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Erratum

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THE ADOPTION AND SAFE FAMILIES ACT OF 1997: CHANGING CHILD WELFARE POLICY WITHOUT ADDRESSING PARENTAL SUBSTANCE ABUSE

*Mary O'Flynn**

INTRODUCTION

Sam and his sister Julie, ages five and three respectively, have been brought to the attention of the child protective services agency. A neighbor called the child abuse and neglect hotline¹ alleging maternal neglect by Mrs. C. The neighbor informed the intake worker that the children are often left alone, look hungry and wear the same dirty clothes for days at a time. Neglect is the primary reason children enter the foster care system.²

As a result of the report, an investigation was initiated and a case worker went to the home. The case worker observed the children's living conditions and subsequently had them removed from the home. At the initial hearing, the court determined that Ms. C. was temporar-

* J.D. 1999 Columbus School of Law, The Catholic University of America; Fairfeild University, B.A. 1996.

1. This account is drawn from a composite of cases illustrating the manner in which many families are brought to the attention of child protective services agencies and family court.

2. See U.S. General Accounting Office, GAO/HEHS 98-40, PARENTAL SUBSTANCE ABUSE IMPLICATIONS FOR CHILDREN, THE CHILD WELFARE SYSTEM, AND FOSTER CARE OUTCOMES 4 (1997) [hereinafter PARENTAL SUBSTANCE ABUSE IMPLICATIONS]. "Neglect is most frequently cited as the primary reason children are removed from the custody of their parents and placed in foster care." *Id.* A large percentage of children entering the child welfare system suffer from neglect while only seven percent of the children in foster care reportedly suffer physical, sexual, or emotional abuse. See *id.* The Office of Child Abuse and Neglect reports that chemically dependent parents often neglect their children because they are physically or psychologically absent due to drug use. See *id.* In 1991, 68% of foster children in California and New York were removed from their parents because of neglect. See *id.*

ily unable to care for her children because of her continued use of alcohol and cocaine. Following a dispositional hearing, the children were placed in foster care.³

In recent years, the child welfare system has seen a dramatic increase in the number of abuse and neglect⁴ cases like Sam and Julie's. Between 1982 and 1992, the nation's foster care population doubled.⁵ The General Accounting Office (GAO) estimated in 1998 that there were 500,000 to 600,000 children living in foster care placements nationwide.⁶

One major cause of these increased numbers is drug use. During the mid-1980s, crack cocaine was introduced into low-income neighborhoods⁷ and over same time period, parental cocaine use became wide-

3. Foster care is the term used for a state arranged placement for children removed from the home as a result of neglect or abuse. Foster care provides a temporary, substitute family licensed and compensated by the state child welfare agency. It provides child care and an alternative family placement while the parent attempts to remedy the circumstances causing the child's removal from the home.

4. See U.S. General Accounting Office, GAO/HEHS 98-40, PARENTAL SUBSTANCE ABUSE IMPLICATIONS, *supra* note 2, at 4.

5. See *Hearing on P.L. 104-33 Before the Subcomm. on Human Resources of the House Comm. on Ways and Means*, H.R. REP. NO. 104-33, at 8 (1995) (statement of Dale Robinson, analyst in Social Legislation Education and Public Welfare Division of the Congressional Research Service. Between 1982 and 1992, the foster care population doubled in size to 442,000 children in care); see also U.S. General Accounting Office, GAO/HEHS-98-182, FOSTER CARE: AGENCIES FACE CHALLENGES SECURING STABLE HOMES FOR CHILDREN OF SUBSTANCE ABUSERS 1 (1998) [hereinafter FOSTER CARE: AGENCIES FACE CHALLENGES].

6. See U.S. General Accounting Office, GAO/HEHS-98-182, FOSTER CARE: AGENCIES FACE CHALLENGES at 1; Kathleen A. Bailie, *The Other "Neglected" Parties In Child Protective Proceedings: Parents in Poverty and the Role of the Lawyers Who Represent Them*, 66 *FORDHAM L. REV.* 2285, 2291 (1998); U.S. Department of Health and Human Services, *Blending Perspectives and Building Common Ground, a Report to Congress on Substance Abuse and Child Protection* (visited March 9, 1999) <<http://www.aspe.hss.gov/hsp/subabuse99/subabuse.htm>> (stating that as of Mar. 31, 1998, there were approximately 520,000 children in foster care).

7. See Douglas J. Besharov, *When Drug Addicts Have Children* ix (1994) (emphasizing the seriousness of child abuse and neglect caused by parental drug addiction). Besharov states that "more than heroin, crack cocaine threatens the well-being of hundreds of thousands of children, especially Afri-

spread,⁸ especially among women.⁹ Between 1986 and 1996, an estimated eighty percent of child abuse and neglect cases involved single mothers with substance abuse problems.¹⁰

This increase in drug use resulted in more reports to child protective services of child neglect and abuse and directly impacted the growth of the child welfare population.¹¹ The General Accounting Office recently completed a survey on substance abuse and foster care in which it evaluated the foster care populations of California and Illinois, states which comprise one-quarter of our country's foster care children.¹² The report found that two-thirds (or 84,000) of the children within the systems surveyed had at least one parent who abused drugs or alcohol.¹³

The issues facing children in the system and those persons working in child welfare are complex: the best interests of the child must be balanced against the parents' "fundamental liberty interest in the care,

can-American children." *Id.*

8. See U.S. General Accounting Office, GAO/HEHS 98-40, PARENTAL SUBSTANCE ABUSE IMPLICATIONS, *supra* note 2, at 4 ("Cocaine was the most prevalent substance that young foster children were known to have been exposed to, and the incidence of this exposure increased from about seventeen percent of young foster children in 1986 to fifty-five percent in 1991.").

9. See Joan L. Lieb & Claire Sterk-Elifson, *Crack in the Cradle: Social Policy and Reproductive Rights Among Crack-Using Females*, CONTEMP. DRUG PROBS. (Dec. 22, 1995). "One unique feature of the crack cocaine epidemic is the relatively high involvement by women as compared with women's involvement in other drug epidemics; the number of female crack cocaine users equals or exceeds that of men." *Id.*

10. See Lenette Azzi-Lessing & Lenore J. Olsen, *Substance Abuse-affected Families in the Child Welfare System: New Challenges, New Alliances* 41 SOCIAL WORK 15 (1996); See generally CHILD WELFARE LEAGUE OF AMERICA CRACK AND OTHER ADDICTIONS: OLD REALITIES AND NEW CHALLENGES, (1990).

11. See Alma J Carteen, *Mothers in Recovery: Rebuilding Families in the Aftermath of Addiction*, 41 SOCIAL WORK 214 (1996).

12. See U.S. General Accounting Office, GAO/HEHS 98-182, FOSTER CARE: AGENCIES FACE CHALLENGES, *supra* note 5, at 1.

13. See *id.*; U.S. General Accounting Office GAO/HEHS 98-40, PARENTAL SUBSTANCE ABUSE IMPLICATIONS, *supra* note 2, at 4 (U.S. Department of Health and Human Services report found that depending on the area of the country examined, substance abuse was involved in up to 90% of all child abuse or neglect cases. In New York City, 75% of the confirmed cases of child abuse and neglect involved parental substance abuse.).

custody and management of their child.”¹⁴ Despite the increasing number of families needing support services, resources for treatment have not increased.¹⁵

Nationally, mental health, alcohol and drug treatment expenditures decreased by ten percent since 1986.¹⁶ At the local level, some states, such as New York, cut funding further for parental drug treatment services.¹⁷ In the District of Columbia, substance abuse treatment services decreased by fifty percent over the past five years.¹⁸

In November 1997, Congress passed the Adoption and Safe Families Act (ASFA)¹⁹ in response to the failed attempts of the current child welfare system²⁰ and the growth of the foster care population over the last two decades.²¹ The purposes of ASFA are to promote adoption of foster children and to shorten the time for assisting the numerous children waiting in the system to achieve permanency.²²

14. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

15. See JOAN KAUGMAN & EDWARD F. ZIGLER, *CHILD ABUSE AND SOCIAL POLICY IN CHILDREN, FAMILIES AND GOVERNMENT: PERSPECTIVES ON AMERICAN SOCIAL POLICY* 235 (Edward F. Zigler et al. eds., 1996).

16. See U.S. Department of Health and Human Services, *BLENDING PERSPECTIVES AND BUILDING COMMON GROUND, A REPORT TO CONGRESS ON SUBSTANCE ABUSE AND CHILD PROTECTION*, App. C at 1 (visited Mar. 9, 1999) <<http://www.aspe.hss.gov/hsp/subabuse99/subabuse.htm>>.

17. See Karen Houppert, *Crisis in Family Court*, *THE VILLAGE VOICE*, Apr. 20, 1999, at 41.

18. See Shari Horwitz, *Study Finds Drug Abuse at Heart of City's Ills*, *WASH. POST*, Apr. 17, 1999, at B1 (stating the findings of a two year study which reports that despite the increase in drug use, the outpatient opportunities and inpatient bed availability decreased by 50.3% over the last five years).

19. Pub. L. No. 105-89, 111 Stat. 2115 (1997).

20. See Title IV-E Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews, 63 Fed. Reg. 50,061 (1998).

21. See H.R. REP. NO. 105-77 at 7 (1997).

22. See *id.* The ultimate goal of foster care is to provide a child with a safe, stable, and permanent home.

Permanency can be achieved in several ways. The most common options are (1) the child is returned to the home from which it was removed or (2) the child is placed with a new family in either a guardianship or an adoption relationship. Foster care is temporary in nature, the goal of permanency seeks to remove the child from a temporary life style and to replace it with a permanent arrangement. Some believe a permanent home (even if not the home of origin) is best for the psychological development of the child. Other studies show that even an unstable biological parent best provides the bonding necessary for development.

ASFA now requires permanency decisions within twelve months of a child's entry into foster care.²³

ASFA re-emphasizes the original goals of federal child welfare law²⁴ while placing greater attention on areas where the system has failed. Under ASFA, the health and safety of a child are the paramount factors considered in the evaluation of all prospective placement options.²⁵ ASFA also provides changes in policy that guide the child welfare system and the manner in which foster care systems are to address the issue of reunification between a child and his/her biological parent.

Although ASFA may have far-reaching effects on the lives of thousands of children and families, it lacks any firm response to parental substance abuse. As a result of this omission and the accelerated time lines placed on states to terminate parental rights, ASFA may set many families up for failure. Specifically, parents with substance abuse problems may be unable to comply with the state requirements imposed by ASFA, resulting in some children becoming available for adoption by strangers in a little more than a year.²⁶

This paper argues that children of substance-abusing parents will be unfairly removed permanently from their parents' care because of the increased speed of termination of parental rights proceedings under ASFA and because of the inadequacy of available drug treatment programs to serve parents whose children are in foster care. Part I briefly discusses child welfare law and policy prior to the enactment of the Adoption Assistance and Child Welfare Act of 1980 (P.L.96-272) and explores the effects of P.L. 96-272. Part II addresses the implementation of ASFA and the manner in which the failure of P.L. 96-272 led to enactment of ASFA.

Part III explains why the problems of substance abuse must be addressed more directly. It focuses on the problems substance abuse causes for families in the foster care system and the barriers parents

Id.

23. See Pub. L. No. 105-89, 111 Stat. 2115 § 302 (1997).

24. See The Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (1980). The law and policy of the Child Welfare Act of 1980 is discussed in part I B of this paper.

25. The Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified at 42 U.S.C.A. § 1305)

26. Kinship care, in which a child is placed with a relative, is another placement option recognized by ASFA that is discussed in greater depth in section II of this paper.

face in obtaining treatment. Part IV suggests amendments to the Act to address the needs of this population and integrate existing support systems currently operating independently with the same individuals.

I. HISTORICAL CONTEXT OF CHILD WELFARE LAW AND POLICY

A. *Law and Policy Prior to the Adoption Assistance and Child Welfare Act*

The Fourteenth Amendment to the U.S. Constitution protects and favors the family in issues relating to domestic matters.²⁷ This protected interest, however, must be balanced against the state's compelling interest in the health, welfare, and safety of its citizens.²⁸ As a result, states may legislate in the area of child welfare and provide child welfare services. In 1935, Congress passed the Social Security Act thereby establishing the foundation for federal funding and intervention in social services.²⁹ It was not until the enactment of the Child Abuse Prevention and Treatment Act (CAPTA) in 1974³⁰ and the Adoption Assistance and Child Welfare Act of 1980 (P.L. 96-272)³¹ in 1980 that the federal government took an active role in child welfare policy. CAPTA required states to develop child abuse and neglect reporting systems and to provide protection and court representation for

27. See *Santosky v. Kramer*, 455 U.S. 745, 753 (quoting from *Quilloin v. Walcott*, 434 U.S. 246, 255 (1958) (emphasizing the Court's historical recognition that "freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment"). See also U.S. CONST. amend XIV, § 1, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28. See *Stanley v. Illinois*, 405 U.S. 645, 653 (1972).

29. See Sharon L. Kagan & Eliza Pritchard, *Linking Services for Children and Families: Past Legacy, Future Possibilities* in CHILDREN, FAMILIES, AND GOVERNMENT 378, 381 (Edward F. Zigler ed., 1996).

30. The Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (1974).

31. The Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified at 42 U.S.C. § 670 et seq. (1994.)).

children.³²

State foster care policy prior to the enactment of P.L. 96-272 focused primarily on removal of children from unsafe environments³³ rather than on prevention services or family reunification.³⁴ While children were separated from their families without reunification efforts, foster care systems attempted to promote the family by refraining from terminating parental rights.³⁵ This framework left children in the system with little hope of movement toward reunification or alternative permanent placement.³⁶

In 1977, the U.S. Supreme Court recognized several crucial problems within the child welfare system.³⁷ The Court noted that children remained in the New York foster care system for an average of more than four years,³⁸ with many remaining in the system indefinitely.³⁹ The Court referred to studies indicating that social workers favored continued placement of children with families of greater economic means, rather than reuniting children with their lower-income parents.⁴⁰ The Court noted that agency policies discouraged involvement of biological parents with a child in foster care and that funding resources promoted continued foster care rather than reunification.⁴¹

A few years later, the Court held that the Due Process Clause does not entitle indigent parents faced with possible termination of parental rights to representation by appointed counsel.⁴² While the Court required states to follow procedures in terminating parental rights that

32. See CHILDREN'S DEFENSE FUND, STATE OF AMERICA'S CHILDREN YEARBOOK 1998 63 (1998).

33. See Bailie, *supra* note 6, at 2286; Martin Guggenheim, *The Effects of Recent Trends to Accelerate The Termination of Parental Rights of Children in Foster Care – An Empirical Analysis in Two States*, 29 FAM. L.Q. 121, 121 (1995).

34. See Rudolph Alexander, Jr. & Cora L. Alexander, *The Impact of Suter v. Artist M. on Foster Care Policy*, 40 SOCIAL WORK 4 (1995).

35. See Guggenheim, *supra* note 33, at 121.

36. See *id.*

37. See generally Smith v. Organization of Foster Care Families for Equality and Reform, 431 U.S. 816 (1977).

38. See *id.*

39. See *id.* at 835.

40. See *id.* at 834.

41. See *id.* at 835.

42. See generally Lassiter v. Dep't of Social Services, 452 U.S. 18 (1981).

would satisfy due process requirements, it did not specify what standard or procedures should be applied to achieve this goal.⁴³

In 1982, the Supreme Court established that a state must show "clear and convincing evidence" of abuse or neglect before parental rights may be terminated.⁴⁴ The Court concluded that it was necessary to raise the standard from preponderance of the evidence, a decision made in light of the important rights at risk in termination of parental rights proceedings which are final and irrevocable.⁴⁵ The Court held that biological parents have fundamental liberty interests in the family and the care of children, and such interests would be better protected by the clear and convincing evidentiary standard. Although this liberty interest may be limited at times by state intervention for the health, safety, or welfare of a child, the liberty interest is, nevertheless, a fundamental right guaranteed to all parents.⁴⁶

*B. The Adoption Assistance and Child Welfare Act, P.L.
96-272*

In response to the documented problems arising in foster care systems of that era,⁴⁷ Congress passed the Adoption Assistance and Child Welfare Act of 1980,⁴⁸ commonly referred to as P.L. 96-272. This Act established uniform guidelines and requirements for state child welfare systems.⁴⁹ In an effort to solve the dilemma of children being trapped in the system, P.L. 96-272 changed the philosophy of the child welfare system by placing a new emphasis on family preservation and reunification.⁵⁰

43. *See id.*

44. *Santosky*, 455 U.S. at 756.

45. *See id.* at 759.

46. *See id.* at 753

47. *See* Alice C. Shotton, *Making Reasonable Efforts in Child Abuse and Neglect Cases: Ten Years Later*, 26 CAL. W.L. REV. 223, 224 (1990). The legislative history of the Act shows that Congress heard testimony over a five-year period regarding the child abuse and neglect system. *See id.* "The most striking fact presented was the astonishing number of children who were being removed from their families and placed in foster care, many for the entire duration of their childhoods." *Id.*

48. The Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500. (codified at 42 U.S.C. § 670 et seq.).

49. *See* Guggenheim, *supra* note 33, at 122.

50. *See* Alexander & Alexander, *supra* note 34, at 543.

P.L. 96-272 was designed to provide financial incentives to states to prevent unnecessary removal of children from families, to provide family preservation services, to reunify families when possible and to shorten the time spent in foster care by promoting adoption when reunification with a child's biological family was not possible.⁵¹

Before the enactment of P.L. 96-272, states could only receive federal reimbursement for cases in which children were physically removed from the home and placed in foster care.⁵² P.L. 96-272 marked the first attempt by the federal government to provide financial incentives to states to reduce the time each child spent in foster care and to implement permanency planning for foster children.⁵³

When P.L. 96-272 was adopted, psychologists were promoting the "psychological parent" theory which proved to be one of the new law's influential elements and underlying themes.⁵⁴ The notion was that children suffer emotional damage when the parent-child relationship is disturbed. To avoid or minimize such damage, this theory states that children should be provided with permanency, either with their biological parents through family preservation services or with psychological parents, such as adoptive parents.⁵⁵

P.L. 96-272 recognized the importance of family preservation⁵⁶ and established services to families as an alternative to foster care in the welfare system. The psychological parent theory thus promoted permanency as the goal for children in the foster care system.⁵⁷

1. P.L. 96-272 Establishes a Federal Funding Structure for Foster Care and Adoption Assistance

To create uniformity in foster care practice throughout the country,

51. See Guggenheim, *supra* note 33, at 122-123.

52. See *Suter v. Artist M.*, 503 U.S. 347 (1992) (quoting the report of the Senate Comm. on Finance regarding federal reimbursement methods in place prior to the Adoption Assistance and Child Welfare Act, which encouraged out of home placement as the only way a state could be reimbursed for foster care costs); S. Rep. No. 96-336, at 12 (1979).

53. See Alexander & Alexander, *supra* note 34, at 543.

54. See Guggenheim, *supra* note 33, at 124.

55. See generally JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973) and *BEFORE THE BEST INTERESTS OF THE CHILD* 41 (1979).

56. See Bailie, *supra* note 6, at 2289.

57. See Guggenheim, *supra* note 33, at 124.

the drafters of P.L. 96-272 changed the financial incentives to encourage the use of foster care⁵⁸ and restructured the disbursement of federal funding of child welfare services.⁵⁹

Eligibility for federal reimbursement required states to submit plans committing to make "reasonable efforts"⁶⁰ to prevent the removal of children from their families and to promote reunification of children with their biological families.⁶¹ Funds appropriated under this section would be used to pay a percentage of the foster care and adoption assistance costs of states that submitted approved state plans.⁶²

P.L. 96-272 mandated that an individual case plan be developed for each child in foster care for whom the state received foster care maintenance payments.⁶³ Furthermore, P.L. 96-272 also required a dispositional review hearing to be held in court to determine each child's case plan. These hearings were to take place no later than eighteen months after a child entered the foster care system.⁶⁴

58. *See id.* at 123.

59. *See* P.L. 96-272 amended Title IV of the Social Security Act, creating Title IV-E Federal Payments for Foster Care and Adoption Assistance. The Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500. § 470 (1980).

60. The Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 § 471 (codified in 42 U.S.C. § 671(a)(15)) reads as follows:

(a) in order for a state to be eligible for payments under this part, it shall have a plan approved which . . . (15) effective October 1, 1983, provides that, in each case, reasonable efforts will be made (A) prior to placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home.

61. *See id.*

62. *See* The Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 § 470 (1980) (codified in 42 U.S.C. § 670).

63. *See* The Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 § 475 (1980) (codified in 42 U.S.C. § 675(1)). Each case plan was required to include: a description of the child's placement, discussion of the appropriateness of the placement, an explanation of the manner in which the child welfare agency plans to carry out the judicially determined permanency goal of the child, a plan which assures that the child receives the care and services which are needed, a plan to ensure services be provided to the child's parents in order to facilitate the return of the child to his/her own home or alternative permanent placement arrangements. *See id.*

64. *See* The Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 § 475(5)(c) (codified in 42 U.S.C. § 675 (5)(c)).

2. P.L. 96-272 and the "Reasonable Efforts" Requirement

A foundation of P.L. 96-272 was the requirement that "reasonable efforts" be made to reunify families. The term "reasonable efforts" however, was neither defined in the statute nor in the regulations adopted by the U.S. Department of Health and Human Services.⁶⁵ This led to much debate in the implementation and practical application of P.L. 96-272, as the Act permitted individual states and court systems to define reasonable efforts.⁶⁶ Only three states incorporated a definition of reasonable efforts into their statutes.⁶⁷

The intent of the reasonable efforts requirement was to help families remain together by providing needed social services and to reunify families who were separated as a result of foster care.⁶⁸ Without a clear definition of the term, it has been subject to varying interpretation, with unintended consequences for children and families.⁶⁹ The legislative history of ASFA highlights some of the problems arising under the reasonable efforts term in P.L. 96-272. For example, in some cases social workers and the courts have been accused of interpreting the term too broadly and favoring parental rights over those of children by supplying services for extended amounts of time.⁷⁰ The reasonable efforts requirement has been similarly criticized as placing children at risk by forcing children to remain in the system for unreasonable lengths of time.⁷¹

The reasonable efforts standard was created to enhance family pres-

65. See Shotton, *supra* note 47, at 225; see also U.S. General Accounting Office, GAO/HEHS 98-182, FOSTER CARE: AGENCIES FACE CHALLENGES, *supra* note 6, at 4.

66. See Shotton, *supra* note 47, at 225.

67. See *id.* Only Florida, Minnesota, and Missouri have attempted to define the term reasonable efforts.

68. See The Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500; see also H.R. REP. 105-77, at 8.

69. See Interview with Sarah R. Kaplan, Assistant General Counsel, D.C. Child and Family Services, in Washington, D.C. (Aug. 23, 1999) (on file with author).

70. See H.R. REP. 105-77, at 8.

71. Misinterpretation of the reasonable efforts requirement due to the lack of clarity between proper preservation efforts and child safety has been blamed for a number of highly publicized child deaths. See Title IV-E Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews, Proposed Rule, 63 Fed. Reg. 50,061 (1998).

ervation and reunification services, rather than being used as a device to keep children in the foster care system for extended periods or to return a child to a dangerous or abusive home.⁷² The failure of P.L. 96-272 was vividly illustrated by a series of highly publicized child deaths nationwide and by the rapid growth of a foster care population which more children enter than exit each year.⁷³

II. THE ADOPTION AND SAFE FAMILIES ACT OF 1997

Congress passed the Adoption and Safe Families Act⁷⁴ as a result of the difficulty arising from interpretations of the "reasonable efforts" requirement⁷⁵ and the inability of P.L. 96-272 to achieve permanency goals for foster children.⁷⁶ ASFA amended P.L. 96-272 by providing clarification of its original intent and establishing new requirements for states to receive federal foster care and adoption assistance funding.

A. Clarification of the Reasonable Efforts Requirement

ASFA lists specific circumstances under which reasonable efforts to preserve or reunify a family are not required.⁷⁷ These include situations in which a court determines:

- The parent subjected a child to "aggravated circumstances," which may include abandonment, torture, chronic abuse, and sexual abuse;⁷⁸
- The parent murdered another of his/her children;⁷⁹

72. *See id.*

73. *See id.*

74. The Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115.

75. *See* 143 Cong. Rec. S12668-03, S12669. Senator DeWine, explaining the need for The Adoption and Safe Families Act to correct the misinterpretation of the reasonable efforts standard stated, "There can be no doubt that this problem did, in fact arise because of the 1980 law, and it arose because the 1980 law was and has been for 17 years misinterpreted." *Id.*

76. *See* Bailie, *supra* note 6, at 2291.

77. *See* The Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 § 101 (codified in 42 U.S.C. § 671(a)(15)(D)).

78. *See* The Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 § 101 (codified in 42 U.S.C. § 671(a)(15)(D)(i)) (defining aggravated circumstances in state law).

79. *See* The Adoption and Safe Families Act of 1997, Pub. L. No. 105-89,

- The parent committed voluntary manslaughter of one of his/her children;⁸⁰
- The parent aided or abetted a murder or voluntary manslaughter of another child of the parent;⁸¹
- The parent committed a felony assault which results in serious bodily injury to the child or another child of the parent.⁸²

In addition to the limitations on the state's obligation to make "reasonable efforts," the law requires that a permanency hearing be held within thirty days of the reasonable efforts determination⁸³ and that the state file a petition to terminate parental rights.⁸⁴ ASFA emphasizes that the health and safety of the child are paramount in situations of severe violence and that permanent removal from the home, as well as legal separation from the parent in such cases is warranted.

B. ASFA Accelerates Time Frames for Termination of Parental Rights

ASFA establishes defined timelines for movement of children out of the foster care system. Where a child has been in the foster care of a state welfare agency for fifteen out of the most recent twenty-two months, the State must file or join any existing petitions for termination of parental rights.⁸⁵ Under ASFA, the state need not initiate termination of parental rights if:

- the child is being cared for by a relative;⁸⁶

111 Stat. 2115 § 101 (codified in 42 U.S.C. § 671(a)(15)(D)(ii)(I)).

80. See The Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 § 101 (codified in 42 U.S.C. § 671(a)(15)(D)(ii)(II)).

81. See The Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 § 101 (codified in 42 U.S.C. § 671(a)(15)(D)(ii)(III)).

82. See The Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 § 101 (codified in 42 U.S.C. § 671(a)(15)(D)(ii)(IV)).

83. See The Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 § 101 (codified in 42 U.S.C. § 671(a)(15)(E)(i)).

84. See The Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 § 101, 103 (codified in 42 U.S.C. § 671(a)(15)(D), and 42 U.S.C. § 675(5)(E)).

85. See The Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 § 103 (codified in 42 U.S.C. § 675(5)(E)).

86. See The Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 § 103 (codified in 42 U.S.C. § 675(5)(E)(i)) (signifying safe and appropriate kinship care is a popular placement alternative to foster care); See Stefanie Fliescher Seldin, *Legislative Trends*, 17 ABA CHILD LAW

- the state has documented “compelling reasons” why filing the petition for termination of parental rights would not be in the best interests of the child;⁸⁷
- services have not been provided to the family consistent with the state-established case plan time periods.⁸⁸

Whereas foster care systems once provided long-term services to preserve and reunify families, ASFA now defines the time limit placed on family reunification services.⁸⁹ Unlike past child welfare policy, ASFA prescribes the manner in which foster care agencies are permitted to provide reunification services for the child with its biological parents while the agencies are investigating, recruiting, and planning for the potential adoption of the same child by another family.⁹⁰

In conjunction with the newly established time lines placed on foster care, the Act also shortens the time period for court hearings and establishes permanency planning hearings.⁹¹ The purpose of the permanency hearing is to determine whether the ultimate permanency goal for each child will be reunification or adoption. P.L. 96-272 originally required that the first dispositional hearing take place eighteen months after the child entered foster care.⁹² ASFA now requires that a permanency hearing be held within the first twelve months of care, with follow-up hearings every twelve months thereafter.⁹³

PRACTICE 124 (October 1998). A 1994 census estimated that 5.3 million children live in relative placements. *Id.*

87. *See* The Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 § 103 (codified in 42 U.S.C. § 675(5)(E)(ii)). Compelling reasons, like the term “reasonable efforts” in P.L. 96-272, is undefined and may be open to varying interpretations.

88. *See* The Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 § 103 (codified in 42 U.S.C. § 675(5)(E)(iii)).

89. *See* The Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 § 103 (codified in 42 U.S.C. § 675(5)(E)).

90. *See* The Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 § 103 (codified in 42 U.S.C. § 671(A)(15)(f)).

91. *See* U.S. General Accounting Office, GAO/HEHE 97-73, FOSTER CARE: STATE EFFORTS TO IMPROVE THE PERMANENCY PLANNING PROCESS SHOW SOME PROMISE 6 (1997). Prior to the enactment of the Adoption and Safe Families Act, twenty six states enacted laws or policies to shorten the permanency plan hearing time from eighteen months. *See id.*

92. *See* The Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified 42 U.S.C. § 675(5)(C)).

93. *See* The Adoption and Safe Families Act of 1997, Pub. L. No. 105-89,

ASFA mandates specific time-limited family reunification services,⁹⁴ essentially codifying what "reasonable efforts" should be taken within the fifteen-month foster care period. Services are to be provided both to the child placed in foster care and to the parent or primary caregiver of the child.⁹⁵ Services include counseling, mental health services, assistance with domestic violence, temporary child care, and therapeutic, inpatient, residential, or outpatient substance abuse services.⁹⁶ However, as discussed below, these services and funding are currently inadequate.

III. IMPACT OF ASFA FOR FAMILIES OF SUBSTANCE ABUSE

Expedited hearings present problems for some parents seeking substance abuse treatment because permanency decisions may be required before a parent is even admitted to a treatment program, and long before it can be determined whether a parent is likely to succeed in substance abuse treatment.⁹⁷

This dilemma is illustrated by Ms. C.'s situation from the composite stated previously. As soon as Sam and Julie were removed from Ms. C. and placed in foster care, the clock began to run. In most states, Ms. C. would be given a list of local treatment centers and would be instructed to become drug free within twelve months if she wanted to regain custody of her children. The referral list would likely include several programs with no available space. This is often the extent of assistance offered by the child welfare agency.⁹⁸

Concurrently, Ms. C.'s children would be placed in a foster home also approved as an adoptive placement. If Ms. C. obtained treatment and demonstrated success within the twelve-month period, reunification would be pursued. The more probable outcome is that without sufficient treatment resources, Ms. C. will be unable to access treatment or have an opportunity to show improvement. A petition to ter-

111 Stat. 2115 § 302 (codified in 42 U.S.C. § 675(5)(C)).

94. See The Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 § 103 (codified in 42 U.S.C. § 629a(a)(7)).

95. See The Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 § 103 (codified in 42 U.S.C. § 629a(7)).

96. See The Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 § 103 (codified in 42 U.S.C. § 629a(7)(B)).

97. See U.S. General Accounting Office, GAO/HEHS 98-40, PARENTAL SUBSTANCE ABUSE IMPLICATIONS, *supra* note 2, at 9.

98. See U.S. Department of Health and Human Services, *supra* note 6, at 3.

minate Ms. C.'s parental rights with respect to Sam and Julie would be filed within fifteen months of the children's entrance into foster care.

Speedy exit out of the foster care system does not take into consideration the conflicting time requirements for a parent's recovery⁹⁹ from a substance abuse problem often lasting more than a year.¹⁰⁰ The short timeline presents a challenging dilemma to parents like Ms. C with substance abuse problems,¹⁰¹ because recovery from drug and alcohol addictions requires substantial time and effort.¹⁰² Drug dependency has been described as a chronic, relapsing condition for which there is no fast cure,¹⁰³ but rather a lifetime process of recovery. Cessation of services in the time limited manner overlooks the importance of continued support that could mean the difference between relapse or recovery for the parent.¹⁰⁴

A. Recognition of the Interconnected Issues of Substance Abuse and Child Neglect and Abuse

Substance abuse by parents has long been recognized as a major

99. See *Hearing on the Impact of Substance Abuse on Families Receiving Welfare Before the Subcomm. on Human Resources of the House Committee on Ways and Means*, 105th Cong. 13, 18 (Oct. 28, 1997) (statement of Jane L. Ross, Director, Income Security Issues Health, Education and Human Services Division).

100. See U.S. General Accounting Office, GAO/HEHS 98-40, PARENTAL SUBSTANCE ABUSE IMPLICATIONS, *supra* note 2, at 2. "Drug treatment may last up to one or two years, and recovery is often characterized as a lifelong process with the potential for recurring relapses." *Id.* at 8.

101. See Janet Chiancone, *Substance Abuse Treatment in Child Welfare: A Guide for Lawyers Representing Children and Families*, 17 ABA CHILD LAW PRACTICE 94 (Aug. 1998) (emphasizing the time frames for effective treatment for many substance abusers is longer than the permanency time frames established by ASFA).

102. See U.S. General Accounting Office, GAO/HEHS 98-40, PARENTAL SUBSTANCE ABUSE IMPLICATIONS, *supra* note 2, at 2. "Drug treatment may last up to one or two years, and recovery is often characterized as a lifelong process with the potential for recurring relapses." *Id.* at 8.

103. See Wade F. Horn, *Implications for Policy Making*, in WHEN DRUG ADDICTS HAVE CHILDREN 170-71 (Douglas J. Besharov ed., 1994).

104. See *Hearing on the Impact of Substance Abuse on Families Receiving Welfare, Before the Subcomm. on Human Resources of the House Comm. on Ways and Means*, 105th Cong. 34, 38 (Oct. 28, 1997) (statement of Nancy K. Young, Ph.D., Director, Children and Family Futures).

reason children enter the foster care system,¹⁰⁵ yet ASFA neither provides for funding nor coordination with other social service systems to address this basic issue. The nexus between parental drug abuse and the child welfare population was recognized in early versions of ASFA.¹⁰⁶ These drafts included detailed provisions regarding coordination of substance abuse treatment and child welfare systems as well as appropriation recommendations for drug treatment programs.¹⁰⁷ Proposed funding included block grant allocations for prevention and treatment services,¹⁰⁸ priority treatment for pregnant women and caretaker parents,¹⁰⁹ and foster care funding for children with parents in residential treatment facilities.¹¹⁰

The proposed legislation marked the first time foster care funding would have been permitted for parental substance abuse treatment purposes.¹¹¹ However, this important element of the earlier versions

105. See U.S. General Accounting Office, GAO/HEHS-97-115 CHILD PROTECTIVE SERVICES: COMPLEX CHALLENGES REQUIRE NEW STRATEGIES 9 (1997). The recognition of this link between child maltreatment and substance abuse was addressed in 1990 in the first report of the U.S. Advisory Board on Child Abuse and Neglect. *Id.*

106. See Safe Adoptions and Family Environments Act, S. 511, 105th Cong. (1997); Promotion of Adoption, Safety, and Support for Abused and Neglected Children Act; S. 1195, 105th Cong. (1997).

107. See Safe Adoptions and Family Environments Act, S. 511, 105th Cong. (1997); Promotion of Adoption, Safety, and Support for Abused and Neglected Children Act, S. 1195, 105th Cong. § 306, 307 (1997).

108. See S. 511, 105th Cong. § 201 (1997) (introduced March 20, 1997.)

109. See S. 511, 105th Cong. § 306(b) (1997) (introduced September 18, 1997.)

110. See S. 511, 105th Cong. § 306(c) (1997) (introduced September 18, 1997); Margaret E. Goldberg, *Substance-Abusing Women: False Stereotypes and Real Needs*, Vol. 40, No. 6 SOCIAL WORK 1 (Nov. 1, 1995) (Existing residential treatment programs are difficult for women with dependent children to participate in because there are no wide-scale provisions for children while mothers are in treatment. Few experimental treatment programs provide accommodation for children with their mothers.)

111. See Nancy Young & Sidney L. Gardner, *Children at the Crossroads*, Vol. 56, No. 1 PUBLIC WELFARE 3 (Jan. 1998); see also *Hearing on the Impact of Substance Abuse on Families Receiving Welfare Before the Subcomm. on Human Resources of the House Comm. on Ways and Means*, 105th Cong. (1997) (statement of Richard P. Barth, Ph.D., S. 1195 provision regarding time limited reunification services for a mother and child living in residential treatment would have greatly expanded a promising program.).

of ASFA was not included in the final legislation.¹¹² Federal policies regarding the coordination of such services were debated during the drafting of ASFA,¹¹³ yet Congress could not agree on a proper response to the interconnected issues involved in parental substance abuse and child welfare systems.¹¹⁴ A compromise was reached in a request to the Department of Health and Human Services to provide a comprehensive report within one year of enactment.¹¹⁵ Other references to substance abuse and the role it plays in child welfare were removed from the bill.¹¹⁶

B. Barriers to Substance Abuse Treatment

Although the Adoption and Safe Families Act does provide for time-limited inpatient, residential, or outpatient substance abuse treatment services,¹¹⁷ it does not provide specific funding for such programs. Services currently available are inadequate. Many communities lack any substance abuse treatment services. Nationally, the demand for drug treatment far exceeds the supply.¹¹⁸ In 1997, the National Association of State Alcohol and Drug Abuse Directors estimated that there were 52,000 people on waiting lists for substance

112. The legislative history does not provide any additional information on this debate.

113. See U.S. Department of Health and Human Services, *BLENDING PERSPECTIVES AND BUILDING COMMON GROUND, A REPORT TO CONGRESS ON SUBSTANCE ABUSE AND CHILD PROTECTION* (visited Mar. 9, 1999) <<http://www.aspe.hss.gov/hsp/subabuse99/subabuse.htm>> 1.

114. See Young & Gardner, *supra* note 111, at 5; CHILD WELFARE LEAGUE OF AMERICA, *RESPONDING TO ALCOHOL AND OTHER DRUG PROBLEMS IN CHILD WELFARE* 15 (1998) (discussing the preoccupation of some lawmakers with sanctioning clients who abuse drugs without addressing solutions for individuals to get treatment).

115. See The Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 § 405 (42 U.S.C. § 613 note). The report has been completed by the Administration for Children and Families, Children's Bureau; see also U.S. Department of Health and Human Services, *supra* note 6. The report is also available at <<http://www.aspe.hss.gov/hsp/subabuse99/subabuse.htm>>.

116. See Young & Gardner, *supra* note 111, at 5.

117. See The Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 § 103 (codified in 42 U.S.C. § 629a(7)(B)(ii)).

118. See U.S. General Accounting Office, GAO/HEHS 97-115, *CHILD PROTECTIVE SERVICES: COMPLEX CHALLENGES REQUIRE NEW STRATEGIES* 9 (July 1997).

abuse treatment facilities daily.¹¹⁹ In 1998, the Child Welfare League of America reported that only ten percent of child welfare agencies were able to find substance abuse treatment programs for needy clients within thirty days.¹²⁰ In both 1994 and 1995, a mere thirty-seven percent of drug-using mothers received any form of substance abuse treatment.¹²¹ Drug treatment administrators believe treatment is more likely to succeed if the full range of needs are addressed. Child care and parenting classes, as well as assistance with housing and employment should be included to assist in the transition to a drug-free lifestyle.¹²²

Several reasons exist why parents of children in foster care may not have access to treatment or may not succeed in treatment. One of the greatest barriers to access may be the lack of communication and connection between foster care agencies and treatment providers.¹²³ The distinct client focus of each agency hinders communication in that agencies often ignore the needs of the other members of the family.¹²⁴ Federal confidentiality laws for alcohol and other drug treatment programs¹²⁵ require strict compliance with nondisclosure of client information, comprising yet another hindrance in communication between the agencies.

As a result, a parent will be caught between the "ticking" of many clocks which not only fail to ring in unison but also contradict one another. The child welfare system and the substance abuse treatment system have conflicting time frames and contradictory agendas for the same family. The child welfare system revolves around the developmental needs of the child while the substance abuse treatment system attempts to stabilize an individual's addiction, relapse, and

119. See U.S. Department of Health and Human Services, *supra* note 6, at 5 (citing report by the National Association of State Alcohol and Drug Abuse Directors).

120. See *id.* (citing Child Welfare League of America 1998 report).

121. See *id.* at 3 (citing study of the U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration).

122. See U.S. General Accounting Office, GAO/HEHS 98-40, PARENTAL SUBSTANCE ABUSE IMPLICATIONS, *supra* note 2, at 8.

123. See generally CHILD WELFARE LEAGUE OF AMERICA, RESPONDING TO ALCOHOL AND OTHER DRUG PROBLEMS IN CHILD WELFARE (1998).

124. See *id.*

125. See 42 U.S.C. § 290dd-2 and 42 CFR part 2. See also CHILD WELFARE LEAGUE OF AMERICA, *supra* note 114, at 14.

recovery.¹²⁶

In addition to the lack of treatment services available in many communities,¹²⁷ most existing substance abuse treatment models are based on models developed for men and do not cater to women's social and economic needs.¹²⁸ Specifically, mental illness and sexual abuse are often underlying causes of a woman's addiction that go unaddressed.¹²⁹ Moreover, women generally enter treatment at a later stage of dependency than men, with abuse at a correspondingly more severe degree.¹³⁰

Treatment facilities also fail to recognize the importance of a client's child in a woman's life and in her recovery.¹³¹ Residential drug treatment facilities rarely provide child care for parents. As a result, many mothers avoid such treatment so that their children will not be placed in foster care.¹³² However, a drug-abusing mother who does not receive treatment risks her child's removal from the home and place-

126. See *Hearing on the Impact of Substance Abuse on Families Receiving Welfare, Before the Subcomm. on Human Resources of the House Comm. on Ways and Means*, 105th Cong. 37 (1997) (statement of Nancy K. Young, Ph. D., Director, Children and Family Futures, emphasizing the lack of coordination between child welfare workers and substance abuse treatment agencies. "For years the workers have been saying 'substance abuse isn't on the form and it usually isn't in the allegation . . . so I don't look for it.' [A] parallel comment from a treatment agency official was 'we have not seen children as part of our responsibility.'").

127. See U.S. General Accounting Office, GAO/HEHS 98-182, FOSTER CARE: AGENCIES FACE CHALLENGES, *supra* note 5, at 20. Caseworkers and judges explained that alcohol and drug treatment centers are not available in some communities. See *id.* at 20, n.25. Waiting lists to enter existing programs continue to be a problem. *Id.*

128. See Margaret Goldberg, *Substance-Abusing Women: False Stereotypes and Real Needs*, Vol. 40, No. 6 SOCIAL WORK (Nov. 1, 1995). Because most treatment programs are developed for male substance abusers, availability of treatment for female abusers is reduced. Experiments with programs specifically designed for women suggest higher rates of recovery can be achieved where programs are specifically geared toward women. *Id.*

129. See U.S. Department of Health and Human Services, *supra* note 6, at 4.

130. See *id.* at 4.

131. See Chiancone, *supra* note 101, at 92. (Several studies have found that children have been the major motivational factor for seeking treatment.)

132. See Barry Zuckerman, *Effects on Parents and Children*, in WHEN DRUG ADDICTS HAVE CHILDREN 57 (Douglas J. Besharov ed., 1994).

ment in foster care.

Another barrier to treatment is the current funding structure for such services. The Child Welfare League of America reports that half of all states spend no child welfare funds for substance abuse treatment.¹³³ Medicaid, the main funding source for drug treatment, contains substantial limitations in coverage. Medicaid funds may not be used for "institutions for mental diseases," including any facility specializing in psychiatric care that contains more than sixteen beds. Most residential drug treatment facilities fall under this definition, and as a result, are excluded from Medicaid funding.¹³⁴ This exclusion severely limits access to residential treatment facilities for those patients dependent on Medicaid.

C. Effectiveness of Treatment

Several long-range studies of alcohol and substance abuse treatment conclude that treatment can be effective.¹³⁵ It is estimated that one-third of the clients who receive substance abuse treatment achieve abstinence on their first attempt. Another third relapse but are eventually capable of refraining from drug use.¹³⁶ Success rates are higher for those who remain in treatment for greater lengths of time.¹³⁷ Treatment models focusing on women and providing multidisciplinary services are among the most effective.¹³⁸

A 1995 study by the Center of Substance Abuse and Treatment found that seventy-five percent of women receiving treatment who completed the program remained drug-free. Sixty-five percent of their children were returned from foster care, and school performance of eighty-four percent of the children who participated with their mothers improved. Another study evaluated a random sample of sixty women one year after discharge from treatment and found seventy-two percent

133. See U.S. Department of Health and Human Services, *supra* note 6, at 5.

134. See *id.*

135. See Chiancone, *supra* note 101, at 90.

136. See U.S. Department of Health and Human Services, *supra* note 6, at 1.

137. See Chiancone, *supra* note 101, at 93.

138. See CHILD WELFARE LEAGUE OF AMERICA, *supra* note 114, at 88-110. Research shows that there is an increased rate of success with programs that last longer than 180 days. See *id.* at 91.

of women reported abstinence from alcohol and other drugs.¹³⁹

Treatment is also cost-efficient. A 1994 California study found that each dollar invested in treatment resulted in a seven-dollar savings in other societal costs.¹⁴⁰ Even if treatment were to succeed for only one-third of parents referred to treatment, the savings in avoided foster care costs far exceed the cost of not providing treatment.¹⁴¹

IV. CRITIQUE OF ASFA

Prior to the enactment of the Adoption and Safe Families Act, the child welfare system had two primary roles: to protect children and to preserve families.¹⁴² With the enactment of the new law, the role of protecting the child remains intact while preserving families is diminished. Reunification is no longer the ultimate goal; adoption has become the preferred permanency option for a child who can neither return home safely nor reside with a relative.¹⁴³

Where P.L. 96-272 did not succeed, ASFA continues to promote permanency as the goal for foster children. Although based on a similar theory, The Act changes the manner in which child welfare agencies are to respond to children entering the system and to families within the system.

This change is illustrated by the transfer in focus from a policy of family preservation and reunification to one which encourages the speedy termination of parental rights and adoption. The goal of the ASFA is to promote the health and safety of a child as the paramount concern.¹⁴⁴ While the health and safety of the child have always been the goal of child welfare systems, P.L. 96-272 attempted to help the child by helping the entire family.¹⁴⁵ ASFA on the other hand attempts

139. *See id.* at 93.

140. *See id.* at 89.

141. *See* CHILD WELFARE LEAGUE OF AMERICA, *supra* note 114, at 105 (providing a cost benefit analysis of treatment).

142. *See* Jamie D. Manasco, *Parent-Child Relationships: The Impetus Behind the Gregory K. Decision*, 17 *LAW & PSYCHOL. REV.* 243, 245 (1993).

143. *See* Mimi Laver, *Advice for Agency Attorneys Implementing ASFA: A Challenge For Agency Attorneys*, 17 *ABA CHILD LAW PRACTICE* 117, 123 (Oct. 1998).

144. *See* Bailie, *supra* note 6, at 2292; The Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 § 101 (codified in 42 U.S.C. § 671(a)(15)).

145. *See* Bailie, *supra* note 6, at 2288.

to promote the health and safety of the child entirely independent from the family.

ASFA places priority on the permanent placement of the child with an adoptive family over time-limited attempts to reunify the birth family.¹⁴⁶ This adoption-promotion focus is vividly illustrated by the adoption incentive payments made available to states through ASFA. States are now eligible to receive \$4,000 for each foster child adoption that exceeds the base number of foster care adoptions for the fiscal year.¹⁴⁷ States may also be eligible for an additional \$2,000 for each special needs adoption¹⁴⁸ exceeding the base number for the fiscal year.

While the health and safety of a child is always of the utmost importance, a child's connection to family and psychological development is also relevant. To succeed, efforts to protect children's health and safety must be made within the context of services aimed at preserving families prior to placement in foster care or reunifying families after foster care. Now, however, these services are time-limited.

A. *Due Process Implications of ASFA*

This rapid movement of foster children toward adoption in a time-limited fashion presents several due process concerns for children and families within the system. The fundamental rights of parents to care for their children¹⁴⁹ may be taken away, and the child's bond with its family permanently destroyed. Decisions to terminate the rights of a parent have been characterized as "the ultimate interference by the state . . . with the family's constitutionally protected rights to privacy and the parents' constitutionally protected rights to raise their children."¹⁵⁰

Providing a foster child with a continuous and exclusive family relationship simply by replacing his/her family of origin with a new

146. See Roy A. Hough, *Juvenile Law: A Year in Review*, 63 MO. L. REV 459, 467 (1998).

147. See Pub. L. No. 105-89, 11 Stat. 2115 § 101 (codified in 42 U.S.C. § 473(d)).

148. Special need adoptions may include children with serious medical conditions. See Pub. L. No. 105-89, 11 Stat. 2115 § 101 (codified in 42 U.S.C. § 473(d)).

149. See *Santosky*, 455 U.S. at 745 (1982).

150. Manasco, *supra* note 142, at 243.

family has similarly been criticized as unrealistic and harmful to the child.¹⁵¹ Permanent separation from a biological parent can severely damage a child by eliminating that child's main source of identity and self-esteem.¹⁵²

The University of East Anglia recently conducted a follow-up study of 170 children within the British child abuse and neglect system ten years after their entry into care.¹⁵³ This study illustrates the weakness of the permanency planning model and speedy placement in adoptive homes. In the 1980s, the British child welfare system favored permanency planning through adoption promotion,¹⁵⁴ similar to the Adoption and Safe Families model. Although many believe that children in adoptive placements will have the most successful outcomes, the study determined that adopted children had more social and behavioral problems than the children in foster care. The adopted children exhibited higher rates of depression and faced more problems with peers than those children remaining in foster care.¹⁵⁵

The United States Supreme Court established that terminating parental rights destroys the fundamental liberty interest of family.¹⁵⁶ Therefore, parents facing possible termination of their parental rights must be afforded appropriate procedural protections. For example, a state must prove by "clear and convincing evidence" that it is in the best interest of the child that parental rights are terminated.¹⁵⁷

Under ASFA, parental rights may be terminated expeditiously if a child remains in the child welfare system for a period of fifteen months. Thus, while a child's placement in foster care may, in some instances, clearly show that a parent is temporarily unable to care for a child, without available services in place for rehabilitation, the pre-

151. See Nancy Goldhill, *Ties That Bind: the Impact of Psychological and Legal Debates on the Child Welfare System*, 22 N.Y.U. REV. L. & SOC. CHANGE 295, 300 (1996).

152. See *id.*

153. See JANE GIBBONS ET AL., DEVELOPMENT AFTER PHYSICAL ABUSE IN EARLY CHILDHOOD: A FOLLOW-UP STUDY OF CHILDREN ON PROTECTION REGISTERS II (1995).

154. See *id.* at 78.

155. See *id.* at 86-87.

156. See *Santosky*, 455 U.S. at 759. "[W]hen the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it." *Id.*

157. See *id.* at 745.

sumption of parental fitness will be time-determined.

Due process ramifications are of special concern in parental substance abuse cases because many parents will be unable to rectify their circumstances within the established fifteen-month period.¹⁵⁸ Without proper systems in place to address the needs of families where parental substance abuse is an issue, those families will be unable to challenge termination of parental rights proceedings. There are such large numbers of children in the foster care system as a result of parental substance abuse that this policy will permanently change child welfare.

In *Lassiter v. Dep't of Social Services*,¹⁵⁹ the Court found that the nature of the process due in parental rights termination proceedings requires a court to examine several due process factors. The Court applied the test set forth in *Matthews v. Eldridge*.¹⁶⁰ The first factor is the private interest affected by the proceeding.¹⁶¹ The private interest affected in these cases includes a parent's right to family¹⁶² and a child's right to be with his or her family.

The second factor is the risk of error created by the State's chosen procedure.¹⁶³ The accelerated decisions on termination of parental rights under ASFA pose great risk of error if children are to be removed from families and placed with adoptive families within fifteen months without comprehensive drug treatment and other services being offered to remedy the problems that caused their initial entry into the system. The Child Welfare League of America estimates that with services, as many as eighty percent of the families involved in the system can be taught the skills they need to live together safely.¹⁶⁴

The third factor is the countervailing government interest supporting

158. See U.S. General Accounting Office, GAO/HEHS 98-40, PARENTAL SUBSTANCE ABUSE IMPLICATIONS, *supra* note 2, at 2, 8. Drug treatment may last up to one or two years, and recovery is often characterized as a lifelong process with the potential for recurring relapses.

159. 452 U.S. 18, 27 (1981).

160. 424 U.S. 319, 335 (1976).

161. See *id.*

162. See *Santosky*, 455 U.S. at 759.

163. See *Matthews*, 424 U.S. at 335.

164. See *Hearing on Encouraging Adoption Before Subcomm. on Human Resources of the House Comm. on Ways and Means*, 105th Cong. (Feb. 27, 1997) (statement of David Liederman, Executive Director, Child Welfare League of America).

use of the challenged procedure.¹⁶⁵ Undoubtedly the state has “an urgent interest in the welfare of the child.”¹⁶⁶ However, the manner in which ASFA proposes that a state address the welfare of the child is of concern. Unlike the policy of the past in which family preservation and reunification were the goal, ASFA attempts to solve the dilemma of foster care by moving children quickly to new homes.

Speedy severance of the child’s legal relationship with his or her family of origin does not always serve the best interests of the child.¹⁶⁷ Although remaining in an unsafe home is never a viable option, providing needed services to families can make a child’s home a viable option for permanent placement.¹⁶⁸ In addition, because a large percentage of foster children currently have siblings in the system, comprehensive provision of treatment services to parents may also lead to the decrease of future substance-exposed births.¹⁶⁹

Also, under *Lassiter*, there is no right to court-appointed representation in termination of parental rights proceedings.¹⁷⁰ This is particularly disconcerting for families involved in the child welfare system because most are without the means to pay for private representation.¹⁷¹ These individuals will be most affected by the new accelerated time frames.

165. See *Matthews*, 424 U.S. at 335.

166. *Lassiter*, 452 U.S. at 2160.

167. See Goldhill, *supra* note 151, at 302-03. “Although the goal of adoption is to provide permanence to children. . . children do not measure permanency by the legal label attached to their situation. However, the permanent loss of ties to their family of origin may be far more significant than anything a legal label can offer.” *Id.*

168. See U.S. General Accounting Office, GAO/HEHS 98-40, PARENTAL SUBSTANCE ABUSE IMPLICATIONS, *supra* note 2, at 8. “Treatment is more likely to succeed if the full range of needs of the mother are addressed.” *Id.* Drug treatment administrators stressed how important it was for parents to receive supportive services to continue their recovery process and help care for their children. See *id.* Additionally, the GAO report stated the prospect of reunifying these families may be even worse if the level of services currently provided to them is not enhanced. See *id.*

169. See *Hearing on the Impact of Substance Abuse on Families Receiving Welfare Before the Subcomm. on Human Resources of the House Comm. on Ways and Means*, 105th Cong. 3 (1997) (statement of Richard P. Barth, Ph.D.).

170. See *Lassiter*, 452 U.S. at 18.

171. See *Bailie*, *supra* note 6, at 2285.

In the coming months, the effects of ASFA will begin to be seen. The accelerated termination of parental rights requirement will put the already overburdened abuse and neglect court systems under greater pressure to cope with increased caseloads.¹⁷² A bill currently pending in Congress would increase funding to child abuse and neglect courts by ten million dollars to reduce the current backlog of cases and would appropriate twenty-five million dollars to speed up the adoption process for foster children.¹⁷³

P.L. 96-272 and ASFA both attempt to provide a permanency plan for children in the foster care system. Neither federal law, however, has approached the problem correctly. P.L. 96-272 recognized the importance of family preservation and reunification, but did not adequately define the types of services needed to accomplish that goal. ASFA has too narrowly drawn boundaries and reached the opposite extreme by limiting reunification efforts to fifteen months.

B. Recommendations

Without the necessary treatment services or coordination between substance abuse treatment and child welfare agencies, parents will not be able to achieve satisfactory progress to regain custody of their children.¹⁷⁴ Amendments should be made to Titles IV-E and IV-B of the Social Security Act to provide funding and coordination between substance abuse and child welfare services (as proposed in earlier versions of the Act).¹⁷⁵ These include block grant allocations for preven-

172. See 144 Cong. Rec. S12221-01 (statement of Sen. Rockefeller.) "While essential to protect children, these accelerated time lines increase the pressure on the nation's already overburdened abuse and neglect courts." *Id.*

173. See The Strengthening Abuse and Neglect Courts Act of 1999, 145 Cong. Rec. S3262 (Mar. 24, 1999).

174. See U.S. General Accounting Office, GAO/HEHS 98-40, PARENTAL SUBSTANCE ABUSE IMPLICATIONS, *supra* note 2, at 8. "Treatment is more likely to succeed if the full range of needs of the mother are addressed." *Id.* Drug treatment administrators stressed how important it was for parents to receive supportive services to continue their recovery process and help care for their children. See *id.* Additionally, the GAO report stated the prospect of reunifying these families may be even worse if the level of services currently provided to them is not enhanced. See *id.*

175. See Safe Adoptions and Family Environments Act, S. 511, 105th Cong. §§ 201, 202, 203 (1997), Promotion of Adoption, Safety, and Support for Abused and Neglected Children, S. 1195, 105th Cong. §§ 306, 307 (1997).

tion and treatment services providing priority care for pregnant women and caretaker parents in existing treatment facilities. Increased funding could facilitate the establishment of additional treatment centers. Specifically, residential programs have been found to be the most successful but are currently of limited availability.¹⁷⁶ Priority in enrollment in such programs would maximize a parent's ability to comply with shorter permanency time frames. Funding resources also could be used to establish and finance intensive post-reunification services as well as residential treatment programs for mothers and children, including treatment-friendly housing and community support networks.¹⁷⁷ In addition, cross-agency training of social workers and treatment counselors is necessary to help bring the two systems together.¹⁷⁸

There are some models in place that already attempt to address the dual concerns of child protection and substance abuse treatment. Pensacola, Florida, for example, has created a family drug court as a collaborative effort between the court, the child safety and preservation administration, the alcohol and substance abuse program coordinator, and a local treatment center. This program links services between the agencies and court orders require compliance with prescribed treatment, provided in four phases, including weekly court appearances and random drug testing.

In New York, the newly created Manhattan Family Treatment Court is similar to the program in Pensacola. A comprehensive team works with the same clients and the same judge. Within two days of a mother's first appearance in the court, her situation is assessed by the clinical team. If she acknowledges her addiction and agrees to become involved in the court project, she is immediately enrolled in a drug treatment program. The Family Treatment Court staff and drug treatment counselors communicate regularly and progress reports are

176. See Besharov, *supra* note 7.

177. See *Hearing on the Impact of Substance Abuse on Families Receiving Welfare Before the Subcomm. on Human Resources of the House Comm. on Ways and Means*, 105th Cong. 48 (1997) (statement of Richard P. Barth, Ph.D.).

178. See *Hearing on the Impact of Substance Abuse on Families Receiving Welfare, Before the Subcomm. on Human Resources of the House Comm. on Ways and Means*, 105th Cong. 34 (1997) (statement of Nancy K. Young, Ph.D. Director, Children and Family Futures); CHILD WELFARE LEAGUE OF AMERICA, *supra* note 114.

read aloud to the judge in court.¹⁷⁹

Delaware recently received a Title IV-E waiver to conduct an experimental cross-agency delivery of services. Delaware is using Title IV-E funding to pay for substance abuse counselors who work with the child protection agency staff assessing and treating the multiple needs of families.¹⁸⁰ These examples provide creative solutions and models to address the issues of parental substance abuse and child welfare and could be extremely successful if implemented on the federal level.

V. CONCLUSION

In response to the unsuccessful attempt of P.L. 96-272, ASFA attempts to promote permanency for children in foster care by implementing defined time lines and mandating accelerated termination of parental rights proceedings. However, the accelerated proceedings pose due process concerns similar to those at issue before P.L. 96-272 was enacted because it places fundamental liberty interests of children and their parents at risk.

Current treatment approaches and lack of communication and coordination between child welfare agencies and substance abuse treatment centers may destine many families for failure by permanently placing children with adoptive families in short time frames. Funding resources must therefore be allocated under Title IV-B and IV-E of the Social Security Act to address the issues that face children in the child welfare system whose parents need substance abuse treatment.

179. See Houppert, *supra* note 17, at 46.

180. See CHILD WELFARE LEAGUE OF AMERICA, *supra* note 114, at 33.

