES TO ADDRESS THEM, AND HAS THE AGENCY ADVISED THE CAREGIVER THAT THE AGREEMENT CAN BE RENEGOTIATED LATER?**

**HAS THE CAREGIVER BEEN ADVISED THAT NONRECURRING ADOPTION EXPENSES MAY BE AVAILABLE?**

**HAS THE FAMILY BEEN INFORMED OF THE POLICIES AND PROCEDURES INVOLVED WHEN MOVING TO A NEW STATE?**

**HAS THE AGENCY EXPLAINED TO THE CAREGIVER WHEN ADOPTION ASSISTANCE ENDS?**

**IF THERE ARE DELAYS, WHAT IS THE SOURCE?**

**IF THE AGENCY HAS FOUND THE CHILD INELIGIBLE OR HAS REACHED AN IMPASSE, HAS THE CAREGIVER BEEN ADVISED OF THE RIGHT TO A FAIR HEARING?**

## REASONABLE EFFORTS TO SECURE ADOPTION SUBSIDIES

by Jennifer Renne

Adoption subsidies play an important role in achieving permanency for children. The agency's reasonable efforts to finalize a permanency plan should include informing caregivers about adoption subsidies and securing them when appropriate. For many children, adoption assistance can make adoption possible.<sup>1</sup> Denial of the subsidy, or an insufficient subsidy can be a barrier to permanency.

Before 1980, all states had adoption subsidy programs, however, they were not federally funded. In passing the Adoption Assistance and Child Welfare Act of 1980, Congress established the Title IV-E adoption assistance program as a federal entitlement that *must* be provided to those who are eligible.<sup>2</sup> States must follow federal requirements to receive federal IV-E adoption assistance matching funds. In addition to the federal subsidy program, all states continue to have state-funded adoption assistance programs for children who do not meet federal eligibility criteria.

Subsidy issues usually arise when the plan is adoption, but are important and relevant when considering other permanency plans. For example, caregivers may be reluctant to express a willingness to adopt due to an unawareness of the availability of a subsidy or the range of possible benefits. In addition, when considering placements other than adoption, caregivers may not understand the financial implications of the different options.<sup>3</sup>

In addition to delaying permanence, a lack of a subsidy or an insufficient subsidy can lead to adoption disruption<sup>4</sup> later. A lack of services or resources to address a child's special needs can put pressure on the family (see examples, p. 110). Judges, attorneys, and agency professionals must know about adoption subsidies and understand that arranging for a good subsidy is an element of reasonable efforts.

This article suggests questions to ask to determine whether the agency has made reasonable efforts to secure an adoption subsidy. These questions also explore the agency's efforts to provide needed supports and services to supplement the subsidy and medical

assistance. Ask these questions:

- ◆ during permanency hearings, before and after adoption has been selected as the permanency plan; and
- ◆ when the agency is working toward another permanent plan, to ensure the parties have not erroneously ruled out adoption as a viable plan based on a misunderstanding or lack of knowledge about subsidy.

### **Has the agency informed the caregiver about the possibility of an adoption subsidy?<sup>5</sup>**

If an adoptive resource has been identified, find out if any subsidy issues are creating barriers to finalizing the adoption.<sup>6</sup> Sometimes the availability of an adoption subsidy can be a decisive factor in choosing adoption or other permanency alternatives. Federal law requires the agency to routinely inform caregivers about adoption subsidies, and advocates and judges should make sure this is happening.

The adoption subsidy amount is based on the circumstances of the adoptive family and the needs of the child.<sup>7</sup> It generally can be no higher than what the child is eligible for under IV-E foster care. The child can get a higher subsidy if the child is eligible for "specialized foster care." In states that do not have "specialized care rates," the amount of the subsidy can be negotiated up to what the child would have received had the child remained in foster care. In addition, states are sometimes willing to agree to provide special services for the child or family.

In some states, adoption assistance agreements can include regular monthly cash payments, Medicaid, social services to the family, and nonrecurring adoption expenses. The federal government and the state share the costs of adoption assistance for those children who meet federal eligibility requirements.<sup>8</sup>

For children who do not meet federal eligibility requirements, some states will pay the entire cost of the subsidy. Most states will also provide Medicaid. Consult your state law for more information on state-only adoption assistance.

## Case Studies: How Adoption Subsidies Help

- ◆ A grandmother is reluctant to adopt her two-year-old grandson who was born cocaine positive and HIV positive. The child requires frequent trips to the doctor's office, and a complicated medication regime. His grandmother is concerned that he will need expensive treatment in the future that she will be unable to afford. Her subsidy can address all of the boy's current health needs, and include a provision for renegotiation if his needs change.
- ◆ A 14-year-old child has mental health problems, and her caregivers are concerned about the unpredictable nature of her future needs. She may be at risk of developing deeper emotional problems associated with severe, traumatic physical abuse. The adoptive parents can negotiate a subsidy agreement that includes Medicaid, a fixed monthly payment, and the possibility of an upgrade to the "specialized foster care rate" in the future.
- ◆ A foster family has provided a loving home to a sibling group of five for three years. Because of the multiple needs of so many children, the caregivers are reluctant to commit to adoption. Securing an adoption subsidy as well as other services that will continue until the children reach the age of 18 will be a crucial factor in the foster family's decision to adopt the children

### **If adoption assistance and comprehensive health services are essential elements of a post-adoption plan for the child, has the agency informed the caregiver?**

Merely notifying caregivers of the availability of the subsidy is usually not enough. Some caregivers, in particular relatives, think accepting a subsidy for the child minimizes or undermines their commitment to the child, or that it could lead to that perception. Others resist accepting what they perceive as a government handout.

Caregivers need to understand that in committing to raising the child, unforeseen circumstances may make following through on this commitment difficult. The caseworker should thoroughly discuss these issues with

the caregivers, and encourage them to consider applying for the subsidy when appropriate, including promises to provide additional services. The caseworker should further address any misconceptions the caregiver has about the subsidy and should explain that sometimes Medicaid coverage is insufficient, and there may be a need for more services.

### **To help ensure that the adoption will last, has the agency given the caregiver a realistic understanding of the financial risks and costs of caring for the child? Has it explained possible sources of financial assistance to the family after adoption?**

Ideally, adoption subsidies are readily available to help the caregiver cover the needs of the child through adulthood. However, sometimes the subsidy is not enough. Sometimes a child's special needs—such as for psychiatric care or physical therapy—do not emerge until well after adoption, imposing extreme financial burdens on the adoptive parents. These and other possible circumstances may place strain on the adoptive caregivers and cause them to question their commitment to the adoption.

It is critical, therefore, that the agency inform the adoptive caregivers about the financial risks and burdens that may arise after adopting the child. By explaining these risks in advance, the agency will alert the caregivers to their need for subsidy, eliminate surprises later, and help adoptive caregivers get through trying periods.

The agency should give a realistic picture of the kinds of financial issues that could arise, discuss their potential impact, and make sure adoptive caregivers understand available avenues for addressing them. The agency should frankly discuss with adoptive caregivers their need to avoid the risk of disrupting the adoption due to financial concerns.

### **Has the agency determined whether the child is eligible?**

For children who qualify, federal adoption assistance is an entitlement. The agency may not refuse assistance if the child is eligible. Eligibility for the federal subsidy is complicated, and children must meet the following four criteria:

1. The child was eligible, before adoption, for assistance under one of two programs:

- ◆ Foster care or adoption assistance under Title IV-E. The child (or the child’s birth family) must have been eligible to receive federal AFDC. Even though AFDC was discontinued in 1996, a child’s eligibility for Title IV-E is based on the states’ AFDC eligibility standards as of July 16, 1996.<sup>9</sup>
  - ◆ Supplemental Security Income (SSI), a program for low-income people with disabilities.<sup>10</sup>
2. The child has special needs as defined by the state’s definition of special needs.<sup>11</sup> Special needs may include certain medical, emotional, mental health conditions; and membership in a minority, sibling, or age group.<sup>12</sup>
  3. The child could not be placed for adoption without a subsidy. In other words, the state must make a “reasonable but unsuccessful effort to place the child with appropriate adoptive parents [without providing any assistance].<sup>13</sup> This requirement can be waived if the child already has a significant relationship or significant emotional ties with the caregiver.<sup>14</sup>
  4. There has been a judicial determination that the child cannot or should not be returned home. Obviously, if the child’s parents’ rights have been terminated, this requirement is satisfied.

States may not impose additional eligibility criteria for federal assistance beyond what is required by federal law.

**Has the agency explained to the caregivers that the child’s eligibility does not depend on their income and financial resources, but only on the child’s situation?**

Caregivers sometimes believe their income is a factor in determining the child’s eligibility. The caregivers’ financial resources have no bearing on the child’s eligibility for federal assistance. The child’s *eligibility* is determined according to the criteria discussed above. However, some states consider the family’s income in negotiating the actual subsidy amount. The *amount* of the federal and state subsidy may vary from state to state depending on whether the state considers the financial situation of the caregivers. In the federal and state programs the subsidy amount is based on an individualized assessment.

**If the agency has determined the child is not eligible, how can this be confirmed?**

After verifying that the prospective adoptive parent has applied for the subsidy, and the application has been denied, ask the caseworker why the child is ineligible for an adoption subsidy. Ask the agency for a copy of the denial letter stating the basis for the denial. The caregivers are entitled to a written response to their application. If you are unsatisfied with the information the agency provides, it may be necessary to ask or order the child’s representative to look into the issue.

**If the child is not eligible for the federal subsidy, has the agency attempted to secure a state subsidy?**

All states and the District of Columbia have state-funded adoption assistance programs. The federal adoption assistance program was not intended to replace state programs, but to supplement them.<sup>15</sup> For special needs children who do not meet federal eligibility guidelines, be sure to ask whether the agency has determined if the child is eligible for a state-funded adoption subsidy. Eligibility criteria varies among states.

**Has the agency explained to the caregivers what is covered in the adoption assistance agreement?**

The agreement will almost always include a fixed monthly payment. Occasionally, the agreement will just be for medical assistance, and will not include a monthly stipend. The amount of the monthly payment is negotiated, and is based upon an assessment of the child’s needs and the family’s ability to meet these needs. Medicaid is automatic for federally matched adoption assistance and for nonfederally matched adoption subsidies in most states. But, in either case, a family’s private medical insurance should be used first as Medicaid is the payor of last resort. Specific additional services can be included (see next question), as well as nonrecurring adoption expenses, such as legal expenses. Sometimes a state will provide these supports and services, but they may not be a part of the adoption assistance agreement.

**Has the caregiver been advised that the adoption assistance agreement is negotiable?**

Adoption assistance agreements typically contain standard language regarding what the agreement covers. Agencies are sometimes reluctant or resistant to negotiate, therefore parties are sometimes not advised

that all adoption assistance agreements should be individually negotiated based on the needs of the child and the specific circumstances of the adopting family. Usually, adoption assistance consists of only the monthly payment and medical assistance which, under federal law, are the only entitlements. Other services may be negotiable and discretionary. Families and agencies can discuss and negotiate for additional services, including:

- ◆ **Medical services beyond what is covered under Medicaid.** If a child has specialized medical needs (e.g., medications, surgeries, prosthetic devices), these needs should be met.
- ◆ **Mental health services.** Some specialized services are not covered by Medicaid. It is best to identify potential mental health problems, from the child's family of origin's history, or from the child's personal history. In some cases, counseling for the family and the child will be included.
- ◆ **Educational services.** Children exposed to drugs or alcohol in utero, or who have had damaging early life experiences, may need specialized educational services (e.g., speech and language specialist, occupational therapist). Although it is unusual to incorporate educational services into an adoption assistance agreement, the judge can ask whether the agency is working with the Department of Education to meet the child's educational needs.<sup>16</sup>
- ◆ **Respite care.** Respite services may be important to maintain the well-being of the family unit and preserve placements.
- ◆ **Specialized day care.** Some families may need to place their children in day care, often requiring day care providers trained to meet special needs.
- ◆ **In-house support.** This could include housekeeping and personal care for the child.

Although most children will qualify for the basic rate, each subsidy agreement should be tailored to meet the needs of each family. Documentation supporting the level of subsidy should be submitted. Funding for these services may be limited, and availability of such funding may vary from state to state. Although some of the services listed here can be provided by other child and family serving agencies, caregivers should be advised that the process of identifying a child's needs, and the

family's ability to meet those needs is important.

#### **Has the required documentation been provided?**

If the child's special needs are based on the child's health, the federal regulations require that documentation of the special needs be provided by a medical doctor, a psychiatrist, or a psychologist. The medical and mental health professionals must specify a current condition or problem, not the mere possibility of a future concern. They should describe any testing performed, the child's diagnoses, behaviors, treatment recommendations, and prognosis.

#### **Has the agency anticipated future needs of the child and services to address them, and has the agency advised the caregiver that the agreement can be renegotiated later?**

Because some children may develop problems in the future that are not apparent at the time of the initial adoption subsidy agreement, subsidies can be renegotiated when new issues arise. Ask whether the caseworker has explored the child's future needs with treatment professionals, school personnel, relatives, caregivers, and others in the child's life to identify future support needs. For example, ask whether the child has shown any behaviors that may lead to future problems.

Many caregivers will want a clause in the agreement saying the agreement can be renegotiated to include additional services. If the child will be receiving the basic rate, caregivers may want to negotiate the possibility of a future increase, to include any new "specialized rate" that the child may be eligible for. Recognize, however, that under the Title IV-E program, children only have a right to receive up to the amount they would have received had they remained in a family foster home. Be sure to ask the agency whether the caregiver has been informed of these rights. Some states require that adoption assistance agreements be reviewed by the agency each year.

#### **Has the caregiver been advised that nonrecurring adoption expenses may be available?**

Beyond negotiating the subsidy agreement itself, adoptive parents may be entitled to other resources. For example, one-time expenses for "reasonable and necessary" costs related to the adoption may be reimbursed.<sup>17</sup> These may include adoption fees, legal expenses, health and psychological exams, transportation, and lodging costs for the child and adoptive parents. Through the

federal adoption assistance program, adoptive parents may receive reimbursement of up to \$2,000 per child and the state may claim 50% federal matching funds for these reimbursements. States, however, vary in the maximum amount they allow parents to receive. The amount that will be paid is negotiable, and will depend upon the actual costs of adopting a special needs child.<sup>18</sup>

### **Has the family been informed of the policies and procedures involved when moving to a new state?**

When a family moves to a different state, federal law mandates that states protect the interests of the children. Federal law requires the state of residence to provide Medicaid, regardless of whether it is the state making the adoption assistance payment.<sup>19</sup> In addition, children receiving Title IV-E adoption assistance are eligible to participate in the Title XX Social Services Block Grant Program in their state of residence. The new state will provide Medicaid and possibly other services.<sup>20</sup> Cash payments, however, will continue to come from the child's state of origin.

### **Has the agency explained to the caregiver when adoption assistance ends?**

Federal adoption assistance typically continues until the child turns 18. States have discretion to continue payments until the young person turns 21 if there are severe, documented physical or mental disabilities.<sup>21</sup>

A state may terminate adoption assistance earlier only if it finds “the parents are no longer legally responsible for the support of the child” or if the state determines the child is no longer receiving any support from such parents.<sup>22</sup> These are the only conditions upon which the federal subsidy may be discontinued. If the adoption ends due to the death of the child's adoptive parents, the child can receive adoption assistance if and when the child is readopted; in that case, eligibility does not need to be reestablished.<sup>23</sup>

### **If there are delays, what is the source?**

The process from application to completion can be cumbersome and time consuming. Ask how far along the process is. For example, ask whether an application has been filed, and if not, why. Delays can result from the caseworker not making time to work with the caregiver to file the request for the subsidy. Sometimes the negotiation process takes time and causes delays. Sometimes the required documentation is missing before the application can be submitted. There are

## **Are Indian children adopted through traditional or customary tribal adoptions eligible for federal IV-E adoption subsidies?**

Traditional or customary tribal adoptions permit adoptions of Indian children without terminating parental rights. They have evolved to accommodate the longheld view among many Indian tribes that terminating parental rights violates traditional beliefs. Until recently, this type of adoption did not meet the federal definition of adoption and therefore Indian children adopted this way were ineligible for IV-E adoption subsidies.

On January 23, 2001, the U.S. Department of Health and Human Services, Administration for Children and Families revised its policy addressing this issue (ACYF-CB-PA-01-01). The new policy recognizes that there are situations in which adoptions are legal even though parental rights have not been terminated. Traditional or customary tribal adoptions are among them. As long as Indian children meet all other requirements for IV-E eligibility, and they are adopted through a traditional or customary tribal adoption, they are now eligible to receive IV-E adoption subsidies.

deadlines along the way, including deadlines for fair hearings. A caregiver can miss a deadline due to lack of knowledge about the adoption subsidy application and appeal procedures.

### **If the agency has found the child is not eligible or has reached an impasse regarding benefits, has the caregiver been advised of the right to a fair hearing?**

When the adoption subsidy is denied, the denial letter must inform the caregivers of their right to a fair hearing within 60 days of the denial. The prospective adoptive parent may want to consult an attorney, and may want to pursue administrative recourse following a denial. An unfavorable decision can be appealed, usually through the local child welfare agency.<sup>24</sup> Ask the agency whether it has informed the caregivers of this right, and the steps involved in requesting a fair hearing. The child is also entitled to a fair hearing, and the child's attorney can pursue this. If the denial is upheld, be sure to get the results of the administrative hearing.

## Endnotes

Note: For a more thorough, detailed explanation of adoption assistance agreements, please see , Oppenheim, Elizabeth et al. “Adoption Assistance for Children with Special Needs.” In *Adoption Law and Practice*. Edited by Joan Hollinger. New York: Matthew Bender & Co., 2001.

1. In New York, for example, subsidies are provided in over 80% of the adoptions that occur through the child welfare agency.
2. Adoption Assistance and Child Welfare Act of 1980, P.L. 96-272.
3. The agency should also seek to secure a subsidy when the permanency plan is legal guardianship. Generally, federal subsidies of legal guardianships are limited, because unless a state has received a “waiver,” the state cannot use the Title IV-E federal funds to subsidize guardianships. State subsidies sometimes can be arranged. For a more detailed discussion on financial support for legal guardianships, see Chapter 5.
4. This article uses the term “disruption” to refer to the circumstance where the adoption ends after it has been finalized. Some adoption professionals use the term “dissolution” to describe this situation.
5. The term “caregiver” is used to indicate a prospective adoptive parent.
6. For more discussion of this topic, see Chapter 4.
7. 42 U.S.C. § 673(a)(3).
8. The federal program only reimburses states for part of the costs of providing a monthly cash payment and Medicaid. Children who qualify for the federal subsidy are eligible to receive Title XX services from the state. Title XX services vary from state to state as states have great flexibility to determine what services they will provide with these federal block grant funds.
9. 42 U.S.C. § 673(a)(2)(A)-(B).
10. 42 U.S.C. § 673(a)(2)(A)(ii), 42 U.S.C. § 673(a)(2)(B)(iii).
11. Agencies and courts have traditionally referred to these children as “hard to place.” The more common current term is “special needs.”
12. 42 U.S.C. § 673(c)(2)(A).
13. 42 U.S.C. § 673(c)(2)(B).
14. 42 U.S.C. § 673(c)(2)(B).
15. See H.R. Rep. No. 136, 96<sup>th</sup> Cong., 1<sup>st</sup> Sess. 56 (1979).
16. Federal laws such as the Individual with Disabilities Act (IDEA) mandate that all children receive a free and appropriate public education, which includes a right to special education services for children with special needs.
17. 42 U.S.C. § 673(a)(1)(B)(i).
18. 42 U.S.C. § 673(a)(3).
19. 42 U.S.C. Sec. 673(b)(1); 42 U.S.C. 1396a(b); Oppenheim, Elizabeth et al. “Adoption Assistance for Children with Special Needs, § 9.06[1].” In *Adoption Law and Practice*. Edited by Joan Hollinger. New York: Matthew Bender & Co., 2001.
20. The Interstate Compact on Adoption and Medical Assistance (ICAMA) is a contractual agreement that 42 states have entered. ICAMA provides for uniformity and consistency of policy and procedures to ensure children receive Medicaid in their state of residence. Federal law ensures the family continues to receive benefits and services regardless of state of residence by guaranteeing the family will continue to receive the subsidy payment from the state that entered into the agreement. They are eligible to receive Medicaid in the state of residence but only the benefits and services of the state’s Medicaid program.
21. 42 U.S.C. § 673(a)(4)(A).
22. 42 U.S.C. § 673(a)(4)(B).
23. 42 U.S.C. § 673(a)(2)(C).
24. 42 U.S.C. § 671(a)(12).

## *appendices*

## APPENDIX 1: ASFA REGULATIONS ADDRESSING REASONABLE EFFORTS

The following are relevant excerpts from 45 CFR Parts 1355, 1356 and 1357, and the Final Rule, promulgated by the Department of Health and Human Services (HHS), Administration for Children and Families. After the regulations, excerpts from the “Preamble” are included. The Preamble that appears in the Federal Register is the commentary portion of the regulations where, through a comment/response format, HHS explains its rationale for promulgating the regulations.

### From the definitions section:

#### **Permanency hearing means:**

(1) The hearing required by section 475(5)(C) of the Act to determine the permanency plan for a child in foster care. Within this context, the court (including a Tribal court) or administrative body determines whether and, if applicable, when the child will be:

- (i) Returned to the parent;
- (ii) Placed for adoption, with the State filing a petition for termination of parental rights;
- (iii) Referred for legal guardianship;
- (iv) Placed permanently with a fit and willing relative; or
- (v) Placed in another planned permanent living arrangement, but only in cases where the State agency has documented to the State court a compelling reason for determining that it would not be in the best interests of the child to follow one of the four specified options above.

(2) The permanency hearing must be held no later than 12 months after the date the child is considered to have entered foster care in accordance with the definition at Sec. 1355.20 of this part or within 30 days of a judicial determination that reasonable efforts to reunify the child and family are not required. After the initial permanency hearing, subsequent permanency hearings must be held not less frequently than every 12 months during the continuation of foster care. The permanency hearing must be conducted by a family or juvenile court or another court of competent jurisdiction or by an administrative body appointed or approved by the court which is not a part of or under the supervision or direction of the State agency. Paper reviews, ex parte hearings, agreed orders, or other actions or hearings which are not open to the participation of the parents of the child, the child (if of appropriate age), and foster

parents or preadoptive parents (if any) are not permanency hearings.

\* \* \* \* \*

#### **Sec. 1356.21 Foster care maintenance payments program implementation requirements.**

##### **(b) Reasonable efforts.**

...

##### **(2) Judicial determination of reasonable efforts to finalize a permanency plan.**

(i) The State agency must obtain a judicial determination that it has made reasonable efforts to finalize the permanency plan that is in effect (whether the plan is reunification, adoption, legal guardianship, placement with a fit and willing relative, or placement in another planned permanent living arrangement) within twelve months of the date the child is considered to have entered foster care in accordance with the definition at Sec. 1355.20 of this part, and at least once every twelve months thereafter while the child is in foster care.

(ii) If such a judicial determination regarding reasonable efforts to finalize a permanency plan is not made, the child becomes ineligible under title IV-E from the end of the twelfth month following the date the child is considered to have entered foster care in accordance with the definition at Sec. 1355.20 of this part, or the end of the month in which the most recent judicial determination of reasonable efforts to finalize a permanency plan was made, and remains ineligible until such a judicial determination is made.

...

**(d) Documentation of judicial determinations.** The judicial determinations regarding contrary to the welfare, reasonable efforts to prevent removal, and reasonable efforts to finalize the permanency plan in

effect, including judicial determinations that reasonable efforts are not required, must be explicitly documented and must be made on a case-by-case basis and so stated in the court order.

(1) If the reasonable efforts and contrary to the welfare judicial determinations are not included as required in the court orders identified in paragraphs (b) and (c) of this section, a transcript of the court proceedings is the only other documentation that will be accepted to verify that these required determinations have been made.

(2) Neither affidavits nor nunc pro tunc orders will be accepted as verification documentation in support of reasonable efforts and contrary to the welfare judicial determinations.

(3) Court orders that reference State law to substantiate judicial determinations are not acceptable, even if State law provides that a removal must be based on a judicial determination that remaining in the home would be contrary to the child's welfare or that removal can only be ordered after reasonable efforts have been made.

...

**(g) Case plan requirements.** In order to satisfy the case plan requirements of sections 471(a)(16), 475(1) and 475(5) (A) and (D) of the Act, the State agency must promulgate policy materials and instructions for use by State and local staff to determine the appropriateness of and necessity for the foster care placement of the child. The case plan for each child must:

(1) Be a written document, which is a discrete part of the case record, in a format determined by the State, which is developed jointly with the parent(s) or guardian of the child in foster care; and

(2) Be developed within a reasonable period, to be established by the State, but in no event later than 60 days from the child's removal from the home pursuant to paragraph (k) of this section;

(3) Include a discussion of how the case plan is designed to achieve a safe placement for the child in the least restrictive (most family-like) setting available and in close proximity to the home of the parent(s) when the case plan goal is reunification and a discussion of how the placement is consistent with the best interests and special needs of the child. (FFP is not available when a court orders a placement with a specific foster care provider);

(4) Include a description of the services offered and provided to prevent removal of the child from the home and to reunify the family; and

(5) Document the steps to finalize a placement when the case plan goal is or becomes adoption or placement in another permanent home in accordance with sections 475(1)(E) and (5)(E) of the Act. When the case plan goal is adoption, at a minimum, such documentation shall include child-specific recruitment efforts such as the use of State, regional, and national adoption exchanges including electronic exchange systems.

...

**(h) Application of the permanency hearing requirements.**

(1) To meet the requirements of the permanency hearing, the State must, among other requirements, comply with section 475(5)(C) of the Act.

(2) In accordance with paragraph (b)(3) of this section, when a court determines that reasonable efforts to return the child home are not required, a permanency hearing must be held within 30 days of that determination, unless the requirements of the permanency hearing are fulfilled at the hearing in which the court determines that reasonable efforts to reunify the child and family are not required.

(3) If the State concludes, after considering reunification, adoption, legal guardianship, or permanent placement with a fit and willing relative, that the most appropriate permanency plan for a child is placement in another planned permanent living arrangement, the State must document to the court the compelling reason for the alternate plan. Examples of a compelling reason for establishing such a permanency plan may include:

(i) The case of an older teen who specifically requests that emancipation be established as his/her permanency plan;

(ii) The case of a parent and child who have a significant bond but the parent is unable to care for the child because of an emotional or physical disability and the child's foster parents have committed to raising him/her to the age of majority and to facilitate visitation with the disabled parent; or,

(iii) the Tribe has identified another planned permanent living arrangement for the child.

(4) When an administrative body, appointed or approved by the court, conducts the permanency

hearing, the procedural safeguards set forth in the definition of permanency hearing must be so extended by the administrative body.

**From the preamble:**

(Cites to page numbers in the Federal Register are included.)

[Page 4034]

**Sec. 1355.20 Legal guardianship.**

**Comment:** A few commenters supported the definition of legal guardianship as written in the proposed rule. However, some commenters requested clarification that the term “custody,” as used in the definition, refers only to physical custody of the child rather than legal custody. The commenters asserted that some States retain legal custody of the child in guardianship situations.

**Response:** The definition in the final rule is taken directly from the statute which makes no distinction between physical and legal custody. We believe that the definition is intended to include all legal guardianship arrangements that are permanent.

**Comment:** A commenter wanted to know how the Federal definition for legal guardianship will be applied to States that do not have the same definition in their State statutes.

**Response:** There is no Federal requirement for States to have the statutory definition of legal guardianship in State law. The statute requires States to evaluate certain permanency goals, including legal guardianship, for children during the development of the case plan and the course of a permanency hearing. We believe that the definition was developed to clarify that States should consider legal guardianships that are permanent and self-sustaining as a permanency option for children in foster care.

**Comment:** There were several comments on funding legal guardianships. We received a suggestion that title IV-E funding be made available for subsidized legal guardianship. Another commenter asked for clarification on financial and medical assistance available for children placed in legal guardianship and how to access funding for legal guardianship. A third commenter requested that we clarify that a State is not precluded from providing financial assistance in legal guardianships.

**Response:** While legal guardianship arrangements may be appropriate permanency plans, we have no

statutory authority to make title IV-E funding available for subsidized legal guardianships. However, some States are using title IV-E funds to subsidize legal guardianships under the terms of a title IV-E demonstration waiver approved by the Secretary. The statute does not preclude States from subsidizing legal guardianships with State funds.

**Comment:** A commenter requested that we make a greater distinction between legal guardianships and other living arrangements such as permanent foster care placements and parent-child relationships. The commenter believed that children placed in legal guardianships often are not subject to ongoing judicial review, and that in contrast to parent-child relationships, a child is not entitled to inherit from a guardian, and vice versa.

**Response:** The term legal guardianship should be used in reference to the requirements on reasonable efforts to finalize a permanency plan, case plans,[[Page 4035]]permanency hearings, and TPR. In that context, States determine whether a legal guardianship is the most appropriate permanency option for a child. We do not believe it is appropriate for us to regulate the definition of a legal guardianship further.

**Comment:** One commenter requested guidance on the use of legal guardianship as a permanency option. The commenter requested that we share lessons learned from the title IV-E demonstration waiver States.

**Response:** Information on the findings from the States with demonstration waivers will be disseminated when available. This information will be better provided through our resource centers and technical assistance activities rather than through regulation.

...

**Comment:** One commenter asked that we clarify whether the permanency goal of placement with a fit and willing relative was optional because the commenter’s State had eliminated it as a permanency goal. A few commenters asked that we specifically identify placement in “another planned permanent living arrangement” as the appropriate permanency option for all unaccompanied refugee minors. These commenters requested that, in establishing placement in “another planned permanent living arrangement” as the appropriate permanency option for unaccompanied refugee minors, this group of the foster care population be exempted from the requirement to provide a compelling reason for not setting reunification, adoption, legal

guardianship or placement with a fit and willing relative as the permanency plan.

**Response:** We do not believe it is appropriate for ACF or States to exclude any permanency options from consideration or to identify one permanency goal as the appropriate permanency goal for an entire group of the foster care population. Permanency planning is based on the best interests, individual needs, and circumstances of the child. The requirement to document, to the court, a compelling reason for setting a permanency plan other than reunification, adoption, legal guardianship, or placement with a fit and willing relative is statutory and cannot be waived for any group of the foster care population.

**Comment:** We had several commenters request that we include *[[Page 4036]]* placement in a permanent foster family home and emancipation in the list of permanency goals at section 475(5)(C) of the Act that are exempt from the compelling reason requirement in that section. Some commenters also asked us to include long term foster care and emancipation as other planned permanent living arrangements.

**Response:** Section 475(5)(C) of the Act specifies that the only permanency options the State may set without a compelling reason to do so include reunification, adoption, legal guardianship, or placement with a fit and willing relative. Therefore, “another planned permanent living arrangement” would be any permanent living arrangement that is not enumerated in statute.

**Comment:** One commenter suggested that we amend the section of the definition that describes the decisions to be made at a permanency hearing. The commenter suggested that the term “should” be replaced with “will” in the definition. The commenter thinks the term “will” is consistent with ASFA’s intent to ensure permanency while “should” is noncommittal.

**Response:** We agree and have amended the language accordingly.

**Comment:** One commenter was opposed to the prohibition of paper reviews, ex parte hearings, and agreed orders as satisfying the requirements of a permanency hearing.

[Page 4051]

### Section 1356.21(b) Reasonable Efforts

This section sets forth the ASFA requirement that the State hold the child’s health and safety as its

paramount concern when making reasonable efforts.

**Comment:** We received several suggestions to include, in the regulation, the preamble language at page 50073 of the NPRM which describes the threefold purpose of the reasonable efforts requirements. The basis for this suggestion was a concern that the focus of the regulation was on the steps the State agency must take in order to access Federal funds rather than the intent of the statute. The commenters believe the inclusion of this language in the regulation will provide an outcome oriented balance to the process orientation of this section of the regulation.

**Response:** We concur and have amended Sec. 1356.21(b) accordingly.

**Comment:** Many commenters requested that we delete the preamble language at page 50073 of the NPRM that provides examples of questions the courts should consider in determining whether the agency satisfied the reasonable efforts requirements. These commenters are concerned that examples provided in regulation or policy guidance become de facto policy. Conversely, we received many comments not only supporting the list in question, but encouraging us to include it in the text of the regulation and expand it to include more guidance on reasonable efforts to make and finalize permanent placements.

**Response:** We intend for examples to set parameters for the appropriate use of the flexibility that is inherent in some title IV-E provisions. We believe the examples will be helpful to State child welfare agencies in preparing for hearings at which reasonable efforts determinations are to be made. We do, however, think the list is more appropriate as policy guidance rather than regulatory text and therefore, did not change the regulation to include the examples.

**Comment:** One commenter suggested that we include regulatory language which places the burden of proof in satisfying the reasonable efforts requirements on the State agency.

**Response:** We believe that the very nature of the reasonable efforts determination indicates the burden of proof is on the State agency. Section 472(a)(1) of the Act requires that the court determine whether the State agency made reasonable efforts in accordance with section 471(a)(15) of the Act. We believe that the suggested change is unnecessary, therefore, and have made no changes to the regulation.

**Comment:** We received a few comments suggesting

that we have no statutory basis for requiring a judicial determination that the State made reasonable efforts to prevent the child's removal from his/her home, to reunify the child and family, and to make and finalize an alternate permanent placement when the child and family cannot be reunited. We also received several comments supporting the requirement for three separate reasonable efforts determinations but questioning our authority to link title IV-E funding to such determinations.

**Response:** The judicial determinations are based in the statute. Section 472(a)(1) of the Act contains two eligibility criteria. The first pertains to the child's removal from home. Such removal must be based on a voluntary placement agreement or a judicial determination that it was contrary to the child's welfare to remain at home. The second eligibility criterion requires a judicial determination that the State made reasonable efforts of the type described in section 471(a)(15) of the Act. Section 471(a)(15) of the Act requires the State agency to make reasonable efforts to prevent the child's removal from his/her home, to reunify the child and family, and to make and finalize an alternate permanent placement when the child and family cannot be reunited. The requirements for judicial determinations regarding reasonable efforts are title IV-E eligibility criteria. If the eligibility criteria are not satisfied, the child is not eligible for title IV-E funding.

**Comment:** One commenter suggested we permit a 60-day extension to the time frames prescribed in the regulation for obtaining judicial determinations regarding reasonable efforts to address the problem of continuances.

**Response:** We are sympathetic to the issue of continuances. However, we believe that the need for timely judicial determinations is more appropriately addressed by building capacity through training judges and attorneys rather than extending the time frames for satisfying title IV-E eligibility criteria. Therefore, we have not modified the regulation in response to this comment.

The statute requires that title IV-E eligibility be established at the time of a removal. If the State does not make reasonable efforts to prevent a removal or fails to obtain a judicial determination with respect to such efforts, the child can never become eligible for title IV-E funding for that entire foster care episode because there is no opportunity to establish eligibility at a later

date. Once title IV-E eligibility is initially established, the judicial determination regarding the reasonable efforts the State made to finalize a permanency plan is required to maintain title IV-E eligibility.

[Page 4052]

#### **Section 1356.21(b)(2) Judicial Determination of Reasonable Efforts to Finalize a Permanency Plan**

This section (formerly Sec. 1356.21(b)(3) and (b)(4) of the NPRM) describes the requirements for obtaining a judicial determination to finalize a permanency plan.

**Comment:** Most commenters expressed confusion regarding when the "clock" starts for obtaining judicial determinations that the State made reasonable efforts to reunify the child and family or to make and finalize an alternate permanency plan. A few commenters observed that often the permanency plan may change from reunification to an alternate permanency plan prior to the State obtaining a judicial determination regarding its efforts to reunify the child and family. These commenters requested clarification about which permanency plan the court must rely on to make its determination in such situations. A couple of commenters suggested that we not permit States to change the permanency plan outside a permanency hearing or without a court order so that the court has an opportunity to determine if the State agency did make reasonable efforts to reunify the child and family before sanctioning the change in the permanency plan.

**Response:** After reviewing the comments and the proposed requirements, we determined that our proposal in the NPRM with respect to reasonable efforts to reunify a child and family and to make and finalize alternate permanency plans was confusing and not responsive to actual practice. To simplify the requirements, we have consolidated the reasonable efforts requirements regarding efforts to reunify the child and family and to make and finalize alternate permanent placements into a single requirement related to making reasonable efforts to finalize a permanency plan. In new paragraph (b)(2), we require the State to obtain a judicial determination that it made reasonable efforts to finalize the permanency plan that is in effect, regardless of what it is, within 12 months of the date the child is considered to have entered foster care in accordance with the definition of such at Sec. 1355.20. The State must obtain such a determination every 12 months

thereafter while the child is in foster care. Our purpose in imposing this policy, as stated in the NPRM, is to tie the timing for obtaining reasonable efforts determinations regarding permanency to the timing of the permanency hearing because it is a logical determination to make at such hearings and it would ease administrative burden.

In determining whether the State made reasonable efforts to finalize a permanency plan, the court's determination should be based on the permanency plan that is in effect at the time at which the agency is seeking such a determination. We are not requiring the State to obtain judicial determinations on its efforts regarding permanency plans that it has abandoned.

We realize that obtaining reasonable efforts determinations regarding finalizing permanency plans every 12 months while a child is in foster care is a significant departure from current practice and that States will need transition time to implement this requirement for children who have been in foster care for more than 12 months. Therefore, we will not take adverse action against States who cannot comply with this requirement for a period of 12 months from the effective date of this final rule.

Finally, we think it appropriate to permit the State agency to alter the permanency plan outside a permanency hearing and will not require the court to approve such a plan before the State agency can act on it. When a State agency has placement and care responsibility for a child, it is responsible for setting and acting on the appropriate permanency plan. We understand that, in some States, courts provide such active oversight during the course of a permanency hearing that the court actually sets the permanency plan. That is the State's prerogative. Federal law does not require the courts to play such a prescriptive role in the permanency planning process. Section 475(5)(C) of the Act requires the court to review the permanency plan presented to it by the State agency.

**Comment:** We received several comments objecting to the proposal that children, for whom judicial determinations are not made regarding reasonable efforts to reunify and to make and finalize alternate permanency plans, become ineligible for title IV-E funding until such a determination is made.

**Response:** We did not amend the regulation based on these comments because the requirements for judicial determinations are statutory. To be eligible for

title IV-E funding, section 472(a)(1) of the Act requires the State to obtain a judicial determination regarding its reasonable efforts of the type described in section 471(a)(15) of *[[Page 4053]]* the Act. Section 471(a)(15) of the Act, among other things, requires the State to make reasonable efforts to finalize permanency plans. If these criteria are not satisfied, the child is ineligible for title IV-E funding.

**Comment:** We received a number of comments opposing the requirement that judicial determinations regarding reasonable efforts to finalize permanency plans be made at least every 12 months. These commenters suggested that such determinations should be required every six months to be consistent with the ASFA's focus on expedited permanency.

**Response:** We agree that six-month intervals for making determinations regarding reasonable efforts to effect a permanency plan may provide an incentive for expediting permanency. However, requiring such judicial determinations to be made at the interval suggested would limit the flexibility provided at section 475(5)(B) of the Act for holding the periodic reviews required therein before an administrative body rather than a court. We cannot justify a requirement that would limit flexibility provided by the statute, particularly since we know it would place a significant burden on the courts and State agencies. Therefore, we have made no changes to the regulation.

We believe that the six-month periodic reviews will encourage a timely permanency planning process. These reviews must determine, in part: "the continuing necessity for and appropriateness of the placement, the extent of compliance with the case plan . . . and to project a likely date by which the child may be returned to and safely maintained in the home or placed for adoption or legal guardianship." Thus, the statute already compels States to review reasonable efforts to achieve permanency every six months.

**Comment:** One commenter requested that we amend the regulatory language to ensure that courts oversee reunification efforts between unaccompanied refugee children and the party designated as the child's permanent placement.

**Response:** The courts oversee the State agency's efforts to finalize permanency plans, regardless of what the permanency plan is or with whom the child is to be placed. Therefore, we do not believe we must regulate such an assurance for a particular group of children in

foster care.

[Page 4054]

#### **Section 1356.21(b)(4) Concurrent Planning**

This section (formerly Sec. 1356.21(b)(6) in the NPRM) implements the statutory provision which provides States the option of using concurrent planning.

**Comment:** One commenter suggested that we require an assessment of every family to determine the appropriateness of concurrent planning before the State implements it for that family.

**Response:** We agree that the commenter's suggestion is consistent with good practice. However, it would be overly prescriptive to include such a requirement in regulation since concurrent planning is an option for the State, and not a mandate.

**Comment:** One commenter encouraged us to prohibit States from using concurrent planning for unaccompanied refugee minors.

**Response:** The choice to engage in concurrent planning is optional and should be made on a case-by-case basis. We see no reason to prohibit the use of this technique for a particular group of children in foster care.

**Comment:** One commenter asked if the State must present the concurrent plan to the court and if the court must make a reasonable efforts determination with respect to the concurrent plan.

**Response:** The answer to both questions is no. The State is not required to present the plan for the purposes of obtaining a reasonable efforts determination by the court. The concurrent planning option is addressed in the reasonable efforts section because, among other things, that section of the regulation addresses permanency planning activities, of which concurrent planning is one.

**Comment:** One commenter suggested we broaden the concurrent planning language in the regulation to include all types of permanency plans. As presented in the NPRM, we only address concurrent planning with respect to reunification and adoption. The commenter thinks the regulation should clarify that concurrent planning may be used regardless of what the alternate permanency plan is.

**Response:** We agree and have amended the language in paragraph (b)(4) accordingly.

...

**Comment:** A commenter suggested that we require courts to approve case plans.

**Response:** There is no statutory basis for requiring judicial approval of the State agency's case plan document. The court's role is to: exercise oversight of the permanency plan; review the State agency's reasonable efforts to prevent [Page 4058] removal from the home, reunify the child with the family and finalize permanent placements; and to conduct permanency hearings. The State agency is responsible for developing and implementing the case plan. We see no additional benefit in requiring court approval of the case plan.

In addition, we are clarifying in the regulation at Sec. 1356.21(g)(3) that it is not permissible for courts to extend their responsibilities to include ordering a child's placement with a specific foster care provider. To be eligible for title IV-E foster care maintenance payments the child's placement and care responsibility must either lie with the State agency, or another public agency with whom the State has an agreement according to section 472(a)(2) of the Act. Once a court has ordered a placement with a specific provider, it has assumed the State agency's placement responsibility. Consequently, the State cannot claim FFP for that placement.

[Page 4058]

#### **Section 1356.21(h) Application of Permanency Hearing Requirements**

This section implements the new ASFA requirements related to permanency hearings and modifies and clarifies existing policy. It also sets forth requirements for an administrative body appointed or approved by the court to conduct permanency hearings.

**Comment:** One commenter was concerned that children would become ineligible for title IV-E funding if the permanency hearing requirements were not satisfied as prescribed.

**Response:** We agree that the language at paragraph (h)(1) presented the permanency hearing as an eligibility criterion. That is not the case and we have amended the paragraph to clarify that, in meeting the requirements of the permanency hearing, the State must comply with section 475(5)(C) of the Act and this paragraph. The permanency hearing is a State plan requirement. It is not a title IV-E eligibility criterion. If the State fails to meet the permanency hearing requirements, it is out of compliance with the State plan. The

child does not become ineligible for title IV-E funding.

**Comment:** We received a number of comments regarding paragraph (h)(2) which provides guidance related to determining for whom the State must hold permanency hearings. Commenters thought the paragraph was confusing and unclear about whether we were referring to initial or subsequent permanency hearings. We also received a request not to refer to these permanent placements as “court sanctioned” because the commenter felt the terminology meant the court chooses the placement, which would make the placement ineligible for title IV-E funding.

**Response:** In the NPRM, we proposed to retain the provision in the current regulation for permitting the State to waive subsequent permanency hearings for children placed in permanent foster family homes. The number of comments received prompted us to review this section of the proposed rule against the statutory language as amended by ASFA. Based on that review, we have decided to delete the paragraph in its entirety. When ASFA was passed the language from the definition of permanency hearing in section 475(5)(C) of the Act that addressed children remaining in foster care on a “permanent or long term basis” was removed. Instead, the ASFA requires the State to document a compelling reason for establishing a permanency plan that does not call for the child to exit foster care through reunification, adoption, legal guardianship, or placement with a fit and willing relative. Therefore, all children in foster care must be afforded the benefit of permanency hearings while they are in foster care.

Although the paragraph in question has been deleted from the regulation, we wanted to take this opportunity to respond to the observation that the State may not claim FFP when the court orders a specific placement for a child. The commenter is correct. Section 472(a)(2) of the Act requires responsibility for the child’s placement and care to be with the State agency. When the court orders a specific placement, it in essence takes on the State’s responsibility for the child’s placement and the child becomes ineligible for title IV-E funding. To make this clear, we have amended Sec. 1356.21(g) to note this restriction. The court may sanction a permanent foster family home through its oversight of the permanency plan, however, this does not give the court the authority to determine a specific placement for the child.

Finally, we recognize that States will need transition

time to begin holding subsequent permanency hearings for children who formerly were exempt from this requirement. We will not take adverse action against a State that cannot comply with this requirement for a period of 12 months from the effective date of this final rule.

**Comment:** One commenter suggested that the requirement in paragraph (h)(2) for holding a permanency hearing within 30 days of a judicial determination that reasonable efforts are not required, be extended to circumstances beyond those identified at section 471(a)(15)(D) of the Act. Another wanted us to exempt unaccompanied refugee minors from this provision altogether.

**Response:** The statute is very specific to those circumstances enumerated at section 471(a)(15)(D) of the Act. We have no authority to expand that list. However, the State may hold a permanency hearing any time it deems it to be appropriate to do so. We also have no authority to exempt unaccompanied refugee minors from this requirement.

**Comment:** Some commenters noted that the language in Sec. 1356.21(h)(3) (proposed Sec. 1356.21(h)(4)) is inconsistent with the definition of “permanency hearing” at Sec. 1355.20. The language at Sec. 1356.21(h)(3) limited the alternate planned permanent living arrangement options to a foster family home.

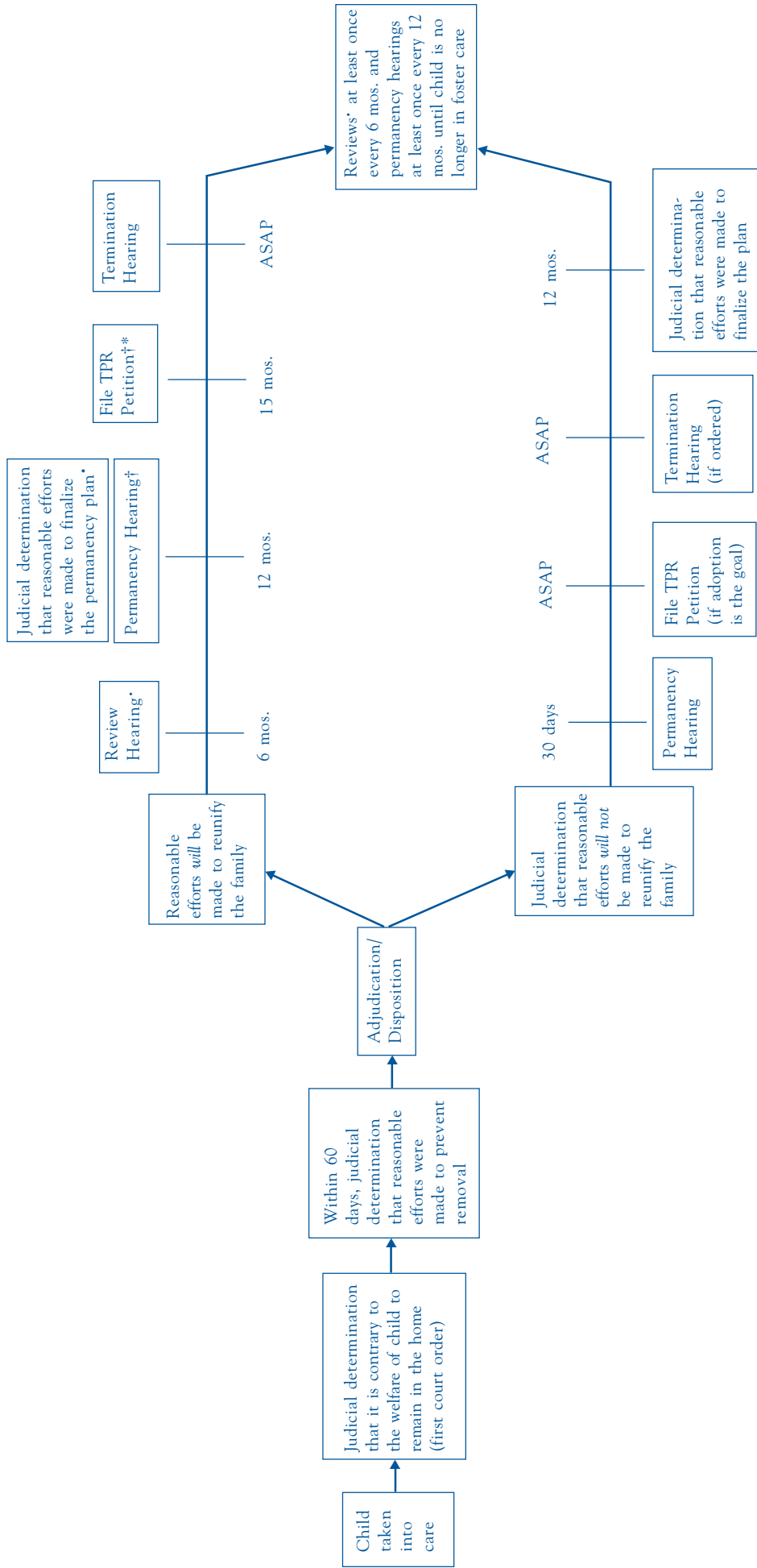
**Response:** We concur with the commenter and have amended paragraph (h)(3) to use the exact statutory language, “. . . another planned permanent living arrangement . . . .”

**Comment:** Some commenters objected to the inclusion of an example of a compelling reason for the State to choose another planned permanent living arrangement over reunification, guardianship, or adoption in the text of the regulation. These commenters believe that examples included in regulation become de facto policy.

[Page 4059]

**Response:** We do not believe that examples in regulation become de facto policy, nor were they intended to do so. However, we do not believe the example provided in the NPRM fully illustrates how to comply with this provision and have included additional examples in paragraph (h)(3) to more accurately reflect its intent.

## APPENDIX 2: ADOPTION AND SAFE FAMILIES ACT TIMELINE



\*If the review hearing is held by the court, it must be held at least once every six months.

• The determination that reasonable efforts to finalize the plan be made is often made at the permanency hearing, although it can be made at another point in the proceedings as long as the 12 month deadline is met.

† When calculating when to have the permanency hearing or the 15 of 22 months, use the earlier of the date of adjudication OR 60 days after the child is removed from the home.

\* Unless one of the following exceptions is documented: child is being cared for by a relative, agency has not provided services it has deemed necessary to rehabilitate the family, or a compelling reason exists.

Source: This timeline was originally prepared by Mimi Laver and published in *ABA Child Law Practice*, Vol. 17(8), p. 119. It was updated and amended by the authors for this book.

## APPENDIX 3: RESOURCES

### **Adoption Exchange Association**

Published *Placing Children Across Geographic Boundaries: A Step-by-Step Guide for Social Workers*, an easy-to-read booklet with comprehensive information on interstate adoption, including how to work with the Interstate Compact on the Placement of Children (ICPC) and the Interstate Compact on Adoption and Medical Assistance (ICAMA). Includes helpful tips on finding resources, travel arrangements, and post-placement visits.

820 S. Monaco Pkwy. #263  
Denver, CO 80224  
303/755-2806  
<http://www.adoptea.org/>

### **American Bar Association/National Child Welfare Resource Center on Legal and Judicial Issues**

Provides training and technical assistance to state and tribal agencies and courts on legal and judicial aspects of child welfare, including reasonable efforts requirements and implementation of the Adoption and Safe Families Act.

ABA Center on Children and the Law  
740 15th Street, NW, 9th Fl.  
Washington, DC 20005-1009  
202/662-1746  
<http://www.abanet.org/child>

### **Annie E. Casey Foundation, Casey Center for Effective Child Welfare Practice**

Manages and coordinates a range of activities designed to promote effective practice and sound public policy affecting families and children. The Casey Center provides assistance and guidance to agencies that wish to replicate Casey program models and learn from each other.

The Annie E. Casey Foundation  
701 St. Paul St.  
Baltimore, MD 21202  
410/547-6600  
<http://www.aecf.org>

### **Association of Administrators of the Interstate Compact on Adoption and Medical Assistance**

### **Association of Administrators of the Interstate Compact on the Placement of Children**

These associations facilitate the administration of, and advocate state participation in, the Interstate Compact on Adoption and Medical Assistance (ICAMA), and the Interstate Compact on the Placement of Children (ICPC), respectively. ICAMA is the legal mechanism by which member states regulate and coordinate the interstate delivery of services to children with special needs adopted pursuant to adoption assistance agreements. ICPC is the legal mechanism by which member states regulate interstate placements of children in the child welfare system. The Association provides technical and legal assistance, education and training, and materials on practice and policy issues.

American Public Human Services Association  
810 First St., NE  
Suite 500  
Washington, DC 20002-4267  
202/682-0100  
<http://www.aaicama.aphsa.org>

### **Dave Thomas Foundation for Adoption**

The Foundation serves as an active voice for the more than 150,000 children in North America's public child welfare system who are waiting for permanent homes and loving families.

Dave Thomas Foundation for Adoption  
4288 W. Dublin-Granville Road  
Dublin, OH 43017  
1-800-275-3832  
<http://www.davethomasfoundation.org>

### **Generations United**

Promotes placement of children with relatives, especially grandparents. Provides information and advocates on behalf of caregivers.

122 C Street, NW, Suite 820  
Washington, D.C. 20001-2085  
202-638-1263  
<http://www.GU.org>

#### **Kmetko and Associates, Ltd.**

Kmetko is a private contractor that handles ICPC placements for the Illinois Department of Children and Family Services. Kmetko receives an average of 30 requests a month for home studies and supervises 300 children placed with Illinois caretakers.

4753 N. Broadway, Suite 1010  
Chicago, IL 60640  
773/561-6196  
<http://www.kmetko.com>

#### **National Adoption Center**

Works to expand adoption opportunities in the U.S., with special attention to minority children and children with special needs.

1500 Walnut Street, Suite 701  
Philadelphia, PA  
1-800-TOADOPT  
<http://www.adopt.org>

#### **National Adoption Information Clearinghouse**

##### **National Clearinghouse on Child Abuse and Neglect Information**

These Clearinghouses publish and distribute fact sheets, directories, literature searches, resource lists, bibliographies, and other products tailored to customers' specific needs. A staff of experts in adoption, child welfare, law, and child maltreatment ensure the quality and scope of the Clearinghouse collection.

Administration for Children and Families  
330 C Street, SW  
Washington, DC 20447  
888/251-0075  
<http://www.calib.com/naic>  
<http://www.calib.com/nccanch>

#### **National Center for Youth Law**

The National Center for Youth Law is a legal office in the nonprofit sector working to protect the legal rights of children. Their services include providing advocates for abused and neglected children,

expansion of access to health care for children and youth, acquiring public benefits specially allotted for the needs of children, and working alongside housing organizations to obtain suitable housing for families with children. The Center advocates on behalf of children to ensure proper attention is given to issues affecting them and their families.

405 14<sup>th</sup> Street, Suite 1500  
Oakland, CA 94612  
510/835-8098  
<http://www.youthlaw.org>

#### **National Child Welfare Resource Center on Family-Centered Practice**

The Center helps child welfare agency managers and staff translate the tenets of the Adoption and Safe Families Act into family-centered practices that ensure the well-being and permanent placement of children while meeting the needs of families.

Learning Systems Group  
1150 Connecticut Ave., NW  
Suite 1100  
Washington, DC 20036  
800/628-8442  
<http://www.esilsg.org>

#### **National Council of Juvenile and Family Court Judges, Permanency Planning for Children Department**

Provides education and technical assistance to courts nationwide to improve practice in child abuse and neglect cases. Operates a "model courts" program to strengthen and improve courts' handling of dependency cases and speed permanence for children in foster care. Its Expedited Adoption Program focuses on finding adoptive and other permanent placements for children who cannot return home.

P.O. Box 8970  
Reno, NV 89507  
775/784-6675  
<http://www.ncjfcj.unr.edu>

#### **The National Foster Parent Association**

National network which aims to improve conditions for children by providing resources for foster parents. Publishes a newsletter and holds an annual national conference. Has state and local affiliates as well.

9 Dartmouth Drive  
Crystal Lake, IL 60014-8603  
815/455-2527; 800/557-5238  
<http://www.NFPAINC.org>

#### **National Resource Center on Child Maltreatment**

Helps states, agencies, and tribes develop effective child protective services systems and responds to needs relating to preventing, identifying, intervening, and treating child abuse and neglect.

Child Welfare Institute  
3950 Shackelford Road, Suite 175  
Deluth, GA 30096  
770/935-8484  
<http://www.gocwi.org/nrccm>

#### **National Resource Center for Information Technology in Child Welfare**

Helps state, local, and tribal child welfare agencies and family and juvenile courts use automated information systems to improve outcomes in the child welfare system. Provides technical assistance on data collection and using data to inform decisions about policies, programs, and practices.

Child Welfare League of America  
440 First St., NW  
Washington, DC 20001-2085  
202/638-2952  
<http://www.cwla.org>

#### **National Resource Center for Organizational Improvement**

Helps agencies build and improve the organizational infrastructures needed to implement federal legislation. The Center helps agencies set goals, identify and remove barriers to improvement, and measure progress towards goals. It also advises on management and human resource issues resulting from changes in the field.

Edmund S. Muskie School of Public Service  
University of Southern Maine  
1 Post Office Square  
P.O. Box 15010  
Portland, ME 04112  
207/780-5810  
<http://www.muskie.usm.maine.edu/helpkids>

#### **National Resource Center for Youth Development**

The center focuses on increasing the capacity and resources of state, tribal, and other publicly supported child welfare agencies to effectively meet the needs of youth who will be emancipated from the child welfare system.

University of Oklahoma  
College of Continuing Education  
4502 E. 41<sup>st</sup> St., Bldg 4 West  
Tulsa, OK 74135-2553  
918/660-3700  
<http://www.nrcys.ou.edu/nrcyd.htm>

#### **National Resource Center for Foster Care and Permanency Planning**

The center supports the efforts of child welfare agencies to provide high quality services to children in foster care and their families and to help them achieve permanency. Assists agencies respond to widespread changes in child welfare brought about by the implementation of the Adoption and Safe Families Act, Multiethnic Placement Act, and Indian Child Welfare Act.

Hunter College School of Social Work  
129 E. 79th St.  
New York, NY 10021  
212/452-7053  
<http://www.hunter.cuny.edu/socwork/nrcfcpp>

#### **The North American Council on Adoptable Children**

Provides education, support and advocacy for adoptive families.

970 Raymond Avenue, Suite 106  
St. Paul, MN 55114  
651/644-3036  
<http://www.NACAC.org>

#### **National Resource Center for Special Needs Adoption**

Provides foster care and adoptive services, and training and consultation to professionals involved in permanency planning.

Spaulding for Children  
16250 Northland Drive, Suite 120  
Southfield Michigan 48075  
248/443-7080  
<http://www.spaulding.org>

# Index

15 of 22 months rule 7, 65, 68

## A

Active efforts 31  
Adjournments 30  
Adoption 4, 39-44  
    appropriateness 4  
    approval process 41, 42  
    barriers 39, 53, 109  
    child's opposition to 5  
    expenses 109, 112  
    financial issues 110  
    home studies 42  
    recruitment 4, 40, 41  
Adoption assistance 4, 41, 109-114  
    agreements 41  
    amount 109  
    case studies 110  
    delays 113  
    denial of 111  
    documentation 112  
    eligibility 110-111  
    fair hearings 113  
    federal 109  
    Indian children 113  
    interstate 113  
    negotiating 41, 43, 111, 112  
    state 109, 111  
    termination 113  
Adoption Assistance and Child Welfare Act of 1980 13, 109  
Adoption disruption. *See* Disruption  
Adoption subsidies. *See* Adoption assistance  
Anger management classes. *See* Services  
Another planned permanent living arrangement 7, 79-84  
    case studies 80  
    compelling reasons 81, 82, 83  
    home studies 83  
    permanency of 81, 83

## B

Bonding/attachment 5, 6, 68  
Border agreements 100

## C

Case plans 14  
    parent's involvement in 14  
Case records, admission of 30  
Child support 7, 27, 55

Child's history, disclosure of 42, 53  
Child's position 14, 39, 68, 81  
Community-based programs. *See* Services  
Compelling reasons 7, 81, 82  
Concurrent planning 14  
Confidentiality 13, 29  
Consent to adoption  
    child's 39  
Continuances 30  
Counseling  
    adoption 4, 5, 39  
    family 14  
    mental health 3, 15  
    relatives 69  
Court's authority  
    choosing permanency plan 5  
Criminal background checks 42, 51  
Criminal conviction 41  
Custody 6, 51

## D

Day care. *See* Services  
Defaults 30  
Delays  
    adoption assistance 113  
    interstate placements 97, 99  
    trial 29, 30  
Disruption 6, 14, 17, 52, 68, 109  
Drug treatment. *See* Services

## E

Emancipation 79  
Employment services. *See* Services

## F

Fair hearings 113  
Family group conferencing 28-29  
Fathers 27  
Food stamps. *See* Public benefits

## G

Group placements 8, 84  
Guardians  
    financial situation 6, 55  
    legal assistance 55  
    qualifications of 53, 55  
    removal 52  
    rights of 55  
Guardianships 6, 51-56  
    advantages 6, 51, 52  
    disadvantages 6, 51, 52  
    establishing 51-52, 54  
    financial assistance 7, 53, 55  
    home studies 51, 55  
    modifying 53

terminating 52, 54, 55

## H

Hard-to-place children 41  
Home studies  
    adoption 42  
    another planned permanent living arrangement 83  
    guardianship 51, 55  
    interstate 40, 99, 100  
    relative placement 70

## I

ICPC Secretariat 102  
In camera exams 29, 30, 68  
Incarcerated parents 30  
Independent living 67, 82  
Indian Child Welfare Act 30, 41  
Indian children 30, 41, 113  
Interstate Compact on Adoption and Medical Assistance 41  
Interstate Compact on the Placement of Children 40, 70, 97  
    bypassing 98  
    Regulation 3 98  
    Regulation 7 99-100, 102  
    violations 97  
Interstate placements 97-103  
    adoption 40  
    border agreements 100  
    contempt proceedings 102  
    delays 99  
    guardianships 98  
    home studies 40, 100, 102  
    jurisdiction 102  
    noncustodial parents 98  
    procedure 99, 101  
    reconsideration 102  
    relative placements 97  
    resolving problems 102  
Intervention  
    Indian tribes 31

## K

Kinship care 51

## L

Long-term foster care 8, 79

## M

Mediation 29  
Medicaid. *See* Public benefits  
Mental health counseling. *See* Counseling  
Mental health evaluations 15  
Mental health records 29

Mentoring. See Services  
Multiethnic Placement Act/Interethnic  
Adoption Provisions of 1996 41

## N

Notice  
biological parent 29  
foster parents 28  
Indian custodians 30  
Indian tribes 30  
missing parents 28  
preadoptive parents 28  
Secretary of the Interior 30

## O

Open adoption 6, 43

## P

Parent representation 29  
Paternity 27  
Permanency hearing requirements  
4, 9  
Permanency hearings 8, 13, 69  
Permanency Plan  
Determining the 3-8  
Post adoptive services. See Services  
Post-adoption contact 43, 44, 56  
Post-guardianship contact 6, 53  
Post-guardianship services. See  
Services  
Public benefits  
food stamps 7, 55  
Medicaid  
7, 40, 43, 65, 109, 111, 113  
Social Security 7, 43, 55  
Supplemental Security Income 55  
Temporary Assistance to Needy  
Families 15, 43, 55, 67  
Putative fathers 27

## R

Reconsideration. See Interstate  
placements  
Recruitment of caregivers 81  
Regulation 3, Interstate Compact on  
the Placement. See Interstate  
Compact on the Placement of  
Children  
Regulation 7, Interstate Compact on  
the Placement. See Interstate  
Compact on the Placement of  
Children  
Relative placements 7, 65-71  
benefits 65, 68, 69  
commitment to child 69  
home studies 70

legal status 65  
adoption/guardianship 67  
custody 66, 67  
foster care 65  
risks 65, 69  
role in preserving family identity 68  
stability of 70  
Reunification 3, 13-17

## S

Services 3, 13, 14, 79, 109  
anger management classes 15  
community-based 82  
day care 3, 16, 56, 112  
drug treatment 3, 15  
education services 112  
employment assistance 15  
housing assistance 3, 4, 15  
medical 4, 65, 112  
mental health 56, 112  
mentoring 82  
parenting classes 15  
post-adoption 43  
post-guardianship 56  
respite care 41, 56, 112  
Siblings 13, 43, 53, 68  
Social Security. See Public benefits  
Special needs 83, 112  
Stipulations 30  
Subsidies. See Adoption Assistance  
Subsidized guardianships 7  
Substance abuse 17  
Substance abuse records 29  
Supplemental Security Income See  
Public benefits

## T

Temporary Assistance to Needy  
Families. See Public benefits  
Termination of parental rights  
4, 27, 53  
Title IV-E 41, 65, 109, 112, 113  
Title XX Social Services Block Grant  
Program 113

## U

Uniform Child Custody Jurisdiction and  
Enforcement Act 100

## V

Visitation 7, 13, 43, 44, 53, 69  
Voluntary relinquishment 6, 28

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