



# Child Law Practice

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Helping Lawyers Help Kids

## IN PRACTICE

### Representing Parents Effectively Post-ASFA

by Mimi Laver

Representing parents has always been tough. In some ways the Adoption and Safe Families Act of 1997 (ASFA) made it even harder.<sup>1</sup> Timelines are tighter for your clients, yet services may not be forthcoming. The push towards permanency may frighten your clients, but may also prove to be the incentive they need to complete treatment programs. As the parent's attorney, you must know ASFA and your state law inside and out, be thoroughly prepared for hearings, and know your client's position on all topics.

This article covers reasonable efforts, permanency hearings, termination of parental rights, and caretaker's right to notice and the opportunity to be heard. The article also provides practice tips for each of these topics and strategies for becoming a more effective parent advocate in this post-ASFA world.<sup>2</sup>

#### ASFA HIGHLIGHTS

##### Reasonable Efforts and the No Reunification Services Decision

"Reasonable efforts" is the requirement on child welfare agencies to provide necessary services for families. A judge in an abuse and neglect court case must make a finding that the agency fulfilled its obligation to make these efforts for the agency to receive its matching funds from the federal government.

The reasonable efforts language you were used to—the requirement that the agency prevent placement whenever possible and make efforts to allow children to return home—is alive and well in ASFA, but it has been expanded. In the past, agencies considered children's safety; however, ASFA explicitly mandates that the child's health and safety are the top concern. Therefore, any reasonable efforts must be made with safety in mind.<sup>3</sup>

In addition to this "old" kind of reasonable efforts, Congress added a new category. If continuing efforts to reunite a family are inconsistent with the permanency plan, the agency must make reasonable efforts to place a child according to the plan and take steps to finalize the plan quickly.<sup>4</sup>

Congress also allows agencies to use concurrent planning.<sup>5</sup> That is, a caseworker can have a "contingency" plan and take steps to ensure that if the original permanent plan (e.g., reunification) does not work, a backup plan (e.g., guardianship or adoption) is in place. This method ensures children do not linger in foster care while the second plan is being implemented after the first failed. If concurrent planning is done correctly, your clients should benefit by receiving services early in the case.<sup>6</sup>

The last new aspect of reasonable efforts under ASFA is that, in some cases, reasonable efforts to reunify a

child do not need to be made at all. Congress set forth three categories of these cases:

- when aggravated circumstances exist (as defined by your state law and may include, for example, abandonment, torture, sexual abuse, and chronic abuse);
- when the parent has committed certain crimes against the child or a sibling of the child (including murder and felony assault);
- when the parent's rights to another child have been terminated involuntarily.<sup>7</sup>

States are defining these exceptions to reunification services in various ways. It is important that you know and understand your state's law and how your local courts are interpreting and implementing that law.

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## **ABA Child Law PRACTICE**

**Child Law Practice (CLP)** provides lawyers, judges and other professionals current information to enhance their knowledge and skills, and improve the decisions they make on behalf of children and families. Topics include: abuse and neglect, adoption, foster care, termination of parental rights, juvenile justice, and tort actions involving children and families.

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### **— Practice Tips: Reasonable Efforts:**

*Use the safety argument to your client's advantage*—Under ASFA, the health and safety of the child are key. If your client has complied with enough of the agency's service plan to provide a safe environment for the child, let the judge know. A child could be safe in a parent's home, even if the parent has not completed everything on the agency's "to do list." A GED, for example, would be nice for many parents, but does not affect whether the child would be safe. Help your client prioritize what he or she is working on to ensure a safe and speedy reunion with the child.

*Know what is worth negotiating*<sup>8</sup>—In many jurisdictions there is a new emphasis on negotiation, mediation, or pre-hearing conferences. In addition to concentrating on your trial skills, focus on negotiation strategies. Know what points your client is willing to compromise and what he or she is not. You may be able to gain a lot for your client in a negotiation situation. For instance, you may believe there are legal grounds for not requiring reunification efforts, but you may be able to negotiate a little extra time for your client before the "no reasonable efforts" hearing. During this time, your client should, with your assistance, actively participate in services to prove he or she can work towards a safe reunification with the child.

*Remember criminal ramifications and think carefully about pleas in criminal court*—If a court finds your client committed certain crimes against his or her child (and in some states any child), the court hearing the abuse/neglect petition could decide reunification services do not need to be provided. If this decision is made, your client will have a very difficult time reunifying with the child. Keep this in mind when determining how to handle the case in criminal court. If you are not representing the parent in criminal

court, consider consulting with the criminal defense attorney to ensure he or she is aware of this provision in ASFA.

*Learn definitions well*—ASFA and each state's implementing legislation are filled with new terms and concepts such as "no reunification efforts will be provided based on sexual abuse, abandonment, torture, and chronic abuse." Be clear on your state's law and the courts' interpretations so you can distinguish your particular case or make an argument (e.g., that "torture" is too vague for a court to use).

*Push the agency for services (efforts) upfront*—Your client's best chance for reunification is receiving and actively participating in services and frequent and substantial visitation with the child early in the case. As an advocate for the parent, push the agency to provide these services. Sometimes, it may even be up to you to identify some of the services and help ensure they happen. For example, the housing authority may respond quicker to a call from you, an attorney, than a call from your client or the caseworker. You may also be able to help your client become involved with other services or support groups such as Parents Anonymous. To find out if there is a local group in your area call 909/621-6184, or visit [www.parentsanonymous-natl.org](http://www.parentsanonymous-natl.org) on the Internet.

*Learn about in-home services and advocate for those that will benefit your client and the child*—In many cases, intense family preservation services can help keep a family together. Know what services are available in your community. You can then make an educated and thorough argument about how those services would benefit your client and his or her family.

*Understand concurrent planning and educate your client about it*—Concurrent planning is good social work

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practice and a tool to move a case forward in a timely fashion. It can be scary for parents, especially if they do not understand how it is used. Concurrent planning can be a positive experience for parents, if they are aware of what the agency and the rest of the planning team expect from them and what the team is planning for the child. Be honest with your client about the plan for the family and your client's role in making the plan a reality.<sup>9</sup>

*If the judge decides no reunification efforts are required, get your client in services so the judge might reconsider at the 30 day permanency hearing—* While a no reunification services decision is bad for your client, the client may have 30 days before a final permanency decision is made. Help your client set the stage for the judge to rethink his or her decision at the next hearing.

### Permanency Hearings

Within 30 days of a no reunification services decision, or 12 months after the “child entered foster care,”<sup>10</sup> the court (or an approved administrative body) must conduct a permanency hearing. Permanency hearings must be held at least every 12 months thereafter while the child is in foster care.

The purpose of the permanency hearing is to determine the permanency plan for the child with priority going to reunification, adoption, or legal guardianship, in that order.<sup>11</sup> In keeping with the spirit of ASFA, be prepared to thoroughly discuss the plan for the child and how it will be met during the permanency hearing. All parties should be prepared to tell the court what they have been doing, (e.g., what the parents have been doing to comply with the service plan, what the agency has been doing to assist the parents and to ensure permanency for the child). At the end of the hearing, all parties should know what steps to take to make the permanency plan a reality and should have a deadline to complete these steps. The hearing is

crucial for making key decisions for the child and family.

You have a central role in this hearing. Know your responsibilities and be clear on what your client wants.

### — Practice Tips: Permanency Hearings

*Reunification is the top choice permanency option—*ASFA leaves the chance for return home open as a permanency goal. In fact, it is the first option listed. Therefore, you should vigorously argue that return home is the appropriate goal for the child, especially when (a) your client is doing well; (b) the agency delayed services; or (c) because of the child's needs, other permanency options don't make sense.

*Relatives can help your client<sup>12</sup> —* While your client may be hesitant to have a relative care for the child, explore the option early in the case. If the parent waits until the child is attached to another caretaker, it may be too late for a relative to take over. Keeping the child in the family of origin is a priority under ASFA and should be considered in all cases. If you find a relative who may be an appropriate caretaker, present that evidence to the agency and court, hopefully before the permanency hearing, but it can be raised as a placement option at the hearing. Consider whether this relative will care for the child for the long term if necessary; otherwise, the relative would not be a *permanency* option.

*Demand full and thorough permanency hearings—*It may be up to you to bring all permanency options to the court's attention. For example, maybe your client has identified someone willing to be a guardian/legal custodian for the child but will not adopt. Maybe your state allows “open adoptions” and this option would be acceptable to your client. Present this information to the agency and court. Push the court for a thorough hearing so you can examine all witnesses to

## Ten Tips For Attorneys in the Post-ASFA World

- 1 Use the safety focus to your client's advantage.
- 2 Monitor the possibility of a no reasonable efforts situation.
- 3 Demand the front loading of services.
- 4 Be clear with clients about new timeframes.
- 5 Actively consider relative resources.
- 6 Make the permanency hearing meaningful.
- 7 Become a “compelling reasons”expert.
- 8 Weigh the significance of the caretaker's involvement.
- 9 Consider desirability of surrender of parental rights.
- 10 Refine open adoption practices.

Source: Margaret Burt, Esq., Pittsford, NY.

ensure the agency is not choosing a permanency option like adoption prematurely. Parents need you to protect their due process rights.

*Know compelling reasons and be prepared to argue them—*You may be able to convince the agency or judge that termination of parental rights is not an appropriate plan because a compelling reason not to terminate parental rights exists. Remember, the compelling reason decision should be made on a child-by-child basis; no category of reasons would fit all children who appear to fit into that category. Examples of common compelling reasons, though, include—

- the child is a teenager who is attached to his birth family and does

- not, after counseling, wish to be adopted;
- the child suffers from severe medical problems and cannot be placed with a family (this child should be reviewed in the future to see if the compelling reason still exists);
- the child is placed with a caretaker, to whom the child is attached, and the caretaker would accept guardianship but does not wish to adopt.

### Termination of Parental Rights

ASFA requires the agency to file a TPR petition if (a) the child has been in foster care for 15 out of the last 22 months; (b) a court determined the child was abandoned; or (c) the parent committed one of several crimes. Be sure you know the following exceptions to this requirement: (a) the child is being cared for by a relative;<sup>13</sup> (b) the agency has documented compelling reasons why termination would not be in the child's best interests; or (c) the agency did not provide the services, within the time period set out in the case plan, that it deemed necessary for the safe return of the child.<sup>14</sup>

This shortened timeframe makes the upfront services and honesty with parents, discussed above, so important. Your client does not have time to wait for services or delay cooperating with the agency's plan. If you find yourself nearing a termination situation, there are a few steps you can take.

#### — Practice Tips: TPR

*Be prepared*—A termination hearing is the parent's last chance. Therefore, a lot of pressure is on you to try the best case possible. Be prepared to present all possible witnesses of the client's efforts to comply with the plan, proof of the client's progress, and the client's attachment to the child. Be sure to preserve any and all issues for appeal.

*Know the exceptions and argue them*—Does it appear there is a compelling reason that the agency should have decided not to file the

TPR? Did the agency provide all necessary services to your client? Try to build a case around these issues. Attempt to make your argument to the agency to see if the TPR could be delayed. If that does not work, argue your case to the court.

It is in the agency's discretion whether to file the petition or not, but if you can show that it was premature or unfair, you may be able to get your client another chance. The exceptions are not a defense for a parent against the TPR. For example, just because a child is living with a relative does not mean adoption is not the best plan. However, if a compelling reason exists that makes TPR not in the child's best interests, that would be a good argument against the TPR. If the *agency* delayed services, that may also be a good argument for your client.

*Consider whether the child seems "adoptable"*—While there may be an adoptive home for most children, it is harder to place some children than others. ASFA is not intended to create legal orphans and it may be up to you to point this out to the judge in the case of a hard-to-place child. If this arises, be prepared to argue why other permanency options would be more appropriate.

*Remember that surrendering parental rights may be a good option for some clients*—Sometimes parents feel awkward saying they want to give up their rights, but it may be exactly what is best for them and their child. Sometimes parents realize they will lose a hearing and it would be too upsetting to go through the court process. Talk with your client honestly about this option. Do not discourage it if it is what the client wants.<sup>15</sup> If your state has an open adoption law or policy, discuss it with your client and try to facilitate such an arrangement if your client would like.

*Consider voluntary surrender to save the parent's chances for future children*—One of the reasons a judge could decide the agency need not

make reunification efforts is if the parent's rights to the child's sibling were terminated involuntarily. In cases in which your client's chances of winning a TPR are not good, consider counseling your client about surrendering his or her rights voluntarily. This way, if your client has another child in foster care, the agency would not have an automatic reason to ask the judge to discontinue services.

Know your jurisdiction's interpretation of "voluntary surrender." In some places, a parent can decide up until the moment an involuntary TPR hearing begins to surrender and it will be considered voluntary. In other jurisdictions, once an involuntary petition is filed, the TPR is considered involuntary, no matter if the parent decides to consent or not. This will impact when and how you counsel your client about this decision.

### Caretaker's Right to Notice and Opportunity to Be Heard

ASFA provides foster parents, preadoptive parents, and relative caretakers the right to be notified of all hearings and an opportunity to be heard at the hearing. This section does not give these individuals party status in the case.<sup>16</sup> ASFA does not dictate the process for how the caretaker will be presented in court, which is causing some problems throughout the country. No matter how your court chooses to hear from the caretaker, you need to be prepared for the testimony.

While caretakers may not always be strong advocates for birth parents, sometimes they have information that would help the parent. Even if the information they will say in court will not help your client, you should know it in advance. The foster parents or other caretakers often know the child best and can provide information about the child's day-to-day functioning. They should be taken seriously by parties and the court.

#### — Practice Tips: Preparing for Hearings Involving Caretakers

*Talk with the caretaker ahead of time*—This is a good way to prepare

for cross-examination. In most jurisdictions, and according to ASFA, the caretaker is not a party, so there are no ethical problems with you talking to the caretaker ahead of time. It is important to know what the caretaker will say and then compare it with what your client thinks the caretaker will say. Of course, you'll need to find out what your client believes to do this effectively.

*If the testimony will help your client, offer the caretaker assistance*—For example, be sure the caretaker knows when and where the hearing will be held and offer help in getting him or her to court.

*Consider client confidentiality*—If there are confidential matters discussed during the hearing, decide whether the caretaker should be in the courtroom for the entire hearing. If you believe the caretaker should not be there for part of the hearing, make a motion at the beginning of the hearing or as soon as you realize there is an issue. Issues to consider include your client's HIV status, and progress in drug treatment or mental health counseling. Judges may disagree on the appropriateness of having the caretaker present; as of now there is little guidance on this topic.

## **STRATEGIES AND TACTICAL DECISIONS**

**To delay or not to delay**—This is a tough question. Most attorneys are trained to perform in an adversarial system where delays often work to their clients' advantage. Attorneys practicing in the child welfare system are no different. We are used to everyone fighting, especially with the agency, for everything. However, delaying and fighting every step of the way may not serve your clients well. With shortened timeframes, and the possibility the agency will request bypassing the reunification efforts requirement, there is a strong motivation for you and your client to cooper-

ate with the agency. If you are part of the planning team, rather than a barrier to progress, your client may benefit, some of the power the agency has over your client may diminish, and the caseworker may have a more positive attitude about your client.<sup>17</sup>

You have an obligation to consider the risks of your case strategy and explain them to your client. In most cases, you should advise your client to cooperate and start services right away. However, there are special cases. For example, when your client denies the abuse happened at all, or when it is difficult for your client to cooperate in your case because a criminal case is pending. Cooperating may be perceived as an admission which could be devastating for your client's case. Consider working out a deal with the agency where your client cooperates without making any admissions or harmful statements. Counsel your clients about the risks of delaying services, and let them make the decision that is best for their situations. For example, you should advise them that the ASFA clock is ticking towards a permanency decision and if they do not cooperate they may not have the child returned.

**Balancing substance abuse treatment and ASFA timelines**—The link between child welfare and substance abuse is obvious to everyone working in the system. Most parents of children in foster care have a substance abuse problem, and yet most jurisdictions lack adequate treatment opportunities. Even if programs exist, there is tension between the child welfare community and the substance treatment community about timeframes and appropriate treatments.

As the parent's advocate, you should understand the effects of substance abuse, the best uses of assessment tools, the best treatment programs and the treatment opportunities available in your community.<sup>18</sup> Many jurisdictions are working hard to improve communication between the child welfare and substance abuse

treatment communities. You could play an integral role in your system to improve the treatment opportunities for your clients. Join any existing committees or push to start one if none exist. Be sure the court, agency, children's attorneys and substance abuse treatment teams are invited to participate. Collaborating on this issue could go a long way to fixing a problem in the system and helping your clients.

**Get educated and share your knowledge**—Knowing about services in your community is useful to question what the agency says is right or available for your client. Find out about treatment opportunities for substance abuse and mental health issues, quality parenting classes, support groups and adoption resources. Learning your state law inside and out will prepare you to make good arguments in court and negotiate fairly. Try to meet with the other parents' attorneys regularly to share information, compare notes, and network.<sup>19</sup> You may not be in the same office, but could meet periodically to support each other and raise the level of representation your clients receive.

**Talk to your client** – Meet with your client often and repeat over and over the new timeframe crunch. Clients familiar with the system may not believe the new timeframes.<sup>20</sup> Advise those who are able to keep a log of their appointments, visits, and phone calls because these documents may be useful as evidence at a hearing.<sup>21</sup> Try to encourage them to be honest with you about their histories/records – you need to know what you are facing. Let them know that responsibility has shifted more to them and they will need to participate actively in services to have their children returned. Honest talk can make a difference.

## **CONCLUSION**

Your job is not an easy one but it is essential. You are the one who can

guarantee parents a fair chance in the system. It takes hard work, creativity, and energy to do what is right for people who may not have anyone in their corner. But by doing so you ensure a fairer child welfare system for everyone involved.

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### Endnotes

1. The Adoption and Safe Families Act, P.L. 105-89, became law in November 1997. It amended the federal foster care law, Titles IV-B and IV-E of the Social Security Act, by putting the primary focus of the law on safety and permanency for foster children.
2. This article assumes you have a basic understanding of ASFA. For general overviews see: Laver, Mimi. "Implementing ASFA: A Challenge for Agency Attorneys." *Child Law Practice* 17(8), October 1998; Rollins, Miriam. "Legislative Update: The Adoption and Safe Families Act of 1997." *Child Law Practice* 16(11), January 1998.
3. ASFA § 101(a)(A), 42 U.S.C. § 671(a)(15)(A).
4. ASFA § 101(a)(C), 42 U.S.C. § 671(a)(15)(C).
5. ASFA § 101(a)(F), 42 U.S.C. § 671(a)(15)(F).
6. For ASFA to work well, and concurrent planning to be implemented correctly, services to parents must be "front loaded" or delivered early in a case.
7. ASFA § 101(a)(D), 42 U.S.C. § 671(a)(15)(D).
8. Greenberg, Daniel & Florence Roberts. "Representing Parents in Article 10 Proceedings." *Practising Law Institute* 158, March 1991, 139-159.
9. Boyer, Bruce A. "Ethical Issues in the Representation of Parents in Child Welfare Cases." *Fordham Law Review* 64, March 1996, 1621-1654, 1650. (critical role of attorney acting as counselor)

10. The timing in this section is: 12 months after the earlier of a finding (adjudication) that the child has been neglected or abused; or 60 days from the date the child was removed from the home. ASFA § 103 (b) (F), 42 U.S.C. § 675(5)(F).

11. ASFA § 302(C), 42 U.S.C. § 675(5)(C).
12. Telephone interview with Margaret Burt, Esq., Pittsford, New York, August 3, 1999.
13. ASFA § 103(a), 42 U.S.C. § 675(5)(E) sets out that the relative exception is at the State's option. Most states have included it as a TPR exception.
14. Ibid.
15. Interview with Margaret Burt.
16. ASFA § 104, 42 U.S.C. § 675(5)(G).
17. Bailie, Kathleen A. "The Other 'Neglected'

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adoption proceedings, he filed a "paternity questionnaire" with the Domestic Relations Division in Washington. The Division notified the father that it lacked jurisdiction over the child since the child lived in Utah. The father did not file a paternity action in Utah or Washington. Instead, he sent a letter to the Utah court opposing the adoption. He also petitioned for custody of the child. The adoptive parents moved to dismiss.

The district court held the father lacked legal standing to contest the adoption because he did not establish paternity in Utah. The Utah Court of Appeals affirmed (unpublished opinion).

The Supreme Court of Utah granted certiorari and affirmed. The father claimed his parental rights were protected by the constitution and could not be terminated without proving unfitness. The court disagreed, explaining that in cases involving unmarried fathers, the biological relationship alone does not establish constitutionally protected parental rights. Utah law requires that an unmarried father fully commit to being a parent for constitutional protections to attach. An unmarried father who does not commit to parenthood by establishing paternity, providing medical care

Parties in Child Protective Proceedings: Parents in Poverty and the Role of the Lawyers who Represent Them." *Fordham Law Review* 66, May 1998, 2285-2331, 2328.

18. Young, Nancy, Sidney L. Gardner & Kimberly Dennis. *Responding to Alcohol and Other Drug Problems in Child Welfare: Weaving Together Practice and Policy*. Washington, DC: CWLA Press, 1998.
- Chiancone, Janet. "Substance Abuse Treatment in Child Welfare: A Guide for Lawyers Representing Children and Families." *Child Law Practice* 17, August 1998, 81-82, 90-95.
19. Interview with Margaret Burt.
20. Interview with Marge Janoski, Esq., Philadelphia, PA, August 1999.
21. Interview with Heidi Redlich Epstein, Esq., Washington, DC, August 1999.

and financial support, etc., loses his constitutional protections. Since the father did not take any legal steps to protect his parental rights, he was not entitled to constitutional protections.

The father also claimed that he was denied due process of law because he was blocked from contesting the child's adoption. The court explained that in order for an unmarried father to be entitled to consent to adoption the father must show full commitment to his parental responsibilities. Because the father failed to establish paternity, he waived his right to consent to the adoption.

Last, the father claimed Utah's adoption statute violated equal protection by requiring the consent of unmarried mothers before adoption proceedings, but not requiring the consent of unmarried fathers, unless the father has established paternity. The court explained that the need to distinguish fathers who have accepted legal responsibility for caring for their children from those who have not was a reasonable basis for the differing requirements for consent of unwed mothers and unwed fathers. Thus, permitting the adoption without the father's consent, since he had not demonstrated a legal commitment to the child, did not violate equal protection.