ARTICLES

DEFINING REASONABLE EFFORTS: DEMYSTIFYING THE STATE'S BURDEN UNDER FEDERAL CHILD PROTECTION LEGISLATION

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I. INTRODUCTION

Ten years ago, the Supreme Court foreclosed private lawsuits brought by abused and neglected children who were attempting to force states to make reasonable efforts to provide adequate child protection services.[1] As beneficiaries of federal child protection legislation, children brought suit pursuant to the Adoption Assistance and Child Welfare Act of 1980 ("Child Welfare Act") and 42 U.S.C. § 1983.[2] In holding that the child plaintiffs did not have a federally enforceable right to reasonable efforts, the Court claimed "that the absence of a remedy to private plaintiffs under § 1983 does not make the 'reasonable efforts'

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[1] *See* Suter v. Artist M., 503 U.S. 347, 364 (1992).

[2] The Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C). 42 U.S.C. § 1983 permits suit based on a violation of a plaintiff's civil rights. Suits initiated pursuant to section 1983 are generally subject to a two-part test. A remedy is not available under section 1983 if: (1) the federal law in question does not create enforceable rights, or (2) Congress has foreclosed the section 1983 remedy in the act under consideration. *See* G. M. Buechlein, Annotation, *Actions Under 42 U.S.C.S. § 1983 for Violations of Adoption Assistance and Child Welfare Act*, 93 A.L.R. FED. 314 (1989).

clause a dead letter."[3] In fact, the reasonable efforts clause has become a dead letter, and the Court's preclusion of suits by private plaintiffs contributed significantly to the demise of this federal requirement.

When a state fears a child's health or safety is endangered, it intervenes in an otherwise autonomous family to resolve the threat or remove the child. The state's efforts to resolve the threat to the child before removing the child or to permit the child to return home after the threat is removed are called "reasonable efforts." "Reasonable efforts" comes from federal law, but the federal government has failed to ever define the term.[4]

Since the inception of the federal reasonable efforts provision, much commentary and debate have ensued about exactly what kind of effort and quality of services the reasonable efforts clause dictates.[5] Despite legislative, regulatory, and oversight enhancements, the federal government has continually bypassed opportunities to explain the affirmative duties the reasonable efforts provision imposes upon states. Instead, Congress has only defined the limits beyond which the obligation to make reasonable efforts does not survive. Likewise, federal administrators have been unsuccessful in providing oversight and otherwise monitoring implementation of the law. Furthermore, the Supreme Court has dismissed private plaintiff lawsuits that sought to enforce reasonable efforts provisions.

When the federal government's child protection program began more han twenty years ago, the need for states to make reasonable efforts to preserve and reunify families was an indispensable part of that program. The reasonable efforts initiative began as an endeavor to ensure that states provided an adequate level of social services to families before removing children from their homes. This endeavor addressed the concern that Child Protective Services ("CPS") case managers were unnecessarily placing children in foster care, and thus contributing

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[3] *Suter*, 503 U.S. at 360-61.

[4] The federal law says specifically that states must "make reasonable efforts." 42 U.S.C. § 671(a)(15) (2000). This Article interchangeably uses phrases such as "making reasonable efforts," "the reasonable efforts obligation," "the reasonable efforts standard," "the reasonable efforts mandate," and "the reasonable efforts requirement." All such phrases refer to the federal law's "make reasonable efforts" language.

[5] *See, e.g.*, MARK HARDIN ET AL., A SECOND COURT THAT WORKS: JUDICIAL IMPLEMENTATION OF PERMANENCY PLANNING REFORMS (1995); ABA PRESIDENTIAL WORKING GROUP ON THE UNMET LEGAL NEEDS OF CHILDREN AND THEIR FAMILIES, AMERICA'S CHILDREN AT RISK: A NATIONAL AGENDA FOR LEGAL ACTION (1993); MARK HARDIN, ABA CENTER ON CHILDREN AND THE LAW, ESTABLISHING A CORE OF SERVICES FOR FAMILIES SUBJECT TO STATE INTERVENTION: A BLUEPRINT FOR STATUTORY AND REGULATORY ACTION (1992); NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES ET AL., MAKING REASONABLE EFFORTS: STEPS FOR KEEPING FAMILIES TOGETHER (1987); DEBRA RATTERMAN ET AL., ABA NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION, REASONABLE EFFORTS TO PREVENT FOSTER PLACEMENT: A GUIDE TO IMPLEMENTATION (2d ed. 1987); DEBRA RATTERMAN ET AL., REASONABLE EFFORTS TO PREVENT FOSTER PLACEMENT (2d ed. 1985).

to the growth of the nation's foster care population.

In the Adoption and Safe Families Act of 1997 ("ASFA"),[6] Congress limited, without defining, the reasonable efforts provision out of concern that CPS agencies were overreaching in the provision of services. In the eyes of policymakers, this overreaching was to blame for a series of high profile child deaths. Congress feared that states were permitting reasonable efforts requirements to take precedence over child safety. Additionally, federal child protection laws, including the reasonable efforts provision, had not succeeded in decreasing the foster care population.

The limitations Congress placed on the reasonable efforts provision in ASFA may have been premature because federal authorities never fully implemented the reasonable efforts provision as it was originally conceived. Prior to ASFA, Congress failed to specifically define reasonable efforts or to sufficiently fund child welfare services. Such actions could have greatly effectuated the original conception of reasonable efforts.

In precluding private enforcement of reasonable efforts, the Supreme Court cited other enforcement mechanisms created by federal child welfare laws. Federal authorities, however, have been largely unsuccessful in monitoring state implementation of reasonable efforts. Federal administrators have not used the established oversight process to spur improvements in child protection services, and violations of federal child protection laws have rarely resulted in actual financial withholding, the primary enforcement tool for federal appropriations. Additionally, the reimbursement framework for federal funding of child protection services has worked against the original intent of the reasonable efforts provision of preventing unnecessary foster care placements. The reimbursement framework caps funding for child welfare services, the tool for providing reasonable efforts, but provides uncapped funding for foster care maintenance. As a result, the framework has encouraged states to place and keep children in foster care.

Instead of defining and properly funding reasonable efforts, Congress limited the effect of the reasonable efforts provision in ASFA by waiving the states' obligations to make reasonable efforts under specified conditions. These waivers, combined with the Supreme Court's preclusion of private suits and other federal actions, shifted the federal focus of child protection from social services aimed at preserving and reunifying families to laws that emphasize "permanency" and adoption. This shift calls for decreasing the foster care population by promoting adoption of foster care children, which stands in stark contrast to the original conception of the reasonable efforts clause. The shift has rendered the reasonable efforts provision a dead letter, at least at the federal level.

Despite the shift at the federal level, not all state governments have followed suit. The federal government's failure to provide guidance on the requirements

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[6] Adoption and Safe Families Act of 1997, Pub. L. 105-89, 111 Stat. 2115 (codified in scattered sections of 42 U.S.C.).

needed to satisfy reasonable efforts, along with the general shift away from preservation and reunification services, has left states to decide how to define the rules and standards for making reasonable efforts. States have approached these tasks in different and divergent ways; some have taken cues directly from the federal government, while others have moved beyond the relaxed federal posture. State legislative bodies and judiciaries are uniquely situated to maintain or recoup some of the initial intent of the reasonable efforts provision. State legislative bodies should provide prescriptive formulas to guide the implementation of the reasonable efforts provision. State courts should play an active role by certifying in each child's case whether the state agency has made reasonable efforts. Where legislative bodies have neglected to define reasonable efforts, the courts should provide CPS agencies with guidance on implementing the reasonable efforts provision. To permit state courts to effectively contribute to the implementation of reasonable efforts, lawmakers should require state agencies to prove they have made reasonable efforts at proceedings to terminate parental rights. Individual states should seize the opportunity presently available to further clarify the parameters of the reasonable efforts standard.

Part II of this Article provides a background on the origins and legal justifications of state intervention in the family. Absent state intervention, families are typically considered autonomous institutions in society. Part II also discusses the continuum of services typically provided to children and families through state CPS agencies and contends that family preservation and reunification services were historically an integral part of this continuum. Part III traces the federal legislative history of reasonable efforts and argues that reasonable efforts began as a standard for providing services that would keep children in or return children to their homes but has rapidly evolved in such a way that this original intention has lost its force. Part III also argues that Congress erred in amending federal child protection laws because Congress disproportionately blamed the reasonable efforts provision for the failures of federal child protection laws, without due consideration of the failure to define reasonable efforts and the history of inadequate and perverse federal funding. Part IV briefly addresses the failure of the Department of Health and Human Services ("DHHS") to provide successful federal oversight that would fully and meaningfully contribute to understanding the reasonable efforts requirement and discusses the Supreme Court's refusal to permit private enforcement of reasonable efforts in the federal courts. Part V argues that the federal events discussed in Parts III and IV collectively leave the reasonable efforts requirement to preserve and reunify families without sufficient federal backing, and, thus, have left states to decide the real force of a federal requirement. Part VI then examines various state statutes that specifically address reasonable efforts and compares lawmakers' attempts to define the requirement. The analysis of state statutes demonstrates that although some states have merely modeled federal law, other states have taken action to provide their CPS case managers additional guidance. Finally, Part VII reviews reasonable efforts caselaw in four states and argues that states should require CPS agencies to prove that reasonable efforts have been made as a

statutory condition to terminating parental rights. The Article concludes that the policies and actions of the federal government have made the reasonable efforts clause a hollow requirement and recommends that federal authorities or individual states act to provide context for understanding the reasonable efforts standard.

II. BACKGROUND

A. The Legal Basis of State Intervention in Child Maltreatment Cases

Parents have primary authority and responsibility for their children. At the most basic level, young children rely on their parents for life's necessities, such as food, shelter, and clothing. Parents also decide the principles and ethics that undergird their children's upbringing. Parents maintain custody, control, and responsibility for children because children are not mentally or physically competent to provide for themselves. When parents neglect their duties, society bears the cost of raising their children.

The parental right to make decisions about child-rearing implicates more than the protection of parents' interest in their property. It also affects the child's interest in developing free of mental, physical, and emotional harm and society's interest in maintaining a productive citizenry. The law tempers the parent's interest with the interests of the child and the state and permits the government to interrupt a parent's initial custody and control to remove children at risk of suffering abuse or neglect.[7]

Historically, the legal rights of parents followed an analogy of the child as the parent's property, in part because children provided economic support for the family. [8] The utility of children as workers has since decreased, while the idea that children are individuals worthy of protection themselves has grown. The shifting societal beliefs about the importance of children have paralleled a change in the legal underpinnings of parental rights from the notion of children as property to children as individuals with certain rights.[9]

Despite the developing rights of children, children still cannot competently govern their own affairs. The strong rights of parents persist even where the law seemingly has made children its primary beneficiaries. In *In re Morrissey*, the Supreme Court decided that a provision excepting children under the age of majority from a military draft protected the parent's custodial interests rather than conveying a privilege to the child.[10] The Court said plainly that "[t]he

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[7] *See infra* notes 12 – 26 and accompanying text.

[8] *See* Barbara Bennett Woodhouse, *"Who Owns the Child?":* Meyer *and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995, 1042-46 (1992) (discussing the historical context of children as property).

[9] *See id.* at 1050-56 (describing the historical development of the children's rights movement).

[10] 137 U.S. 157, 159 (1890).

government will not disturb the control of parent or guardian over his or her child without consent."[11]

The legal role of the state in removing children from their parents' custody originates from both the state's police power and the state's parens patriae power.[12] Through its police power, the state has broad authority to protect its citizens from harm and to promote the public welfare. Through its role as parens patriae, the government possesses more limited authority aimed at protecting individuals incapable of acting in their own best interests.[13] In *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, the Supreme Court noted that the parens patriae doctrine is "inherent in the supreme power of every State, [and] is a most beneficent function . . . often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves."[14]

After the creation of child anti-cruelty societies and orphanages around the turn of the twentieth century,[15] the government began to exert increasing power over the welfare of children.[16] "The allocation of authority over children between the parents and the state . . . shifted toward greater exercise of authority by the state."[17] However, the Supreme Court continued to protect parents against unnecessary state intervention.[18] In *Meyer v. Nebraska*, the Court took issue with a state statute prohibiting the teaching of foreign languages in schools to students who had not yet passed the eighth grade.[19] Striking down the statute, the Court found it exceeded the proper exercise of the state's police power and infringed on individual freedoms guaranteed by the Fourteenth Amendment. Those freedoms included, among other things, the right to acquire useful knowledge and to

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[11] *Id.*

[12] For a specific discussion of the history of parens patriae, see Lawrence B. Custer, *The Origins of the Doctrine of Parens Patriae*, 27 EMORY L.J. 195 (1978). *See also* Neil Howard Cogan, *Juvenile Law, Before and After the Entrance of "Parens Patriae,"* 22 S.C. L. REV. 147 (1970).

[13] *See Developments in the Law - The Constitution and the Family*, 93 HARV. L. REV. 1156, 1198-99 (1980) (noting that when the state acts as parens patriae, it advances the bests of interests of an incompetent individual).

[14] 136 U.S. 1, 57 (1890).

[15] *See* Patricia A. Schene, *Past, Present, and Future Roles of Child Protective Services, in* 8 THE FUTURE OF CHILDREN: PROTECTING CHILDREN FROM ABUSE AND NEGLECT NO. 1, at 24-26 (1998) [hereinafter *Roles of Child Protective Services*]; Patricia A. Schene, *Child Abuse and Neglect Policy: History, Models, and Future Directions, in* THE APSAC HANDBOOK ON CHILD MALTREATMENT 388-90 (John Briere et al. eds., 1996) [hereinafter *Child Abuse and Neglect Policy*].

[16] *See Child Abuse and Neglect Policy*, *supra* note 15, at 390-92 (discussing the establishment of the Children's Bureau, the first White House Conference on Children, and creation of the Aid to Dependent Children program).

[17] SAMUEL M. DAVIS ET AL., CHILDREN IN THE LEGAL SYSTEM 13 (1997).

[18] *See Developments in the Law*, *supra* note 13, at 1199.

[19] 262 U.S. 390, 395 (1923).

establish a home and bring up children.[20] *Meyer* dealt with the instructor's right to teach a foreign language "and the right of parents to engage him so to instruct their children."[21] The Court protected the parental right to raise children, as opposed to the child's right to learn, over unreasonable interference by the state.

In *Pierce v. Society of Sisters*, the Court again provided constitutional protection for parental rights.[22] *Pierce* concerned an Oregon compulsory education statute requiring children of certain ages to attend only public schools and prohibiting their attendance at private schools. The Court held that the statute "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."[23]

In *Prince v. Massachusetts*, the Supreme Court considered whether Massachusetts' child labor laws arbitrarily and unreasonably infringed on religious liberty and the parental right to rear a child.[24] The case involved a nine-year-old Jehovah's Witness who, while in her aunt's custody, violated the state's child labor laws by preaching on the streets and distributing magazines. Upholding the child labor laws, the Court noted that in the best interests of children, "the state as parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways."[25] The Court also stated that preventing the evils associated with child labor falls properly within the state's police power.[26] While *Meyer* and *Pierce* place the parental right to raise a child among constitutionally protected freedoms shielded from state police power, the decision in *Prince* places limits on constitutionally protected parental rights. Together *Meyer*, *Pierce*, and *Prince* show the court balancing parental rights against the state's police power and the state's right as parens patriae to act in the child's best interests.

B. The Child Protective Services Continuum

When parents abuse or neglect their children, the state, as police and parens patriae, can override the parents' interests in raising their children; the interests of the state and the child outweigh the parental interests. When the state intervenes in a family, the state may decide to leave the child in the home while providing services necessary to protect the child's safety. But, where the state believes that risks existing in the home are too high, the state's intervention should include removing the child from the home and placing the child in the temporary custody of the state. Children in state custody will either eventually

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[20] *See id.* at 399.
[21] *Id.* at 400.
[22] 268 U.S. 510, 536 (1925).
[23] *Id.* at 534.
[24] 321 U.S. 158, 159 (1944).
[25] *Id.* at 166.
[26] *See id.* at 168-69.

return to their family of origin or be adopted into a new family.[27]

Whenever it is possible and safe, children should remain in or return to the custody of their natural parents. The legal preference for less intervention in families is supported by social science regarding the development of children.[28] For children, continuity is a central component of their development, influencing their ability to understand, appreciate, and value relationships.[29] To children, parents are powerful and autonomous beings who organize life's daily activities, provide necessaries, make rules and exact discipline, and provide comfort and love. State intervention displaces a child's understanding of the parental role by compromising parental authority.[30]

The relationship between parent and child typically represents the child's first and most essential relationship. A lack of continuity and stability in this first relationship can often lead to lifelong setbacks in emotional, as well as physical, development.[31] Because state intervention often seriously disrupts this continuity, restraint in intervention advances the child's best interests. When states must intervene, they should limit the intensity and duration of such intervention to the degree necessary to ensure the child's safety from abuse and neglect. Thus, the state should not remove a child from the home if services can restore the child's safety. Where removal and foster care placement become necessary for the child's safety, the child should remain in foster care only until CPS has restored safety in the home. If CPS cannot make the home safe, the child should remain in foster care only until the child can be adopted into a new home. But adoption, the final step in the CPS continuum, requires the termination of parent rights. Termination of parental rights ends the parent-child relationship, stripping the parent of any constitutional rights they previously held with respect to the child.

This progression of intervention is precisely the continuum established with the passage of the Child Welfare Act.[32] The Child Welfare Act created federally

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[27] *See* 42 U.S.C. § 675(5)(E)(i) (2000). Although states can elect other permanent options besides adoption, such as placement with a relative, this Article limits its focus to instances in which a child must either be reunified with the family or put up for adoption. While relative placement is generally preferred, such placement does not implicate parental rights to the same extent as adoption. The state can place children with relatives without terminating parental rights; this is not the case with children who are put up for adoption.

[28] *See* David Arredondo & Leonard P. Edwards, *Attachment, Bonding, and Reciprocal Connectedness: Limitations of Attachment Theory in the Juvenile and Family Court*, 2 J. CENTER FOR FAMS., CHILD. & CTS. 109, 112 (2000) (discussing the theory of attachment as a biological process initiated in the child); JOSEPH GOLDSTEIN ET AL., THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE 97 (1996).

[29] *See* GOLDSTEIN, *supra* note 28, at 19.

[30] *See id.* at 19-22, 97.

[31] *See id.*

[32] *See* Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C.). *See also* 42 U.S.C. § 625(a)(1) (2000) (defining "child welfare services" in a manner consistent with this progression of state intervention).

funded programs to support services at each point in the continuum of state intervention. These federally funded programs included part B of Title IV of the Social Security Act, known as the Child Welfare Services Program,[33] and part E of Title IV, known as the Foster Care Maintenance Payments Program and the Adoption Assistance Program.[34] For each child in state custody, the Child Welfare Services Program aspired to provide the following: (1) services protecting the welfare of the child by permitting the child to remain at home and preventing an unnecessary foster care placement; or (2) services allowing the child to return home after removal has occurred; or (3) services permitting a suitable adoptive placement if the child is unable to return home.[35] The Foster Care Maintenance Payments Program assisted states in caring for foster care children by funding the costs of providing for such children, including food, clothes, and school supplies.[36] Finally, the Adoption Assistance Program provided financial assistance to states to promote adoption of hard-to-place children, including children with special needs.[37]

C. The Federal Emphasis on Family Support, Preservation, and Reunification Services

Although the Child Welfare Services, Foster Care Maintenance Payments, and Adoption Assistance programs have separate specific goals, the three programs are related. The Foster Care Maintenance Payments only applies to children actually in foster care, and Adoption Assistance only applies to children actually adopted. The Child Welfare Services program applies more universally, from children remaining in their homes, to children placed in state custody, to adopted children. Prior to the 1980 adoption of the Child Welfare Act, the federal government provided funds for some kinds of child welfare services through part B of Title IV of the Social Security Act of 1935.[38] Instead of equally distributing this funding across the child protective services continuum, states disproportionately used Title IV-B funding for foster care and adoption assistance payments at the expense of services to families whose children remained at home.[39]

The Child Welfare Act attempted to correct this disproportionate funding problem by rewriting Title IV-B. The new Title IV-B restricted the proportion of funding for child welfare services that states could spend on foster care

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[33] *See* Child Welfare Act § 103.

[34] *See id.* § 101.

[35] *See id.* § 103.

[36] *See id.* § 101.

[37] *See id.*

[38] *See* 42 U.S.C. § 620 (2000).

[39] *See Roles of Child Protective Services*, *supra* note 15, at 27; *Child Abuse and Neglect Policy*, *supra* note 15, at 390.

maintenance and adoption assistance payments.[40] The Child Welfare Act provided additional funding for child welfare services, but it did not permit states to use the additional funding for foster care maintenance and adoption assistance payments. It protected the additional funding by restricting the amount states could claim in foster care maintenance and adoption assistance payments to the amount states had previously claimed for child welfare services prior to 1980.[41] Despite this effort, states still lacked sufficient funding for family support and preservation services. The federal government made additional efforts in 1993 and 1997 to provide support and preservation services.

In 1993, Congress passed the Family Preservation and Support Services Initiative under subpart 2 of Title IV-B to specifically fund additional family preservation and support services.[42] Family support services are community-based services that seek to prevent child abuse and neglect in families at risk.[43] Family preservation services target families "in crisis," where some form of child maltreatment has already occurred, but the child can safely remain in the home.[44] In 1997, Congress reauthorized this initiative, renamed as Promoting Safe and Stable Families, and added two more service categories: time-limited reunification services and adoption promotion and support services.[45] Time-limited reunification services consist of services and activities to make homes safe and to reunify families after the state has removed a child and placed the child in foster care.[46] Finally, adoption promotion and support services seek to increase the adoption of children out of foster care through pre- and post-adoption services.[47]

With the exception of adoption services, child welfare services are highly concentrated in preventing maltreatment, preventing removal, and reunifying families after removal has occurred. With the Child Welfare Act, Congress attempted to make child welfare services an important priority by restricting spending for foster care maintenance and adoption assistance. In 1993 and 1997, Congress reaffirmed its support for child welfare services with additional funding for promoting safe and stable families. States should use these services to make

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[40] *See* Child Welfare Act § 103.

[41] *See id.*

[42] *See* Omnibus Budget Reconciliation Act of 1993, 42 U.S.C. § 629 (2000).

[43] *See id.* § 629(b)(1). Community-based family support services are offered through community organizations such as schools and neighborhood centers. The services include parent training, respite care, drop-in centers, and referral services.

[44] *See id.* § 629(b)(1),(2) (2000). Family preservation services include parenting skills training, follow-up services for families after children have returned from foster care, in-home parent aides, and respite care.

[45] *See* Adoption and Safe Families Act of 1997 § 305.

[46] *See id.* Time-limited reunification services include family, individual and group counseling, mental health services, substance abuse treatment, transportation, child care, and family therapy services.

[47] *See id.*

reasonable efforts to preserve and reunify families, but federal funding for these services has consistently taken a back seat to foster care maintenance funding.

III. REASONABLE EFFORTS LEGISLATIVE HISTORY

A. Adoption Assistance and Child Welfare Act of 1980

Federal financial support for state CPS systems dates back to at least 1935, when Congress began providing funding for foster care maintenance payments and other preventive and protective services through Titles IV-A and IV-B of the Social Security Act.[48] Title IV-A created the Aid to Dependent Children[49] (later called Aid to Families with Dependent Children ("AFDC")) program, which targeted financial support primarily toward families in poverty.[50] As discussed previously, the federal goal behind the initial Title IV-B was largely unrealized as states used this funding primarily to supplement the costs of foster care maintenance and adoption assistance payments.[51]

In the years between 1935 and 1980, several federal laws were enacted to address child abuse and protective services. In 1974, Congress passed the Child Abuse Prevention and Treatment Act ("CAPTA"), setting standards for reporting and receiving reports of child maltreatment.[52] CAPTA created a national clearinghouse for the collection and dissemination of information regarding child abuse and established a relatively small grant program to help states identify and treat abuse and neglect.[53] In 1975, Title XX of the Social Security Act established a social services block grant that states used to fund some prevention and child protection services.[54] None of these laws, however, leveled as much responsibility over the states in the provision of services as did the Adoption Assistance and Child Welfare Act of 1980.

The Child Welfare Act represented a significant change in federal support for state intervention and the nation's CPS systems. Through its spending powers, Congress dramatically increased the role of the federal government by ensuring that states provide child welfare services to keep children in their homes and make efforts to secure adoptions for children who cannot return home after entering the foster care system. According to the drafters of the Child Welfare Act, federal funding administered prior to the 1980 restructuring yielded perverse

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[48] *See Roles of Child Protective Services*, *supra* note 15, at 27.

[49] *See* Pub. L. No. 87-543, Title I, § 104(a)(1), 76 Stat. 185 (1962) (substituting "Aid and Services To Needy Families with Children" for "Aid to Dependent Children").

[50] *See* Pub. L. No. 104-193, Title I, § 103, 110 Stat. 2105 (1996) (changing and renaming this legislation "Temporary Assistance to Needy Families").

[51] *See supra* notes 40-43 and accompanying text.

[52] Child Abuse Prevention and Treatment Act of 1974, 42 U.S.C. § 5101-06 (2000).

[53] *See id.* § 2.

[54] *See* 42 U.S.C. § 1397 (1975).

incentives. Although Congress had hoped to reduce states' financial burdens of caring for foster children, the financial scheme actually encouraged states to place children in foster care and leave them there.

Before 1980, the federal government reimbursed states for foster care expenses but did not offer comparable financial support for adoption or prevention and reunification services. In the words of Congressman George Miller, Chairman of the Select Committee on Children, Youth, and Families, "the role of the federal government was limited; we paid the bill, often for warehousing children in institutions and inappropriate settings without services, without accountability, without any significant efforts to address whatever catastrophe had driven them into this Dickens-ian disaster of a system."[55]

As passed in 1980, the Child Welfare Act continued to reimburse states for foster care maintenance payments while offering additional funding for child protection, family intervention, and adoption services for children with special needs. The Child Welfare Act, however, conditioned all such funding on state compliance with certain federal requirements. Part E of Title IV of the Child Welfare Act required states to have an approved plan for administering child protective services.[56] Each state's plan must provide, among other things, 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."[57] This provision of the Child Welfare Act became commonly known as the "reasonable efforts" provision.

The state plan must also provide for the development of a case plan for each foster child and for a case review system that monitors the child's status while the state has custody of the child.[58] Reasonable efforts, case planning, and a case review system all contributed to a fairly elaborate set of requirements facing state CPS systems. By 1980, the federal influence on CPS work had grown considerably from relatively simple bill payment for foster care into a system of requirements that encouraged states to focus on services aimed at preserving families and achieving permanency for children. The state plan was intended to guide the work of CPS agencies in the states, but the federal government only approved state plans and did not monitor the work of CPS agencies implementing the plan.[59] Thus, the language of the legislative requirements turned out to be quite important in guiding states' implementation of the Child Welfare Act.

The 1980 legislation guided states in interpreting the meanings of "case plans"

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[55] *Continuing Crisis in Foster Care: Issues and Problems: Hearing Before the Select Comm. on Child., Youth, and Families*, 100th Cong. 1 (1987) (statement of Rep. Miller, Chairman, Select Comm. On Child, Youth, and Families).

[56] *See* Child Welfare Act § 101 (requiring each state's plan to be approved by the Secretary of Health and Human Services).

[57] *Id.*

[58] *See id.*

[59] *See* discussion *infra* notes 136-144.

and a "case review system," but it offered little direction for determining whether a state has made reasonable efforts. The Child Welfare Act defined a case plan as a written document describing the type and appropriateness of a child's placement. A case plan had to assure proper care for the child and proper services for the child, parents, and foster parents in order to improve conditions in the home and facilitate the child's return. The case plan had to also discuss the appropriateness of the services provided.[60] As defined in the Child Welfare Act, the case review system included procedures for verifying that the state has placed each child "in the least restrictive (most family like) setting available and in close proximity to the parents' home, consistent with the best interest and special needs of the child."[61] The Child Welfare Act also specified that the case review system include a status review for each child at least every six months to determine the appropriateness of the placement and compliance with the case plan and a dispositional hearing no later than eighteen months after original placement to determine the child's future.[62] The drafters of the Child Welfare Act failed to use such specificity in creating the reasonable efforts provision, stating only that states must make reasonable efforts before removing a child from the home and after the child has been removed.

Despite the absence of a more specific definition for reasonable efforts, the intent of the requirement should have been fairly clear. Through the Child Welfare Act, Congress attempted to roll back foster care expenses, to reduce the number of children on foster care rolls, and to increase permanency for children. Between 1962 and 1972, the total foster care population in the United States grew from 272,000 to nearly 320,000.[63] Over the same period, the number of foster care children eligible for federal AFDC payments grew from a mere 989 to more than 71,000.[64] In 1977, the government estimated that more than 500,000 children were in foster care.[65] By 1980, the number of children in foster care had fallen to approximately 302,000, but the number of children eligible for AFDC had grown to 100,000.[66] As Congress considered passing the Child Welfare Act, Representative Miller of California cited federally funded studies that found two-

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[60] *See* Child Welfare Act § 101,

[61] *Id.*

[62] *See id.*

[63] *See* COMMITTEE ON WAYS AND MEANS, U.S. HOUSE OF REPRESENTATIVES, 2000 GREEN BOOK: BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS 719-20 (2000).

[64] *See id.*

[65] *See Proposals Related to Social and Child Welfare Services, Adoption Assistance, and Foster Care: Hearing on H.R. 3434 Before the Subcomm. on Public Assistance of the Senate Committee on Finance*, 96th Cong. 76 (1979) (statement of Hon. Arabella Martinez, Assistant Secretary for Human Development Services, Department of Health, Education, and Welfare).

[66] *See id.*

thirds of the children in CPS systems were inappropriately placed.[67] To solve this problem, he called on the Appropriations Committee to "fund adequately Title IV-B child welfare services" so that the federal government could initiate preventive service programs.[68]

To address the foster care problem, Congress required states to make reasonable efforts at two specific points along the child protective services continuum: before removal and during foster care placement. At least this much was clear from the statute's language. By creating a new Title IV-B that restricted foster care maintenance and adoption assistance expenses, the Child Welfare Act also pushed states to focus more on preservation and reunification services. Thus, on the surface, reasonable efforts quite simply had to do with the quality of preservation services given before foster care placement and the quality of reunification services provided during foster care placement. Both services promoted the Child Welfare Act's goal of reducing the number of children in foster care.

Politically, the Child Welfare Act offered a win-win solution by promoting better outcomes for children while saving the federal government money. In addition to ensuring quality services for children and families, the reasonable efforts mandate supported the economic benefits promulgated in the Child Welfare Act. Understanding these economics benefits begins by understanding that a reasonable efforts determination sits squarely between Title IV-B family support and preservation services and Title IV-E foster care maintenance payments. The federal government required state courts to make a determination for each child whether the state's CPS agency had satisfied the reasonable efforts requirement before that child could be eligible to receive Title IV-E foster care maintenance payments.[69] This charge made the reasonable efforts requirement the primary enforcement mechanism for ensuring that states provide adequate preservation and reunification services.

The Child Welfare Act was intended to provide adequate services early in order to diminish the need for more costly foster care placements. By requiring states to provide adequate services, the reasonable efforts provision narrowed the criteria for entering foster care to those children who could not sufficiently benefit from family preservation services. Once children entered foster care, the reasonable effort provision narrowed the criteria for remaining in foster care to those children who could not sufficiently benefit from reunification services. The reasonable efforts mandate provided "front-end" management to reduce the financial burdens of the foster care system. On the "back-end" of the system, the Child Welfare Act promoted adoption incentives whose primary economic purpose consisted of increasing exits from the foster care system.

Nevertheless, the financial advantages conferred by the Child Welfare Act did not relegate its call for quality services to mere pretext. For the reasonable

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[67] *See* 126 CONG. REC. 9,018 (1980).

[68] *Id.*

[69] *See* 45 C.F.R. § 1356.21(b) (2001).

efforts provision to play an effective role in this financial scheme, states needed to provide children and families with necessary preservation and reunification services. Structurally, the financial success of the reasonable efforts provision relied heavily on the successful provision of services. The reliance on services in the Child Welfare Act, however, changed with subsequent legislation.

B. Developments Leading to the Adoption and Safe Families Act

While the general understanding of reasonable efforts as a service enforcement provision seemed fairly obvious, confusion abounded as to what reasonable efforts required. In the years between 1980 and 1997, a plethora of guides and other "how-to" publications were released to instruct states on how to comply with reasonable efforts and with other provisions of the Child Welfare Act.[70] These publications sought to fill the gap between the federal requirement to make reasonable efforts and the absence of federal guidance on assessing reasonable efforts. What did states need to do specifically to satisfy the reasonable efforts standard? And what was the basis for state court determinations on whether states adequately complied with the federal law?

The social science philosophy of "the least amount of intervention in the least amount of time" intuitively led case managers to err against removing a child. This social science principle was likely reinforced by the reasonable efforts mandate to provide services that prevent removal and work to reunify families.[71] Over time, this principle and the absence of a clear definition for reasonable efforts may have caused CPS case managers to misinterpret the provision. Case managers and policy makers blamed the federal law as a primary factor inhibiting child safety and protection,[72] arguing that federal policy favored family preservation over child safety. When the decision to leave a child in the home resulted in harm to the child, CPS case managers often claimed they lacked authority to remove the child because the state had not made reasonable efforts to keep the family together.

Appearing before the United States Senate Labor and Human Resources Committee in 1996, Professor Richard Gelles explained how case managers' misinterpretations of the reasonable efforts requirement resulted in the deaths of several children, including David Edwards.[73] At fifteen months old, David was

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[70] *See* authorities cited *supra* note 5.

[71] *See Improving the Well-Being of Abused and Neglected Children: Hearing Before the Senate Comm. on Labor and Human Resources*, 104th Cong. 16 (1996) (statement of Richard Gelles, Director, University of Rhode Island's Family Violence Research Program) ("When in doubt, you're going to have to lean towards the vulnerability and protection of the child, and I think anyone who's spent time out in the world knows that when in doubt, unless there's been a very recent tragedy in their own city, they [case managers] lean towards preservation.").

[72] *See id.*

[73] *See id.* David Edwards is a fictitious name used to protect the family's privacy.

killed by his mother despite a history of reports to child protective services and substantiated abuse of his older sister, leading to voluntary termination of parental rights. The mother's abuse left David's sister with a fractured skull and broken ribs, arms, and legs.[74] According to Professor Gelles, David's case manager did not believe the courts would have approved his removal because the state had not made reasonable efforts.[75]

While misinterpretations may have compromised child safety in some instances, the reasonable efforts provision unfairly shouldered too much of this blame. The claimed misinterpretation was that case managers could not remove children, despite unsafe conditions, if the state had not completely satisfied the reasonable efforts requirement. But in some high profile cases, the state never initiated reasonable efforts to preserve the family. In New York, six-year-old Elisa Izquierdo died at the hand of her mother, following a substantial history of abuse.[76] "Elisa was withdrawn, bruised, balding, limping, smearing her feces on the kitchen refrigerator, and burying her urine-drenched underwear in a hole under her bed."[77] Despite at least seven reports and a pattern of abuse, Elisa's case manager failed to remove her.[78] But, Elisa's family was never in a family preservation program,[79] so the problem that led to her death was not attributable to attempts by the state to make reasonable efforts to preserve the family.

Similarly, in the case of Joseph Wallace, another high profile child death, a case manager recommended, and a judge agreed, that Joseph be removed from his mother's care.[80] The state, however, lost Joseph's records when his family moved to another county, and he was returned home where his mother killed him.[81] Reasonable efforts to preserve Joseph's family did not lead to his eventual death. Joseph's death seemed primarily to result from an administrative failure of the state. Still, in hearings leading to the enactment of ASFA, both Elisa and Joseph were mentioned as casualties of the federal law.[82]

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[74] *See id.*

[75] *See id.*

[76] *See* Nina Bernstein & Frank Bruni, *She Suffered in Plain Sight But Alarms Were Ignored*, N.Y. TIMES, Dec. 24, 1995, at 1, 22.

[77] *Id.*

[78] *See id.*

[79] *See id.*

[80] National Coalition for Child Protection Reform, *The Real Reasons For Child Abuse Deaths*, *available at* http://www.nccpr.org/newissues/8.html (last visited Feb. 10, 2003).

[81] *See id.*

[82] *See Improving the Well-Being of Abused and Neglected Children: Hearing Before the Senate Comm.*, *supra* note 71, at 14 ("Congress has the means and the opportunity to make some good come from the public tragedies of Elisa Izquierdo i[n] New York City; Baby Emily in Connecticut; Joseph Wallace (ph) in Chicago; . . . and hundreds more children each year."). For more criticism of using Elisa and Joseph as examples of reasonable efforts gone bad, see Bernstein & Bruni, *supra* note 76; Richard Wexler, *Guest Voice: The Cost of a Foster Care Panic*, *available at* http://www.nysccc.org/Voice/w96/wexler.html (last visited Feb. 10, 2003).

Despite the horror of these kinds of stories, it is simply unclear how much blame for these tragic cases of child fatality was properly attributed to the reasonable efforts provision. The decision to remove a child or make reasonable efforts to preserve a family requires case managers to weigh presumed benefits of family preservation against sometimes unconfirmed indications of danger. Finding the balance between these two important goals complicates removal and child placement decisions. Family preservation and reunification, however, have never been about keeping families intact when a child is unsafe. The very purpose of CPS agencies is to rescue vulnerable children from unsafe and abusive environments. The mission of CPS agencies makes it difficult to understand why case managers would ever knowingly leave children in unsafe homes. Despite the reasonable efforts provision, federal regulations explicitly authorize state agencies to remove children in emergency situations.[83]

Case managers who wrongly decide against removing a child are more apt to seek external blame rather than accept personal responsibility. It is in their self-interest to blame the law. But case managers do make mistakes, or worse, falsify case files. In Joseph Wallace's case, the state misplaced his records, which directly contributed to his death.[84] Other case managers have directly falsified case records. Two recent cases in Florida demonstrate the point. Florida has been unable to locate four-year-old Rilya Wilson, a child in state custody, for well over a year, during which period Rilya's case manager filed false reports claiming she had been visiting the child.[85] Florida has also charged a babysitter for fatally beating two-year-old Alfredo Montes, a child in the state's custody. Alfredo's case file indicated that his case manager had visited the child only hours before his death, but the state has now charged the case manager with falsifying records, and the case manager's lawyer now claims that she failed to see the child that day only because no one was home.[86] An unknown number of other child tragedies have likely resulted from errors in professional judgment, lack of professional competence, or intentional wrongdoing.[87]

Blaming the reasonable efforts provision for the deaths of children did not present a fair and accurate assessment of the federal requirement. A fair assessment of the reasonable efforts provision's impact was further inhibited by long-term and widely acknowledged systemic problems. Federal financial

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[83] *See, e.g.*, 45 C.F.R. § 1356.21(b)-(c) (2001) (allowing sixty days between actual removal of a child and a judicial reasonable efforts determination and requiring a contrary-to-the-welfare finding at the first court hearing approving removal; neither of these requirements restricts state agencies from removing children in emergency situations).

[84] *See* Bernstein & Bruni, *supra* note 76.

[85] Dana Canedy, *Children Suffer as Florida Agency Struggles*, N.Y. TIMES, July 1, 2002, at A1.

[86] Dana Canedy, *Child-Agency Troubles Rise for Gov. Bush*, N.Y. TIMES, July 19, 2002, at A10.

[87] *See, e.g.*, Jane Hanson, *Abuse Suit, State Under Fire in 5-year-old's Death*, THE ATLANTA J. CONST., Nov. 10, 1999, at A1.

reimbursement formulas made foster care placement more financially advantageous to states than providing preservation and reunification services. Then-Assistant Secretary for Human Development Services for the Department of Health, Education, and Welfare summed up the financial incentives problem while testifying before the Senate Finance Committee in 1979:

> Our basic concern has been that there are fiscal incentives to place children and young people in out-of-home care because of the open-ended nature of the appropriation, and that may be in part the reason that there has been an increase in the number of children in foster care. . . .
>
> So, our position is basically a position against financial incentives for institutionalizing children or inappropriately placing children in outof-home care.[88]

Senators Moynihan and Cranston introduced an amendment to correct this financial incentives problem. The amendment was supported by the Carter Administration,[89] but it did not survive to become a part of the final Child Welfare Act of 1980. Today, federal funding formulas continue to restrict funding for child welfare services while leaving foster care maintenance reimbursements uncapped.

The federal government has consistently provided more actual funding for foster care maintenance than for child welfare services. According to former Assistant Secretary Martinez, this tilt toward foster care maintenance in federal

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[88] *Proposals Related to Social and Child Welfare Services, Adoption Assistance, and Foster Care*, *supra* note 65 (statement of Arabella Martinez, Assistant Secretary for Human Development Services, Office of Human Development Services, Department of Health, Education, and Welfare).

[89] *See id.* ("Let me turn to a few of the specific issues in the bills before you. Federal funds for the current AFDC-foster care program are provided on an open-ended basis while the child welfare services needed to keep children and their families together have been funded much below their already closed-ended authorization level. States are simply reimbursed for their foster care claims, as long as they meet the requirements of current law. We believe that continuation of the present system of financing, as is proposed in H.R. 3434, would simply exacerbate perverse incentives to place children in foster care and continue inappropriate foster care placements, rather than create a program for working with children and families in their own home environments.

S. 966 and the Moynihan-Cranston amendment to that bill propose to change the foster care maintenance payment program in a way which provides funding above current expenditures to accommodate the improvements the bill is designed to produce and provides incentives to the states to reduce inappropriate foster care expenditures by allowing them to transfer all unused maintenance funds to their child welfare services program for use in expanding services. . . .

One of the greatest injustices of the current AFDC foster care system is that it provides funds for those who take care of children when they are placed away from their families on a temporary basis but provides no federal funding to those who want to give those children a permanent home and adopt them.").

funding was present before 1980.[90] Little has changed in the twenty years since Congress passed the Child Welfare Act. In 1989, state claims for Title IV-E foster care reimbursements accounted for approximately seventy-four percent of all federal funding for child welfare, foster care, and adoption activities. In the same year, Title IV-B child welfare services comprised approximately sixteen percent of such federal funding while the Independent Living Program (for older teens in foster care) and state adoption assistance claims respectively comprised three percent and seven percent of federal funding.[91] By 1999, foster care still accounted for about seventy-three percent of all federal funding while the proportion of funding for adoption activities rose to approximately fifteen percent, but the proportion of funding covering child welfare services had fallen to only ten percent.[92] The federal government has simply not made child welfare services a funding priority comparable to foster care maintenance reimbursements. Since the reasonable efforts provision called for states to provide child welfare services, second-rate funding of those services inhibited the effectiveness of the reasonable efforts requirement.

In addition to these funding problems, CPS personnel are overworked and often deal with unmanageably heavy caseloads. Take, for example, Elisa Izquierdo's case. Although the CPS agency in Elisa's case promulgated standards, which provided that case managers could safely handle no more than fifteen cases at one time, Elisa's case manager reportedly handled as many as thirty-eight cases and never handled fewer than twenty-six during the year Elisa died.[93] Workforce and financial problems may have contributed more to the growth of foster care rolls than did misinterpretations of the federal law.[94] Even still, the belief that case managers simply misunderstood the reasonable efforts provision seemingly prevailed as the predominant problem in the federal law.

C. The Adoption and Safe Families Act of 1997

In 1997, Congress passed the Adoption and Safe Families Act[95] ("ASFA"), seeking in large part to correct these misinterpretations about the reasonable efforts requirement. ASFA garnered widespread support in both houses of Congress and from the Clinton Administration. Despite this widespread support, ASFA resulted in a one-sided solution for problems the Child Welfare Act failed to solve. ASFA reemphasized safety, promoted permanency, and purported to

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[90] *See Proposals Related to Social and Child Welfare Services, Adoption Assistance, and Foster Care*, *supra* note 65.

[91] *See Improving the Well-Being of Abused and Neglected Children: Hearing Before the Senate Comm.*, *supra* note 71, at 648.

[92] *See id.*

[93] *See* Bernstein & Bruni, *supra* note 76.

[94] *See* National Coalition for Child Protection Reform, *supra* note 80.

[95] Adoption and Safe Families Act of 1997, Pub.L. 105-89, 111 Stat. 2115 (codified in scattered sections of 42 U.S.C.).

clarify case managers' misunderstandings of reasonable efforts. Unfortunately, ASFA largely overlooked the long-neglected family preservation, support, and reunification services on which the success of the reasonable efforts provision had so heavily depended.

ASFA represented the first major change in federal requirements for child protection services since 1980. Immediately following the Child Welfare Act, in 1982 and 1983, the number of children in Title IV-E foster care fell slightly,[96] indicating that the Child Welfare Act might be successful. By 1987, however, the number of children in foster care had crept back to their 1980 level.[97] By 1996, more than a half million children were in foster care,[98] the same number that was estimated to be in foster care in 1977,[99] indicating the Child Welfare Act had failed to scale back these numbers.

ASFA included provisions to reduce the high numbers of foster care children and to alleviate the problem of foster care drift:

1. Adoption Assistance Amendments

ASFA provided additional incentives to states for increasing the number of children adopted out of foster care. Specifically, ASFA awarded states $4,000 per adoption in excess of the state's average number of adoptions prior to 1997. ASFA awarded the state an additional $2,000 if the child adopted had "special needs."[100] ASFA also reduced inter-jurisdictional barriers that had previously delayed adoptions across state lines.[101]

2. Timeline Amendments

ASFA also provided new timelines regulating the amount of time children can remain in foster care before being placed for adoption. The Child Welfare Act required that every child in foster care receive a dispositional hearing within the first eighteen months in state custody.[102] ASFA changed "dispositional" hearings to "permanency" hearings and required states to hold these hearings within the child's first twelve months in foster care and at least once every twelve months as long as the child remained in state custody.[103] ASFA also required that every child in foster care have a permanent plan within twelve months. Significantly, ASFA directed states to petition a court for termination of parental rights once a child has resided in state custody for fifteen of the most recent twenty-two

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[96] *See* COMMITTEE ON WAYS AND MEANS, *supra* note 63, at 719-20.

[97] *See id.*

[98] *See id.*

[99] *See Improving the Well-Being of Abused and Neglected Children: Hearing Before the Senate Comm.*, *supra* note 71 and accompanying text.

[100] *See* Adoption and Safe Families Act § 201.

[101] *See id.* § 202.

[102] *See* Child Welfare Act of 1980 § 101.

[103] *See* Adoption and Safe Families Act § 302.

months.[104] A state can be excused from this obligation if: (1) the state has placed the child in the care of a relative; (2) the state can provide a compelling reason for maintaining the parental relationship; or (3) the state has failed to provide reasonable efforts to reunite the family.[105] This amendment establishing a new timeline for termination of parental rights was a key provision of ASFA.[106]

3. Reasonable Efforts Amendments

More importantly, ASFA directly amended the reasonable efforts provision.[107] A year before passage of ASFA, the Senate Committee on Labor and Human Resources held a hearing where the primary topic concerned asserted misinterpretations of the reasonable efforts provision. In his opening remarks, Senator Mike DeWine of Ohio said he was "convinced that some, some of the tragedies in the child welfare system, are the unintended consequence of a small part of [the Child Welfare Act]."[108] More pointedly, DeWine stated: "There is strong evidence to suggest that, in practice reasonable efforts have become many times, extraordinary efforts—efforts to keep families together at all costs."[109] In a speech on the floor of the Senate as the full body prepared to vote on ASFA, DeWine recounted the more than two years of work completed, especially the work to clarify the reasonable efforts provision. In explaining the need for ASFA, DeWine said that "over the last 17 years . . . this law, tragically, has often been seriously misinterpreted by those responsible for administering our foster care system . . . . Too often, reasonable efforts, as outlined in the statute have come to mean unreasonable efforts."[110]

The Clinton administration also recognized the key importance of the reasonable efforts amendments. On the day he signed ASFA into law, President Clinton said: "The new law will help us to speed children out of foster care into permanent families by setting meaningful time limits for child welfare decisions, by clarifying which family situations call for reasonable reunification efforts and which simply do not."[111] On the same day, President Clinton's Special Assistant

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[104] *See id.* § 103.

[105] *See id.*

[106] *See* UNITED STATES GENERAL ACCOUNTING OFFICE, FOSTER CARE: STATES EARLY EXPERIENCES IMPLEMENTING THE ADOPTION AND SAFE FAMILIES ACT, REPORT TO THE CHAIRMAN, SUBCOMM. ON HUMAN RESOURCE, COMM. ON WAYS AND MEANS, HOUSE OF REPRESENTATIVES 1 (1999) (referring to the timeframe for termination of parental rights and the amendments excusing reasonable efforts as "two key provisions" of ASFA).

[107] *See id.*

[108] *Improving the Well-Being of Abused and Neglected Children: Hearing Before the Senate Comm.*, *supra* note 71, at 2 (statement of Sen. Mike DeWine).

[109] *Id.* at 3.

[110] 143 CONG. REC. S12,669 (daily ed. Nov. 13, 2997) (1997) (statement of Sen. DeWine).

[111] *Remarks on Signing the Adoption and Safe Families Act of 1997*, PUB. PAPERS:

for Domestic Policy specifically described the clarification of the reasonable efforts standard as a "key" provision of the bill.[112]

Congress, the Administration, and child advocates all agreed that changes regarding the reasonable efforts requirement were needed. In 1988, Marcia Lowry of the American Civil Liberties Union ("ACLU") told Congress that children "are supposed to be protected by the very fine legislation that Congress passed in 1980 which requires the states to make reasonable efforts to avoid the need for foster care placement whenever possible," but, unfortunately, "reasonable efforts are not made in hundreds and hundreds of thousands of cases across the country."[113] At the same congressional hearing, Mark Hardin of the American Bar Association recommended three relevant amendments to the Child Welfare Act: (1) "to require [s]tates to establish a set of preventive and reunification services that will be provided on a consistent, statewide basis;" (2) "to require [s]tate child welfare agencies to provide detailed reports concerning what preventive and reunification services are available throughout the [s]tate;" and (3) "to require agencies to provide courts with written statements describing their efforts to preserve families in each individual case."[114] Hardin recognized that reasonable efforts would work effectively only if states provided proper services.

In the pre-ASFA hearing led by Senator DeWine, Professor Gelles noted the problem with the reasonable efforts provision, saying the law "never clearly defined the terms reasonable nor efforts."[115] To solve this problem, Professor Gelles specifically asked the Congress "to spell out what is reasonable and what are efforts . . . . The two words 'reasonable efforts' must be defined or changed so that children, their welfare and development come first."[116]

Congress heeded neither Gelles' specific advice nor Hardin's recommendations. Instead, ASFA attempted to clarify the misinterpretations surrounding reasonable efforts by amending section 671(a)(15) of the Social Security Act. The amended section 671(a)(15) has six subparts. Subpart (A) requires that, in making reasonable efforts and in determining whether reasonable

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WILLIAM J. CLINTON, 1612-14 (Nov. 19, 1997).

[112] *See* Jennifer Klein, Special Assistant to the President for Domestic Policy, White House News Briefing on Adoption Bill, Nov. 19, 1997, *available at* http://clinton6.nara.gov/1997/11/1997-11-19-press-briefing-on-adoption-and-safe-families-act.html.

[113] *Foster Care, Child Welfare, and Adoption Reforms, Joint Hearings Before the Subcomm. on Public Assistance and Unemployment Compensation of the Comm. on Ways and Means and Select Comm. on Child., Youth, and Families*, 100th Cong. 20-21 (1988) (statement of Marcia Lowry, Director, Children's Rights Project, ACLU).

[114] *Id.* at 218-20 (statement of Mark A. Hardin, Esq., Director, Foster Care Project, American Bar Association).

[115] *Improving the Well-Being of Abused and Neglected Children: Hearing Before the Senate Comm.*, *supra* note 71, at 13 (statement of Richard Gelles, Director, University of Rhode Island's Family Violence Research Program).

[116] *Id.*

efforts had been made, "the child's health and safety shall be the paramount concern."[117] Subpart (A) makes explicit that the requirement to make reasonable efforts should not compromise a child's safety.

Subpart (B) provides that "reasonable efforts shall be made to preserve and reunify families: (i) prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child's home; and (ii) to make it possible for a child to safely return to the child's home."[118] In subpart (B), ASFA preserves the reasonable efforts language precisely as it existed under the Child Welfare Act of 1980.

From the mere text of the amendment, subpart (C) seemingly extends the reasonable efforts mandate beyond family preservation and reunification in subpart (B) to include permanency.[119] Under subpart (C), the state must make reasonable efforts "to place the child in a timely manner in accordance with the permanency plan, and to complete whatever steps are necessary to finalize the permanent placement of the child."[120] The regulations pursuant to ASFA, which require a judicial determination that the state has made reasonable efforts to finalize a permanency plan, give this subpart even more meaning.[121]

Subpart (D) provides perhaps the most pronounced change to reasonable efforts because it excuses states from making reasonable efforts based largely on a parent's current and previous conduct. A state does not have to make reasonable efforts where the parent has performed any of several specific acts: (1) subjected the child to aggravated circumstances (as defined by state law); (2) committed murder or voluntary manslaughter of another child of the parent; (3) aided or abetted, attempted, conspired, or solicited to commit such murder or manslaughter; or (4) committed a felony assault that results in serious bodily injury to the child or another child of the parent.[122]

Subpart (E) supports subpart (D) by providing that where subpart (D) excusesa state from its obligation to make reasonable efforts, a court must hold a permanency hearing within thirty days rather than the usual eighteen months.[123]

Finally, subpart (F) explicitly authorizes concurrent planning, permitting states to make reasonable efforts toward a permanent out-of-home placement and reasonable efforts toward reunification at the same time.[124]

The reasonable efforts amendments and the revised timelines significantly

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[117] 42 U.S.C § 671(a)(15)(A) (2000).

[118] *Id.* § 671(a)(15)(B).

[119] Reasonable efforts to find a permanent placement in fact already existed in the Child Welfare Act, which offered additional funding for hard to place children for whom the state had already made reasonable efforts to secure an adoption. *See* S. REP. No. 96-336, at 2 (1979).

[120] 42 U.S.C. § 671(a)(15)(C).

[121] *See* 45 C.F.R. § 1356.21(b)(3) (2001).

[122] *See* 42 U.S.C. § 671(a)(15)(D).

[123] *See id.* § 671(a)(15)(E).

[124] *See id.* § 671(a)(15)(F).

scales back the force of the reasonable efforts standard. While the reasonable efforts amendments provide specific exemptions to the standard, the revised timelines end the obligation to make reasonable efforts much sooner. Although advocates for child welfare reform asked Congress to specifically define reasonable efforts and to ensure reasonable efforts were made in every case, ASFA moves in the opposite direction. At the same time, ASFA does not significantly shore up family support, preservation, and reunification services. The changes to reasonable efforts seemed largely precipitated by perceptions rooted primarily in anecdotal evidence of case managers' misinterpretations. While some advocates for ASFA claimed CPS workers had gone too far in making reasonable efforts, the increasing foster care rolls suggested states had not gone far enough in providing services early on in CPS cases.

IV. LACKING FEDERAL ENFORCEMENT

The perceived failure of the reasonable efforts provision prior to 1997 may have been exacerbated by federal administrative and judicial responses to the requirement. While recipients, or potential recipients, of child protective services claimed that states had not worked hard enough to provide an acceptable level of service, some state CPS workers claimed that the reasonable efforts provision was overly burdensome on the states and had, in some, cases resulted in lapses in protection. Precarious oversight of child protective services by DHHS and limitations on private enforcement pronounced by the Supreme Court limited the potential impact of the reasonable efforts provision.

A. Unsuccessful Federal Oversight

Given legislation that failed to provide details about the affirmative requirements of the reasonable efforts provision, strong federal monitoring and oversight offered a clear avenue for clarifying the specific requirements of the provision. But federal authorities failed to offer the necessary guidance to states for complying with the reasonable efforts requirement. Marcia Lowry characterized the problem: "[S]o far what we see is virtually no monitoring by [D]HHS. The reviews that are done of the states are irresponsible. States are passing [D]HHS audits with systems in which no reasonable person could consider children are being well treated. It is virtually impossible to fail an [D]HHS audit."[125]

This lack of success stemmed from both administrative and bureaucratic delay as well as structural flaws in the federal review system. A report issued in 1994 by the DHHS Office of the Inspector General highlighted a number of shortcomings in the Department's oversight of state child welfare programs, including: (1) "[f]ederal oversight reviews have not identified severe problems

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[125] *Improving the Well-Being of Abused and Neglected Children: Hearing Before the Senate Comm.*, *supra* note 71, at 22.

with several [s]tates' child welfare programs that were specified in successful lawsuits against the [s]tates;" (2) "[s]ection 427 and Title IV-E reviews have been focused on the written record of case work, not on how well children are served;" and (3) "[r]eview reports have not been issued to [s]tates in a timely manner. This has diminished their capacity to improve child welfare programs."[126] The problems with federal oversight were both substantive and procedural.

1. Ineffective Monitoring of Title IV-B Funding

The federal government addressed oversight of Title IV-B and IV-E funding in two separate and distinct review processes. While eligibility for IV-E funding required states to comply with the reasonable efforts mandate, Title IV-B directly funded the services states used to make reasonable efforts. Unlike IV-E funding, IV-B funding originated from a fixed entitlement amount of which states received an allotment.

DHHS attempted to monitor the states' implementation of the Title IV-B Child Welfare Services Program through section 427 of the Child Welfare Act.[127] Section 427 required each state, among other things, to implement and operate a statewide information system and a case review system.[128] In 1988, the ACLU sued at least four states for violations of federal child welfare laws, even though all four states had passed recent federal reviews.[129] According to the information the ACLU collected for the lawsuits, three of the four states had not met the requirements of a case review system.[130] With respect to a statewide information system, the systems states had in place during the 1980's were apparently unsuccessful, prompting Congress in 1993 to begin funding states for the creation of comprehensive Statewide Automated Child Welfare Information Systems ("SACWIS").[131] As of February 2000, five states had not reported any SACWIS activity, and twelve other states were still planning SACWIS.[132] The requirement for statewide information systems has never been fully realized.

Full compliance with section 427 permitted a state to receive its full allotment

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[126] OFFICE OF INSPECTOR GENERAL, DEPARTMENT OF HEALTH AND HUMAN SERVICES, OVERSIGHT OF STATE CHILD WELFARE PROGRAMS iii (1994).

[127] *See generally id.* (describing the federal review process).

[128] *See* 42 U.S.C. § 627, *repealed* by Pub. L. 103-432, title II, § 202(c), 108 Stat. 4454.

[129] In her prepared statement Marcia Lowry noted, for example, that Louisiana had not complied fully with the periodic judicial review requirement. Similarly New Mexico did not conduct six-month reviews, and Kentucky had not met the six-month requirement for the establishment of case plans. *See Foster Care, Child Welfare, and Adoption Reforms*, *supra* note 113, at 21.

[130] *Id.*

[131] *See* Omnibus Budget Reconciliation Act of 1993, 42 U.S.C. § 674 (2000); 45 C.F.R. §§ 1355.50-1355.55 (2001).

[132] *See* COMMITTEE ON WAYS AND MEANS, *supra* note 63, at 719.

of Title IV-B funding as well as additional incentive funding. Noncompliance meant that DHHS should withhold, or disallow, Title IV-B funding and the noncompliant state would receive no incentive funding. But noncompliance in a section 427 review has never resulted in a complete loss of Title IV-B funding.[133] In practice, Section 427 compliance became largely voluntary.

In addition to the diminished real costs states faced in failing a section 427 review, such reviews only involved issues of procedure and neglected to assess the quality of actual case work practice. Once a state had implemented and begun operating an information system and a case review system, the reviews did not go further to ensure that those systems resulted in good outcomes for children. Regarding section 427 reviews, the Office of Inspector General recommended that the Department either "discontinue [s]ection 427 reviews or sharply reduce the use of them."[134]

2. Ineffective Monitoring of Title IV-E Funding

Title IV-E, an uncapped entitlement program, reimbursed states for foster care maintenance and adoption assistance payments. Uncapped Title IV-E expenses comprised the most costly part of the Child Welfare Act.[135] To qualify for Title IV-E funding, each case file had to include a judicial determination that the [s]tate made reasonable efforts.[136] In theory, the reasonable efforts judicial determination should have served as a gateway between providing services for family support and preservation (under Title IV-B) and receiving funding for foster care maintenance payments (under Title IV-E); only those states that offered adequate and proper "reasonable efforts" would receive reimbursements for foster care expenses.

Title IV-E reviews consisted of three types of evaluations: foster care reviews, adoption assistance reviews, and administrative and training expense reviews. The reasonable efforts provision is implicated only in foster care reviews. Generally, federal reviewers examined individual case file records to assess whether the children met AFDC financial eligibility guidelines, whether foster homes met licensing requirements, and whether state courts included in their court orders a judicial determination that reasonable efforts were made prior to each child's removal from home.[137] Most of the Title IV-E requirements involved foster care or adoption eligibility, which correspondingly supported foster care maintenance and adoption assistance payments. Unlike these foster care and adoption assistance related requirements, the reasonable efforts requirement specifically related back to family support and preservation services, which the state should have provided to prevent unnecessary foster care placement. Thus,

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[133] *See infra* notes 144-149.

[134] OFFICE OF INSPECTOR GENERAL, *supra* note 126, at 24.

[135] *See supra* notes 134-143 and accompanying text.

[136] *See* 45 C.F.R. § 1356.71(d)(1)(i)(2001).

[137] *See id.* § 1356.71(d)(1).

the reasonable efforts provision seemed especially promising in ensuring that states offered quality family support and preservation services.

Despite the potential for the reasonable efforts mandate to limit foster care entry, Title IV-E reviews regarding reasonable efforts judicial determinations were criticized. Some criticisms centered on related issues, including the unyielding procedural nature of reviewing judicial determinations and the lack of substantive value in the documentation and review process. Title IV-E reviews of judicial determinations did not assist states in improving their CPS systems. The reviews consisted primarily of identifying documentation in the case files that indicated the court had made a judicial determination with respect to reasonable efforts, but this requirement was practically devoid of substantive value regarding the actual services states provided.

These criticisms were not new. At a 1988 hearing of the Select Committee on Children, Youth, and Families, Chairman George Miller expressed this concern to Jane Burnley, Associate Commissioner for the Children's Bureau, DHHS: "[M]y question is whether or not you're looking at the paper that says there's a reasonable effort or whether or not you're looking behind the paper to see whether or not in fact that's what's taking place."[138] Burnley admitted that Title IV-E reviews have a limited scope: "You are correct, we do not go beyond to look at whether or not ones [sic] reasonable efforts are indicated as part of the judicial determination that placement was necessary . . . ."[139] The Office of Inspector General report found that "[t]he Title IV-E review process is often focused on whether certain forms are filled out appropriately rather than whether, in fact, the purpose of the law in preventing unnecessary placements is being met."[140]

As a case in point, some states addressed the reasonable efforts requirement by creating pre-printed forms that merely required judges to check a box in order to indicate that they had made the appropriate judicial determination. Checking a box on a pre-printed form, however, does not foster a hearing conducive to the individualized determinations that the Child Welfare Act had contemplated. In some cases, the written evidence in the case files did not support the conclusions of the pre-printed forms. For example, California courts have been found to have determined that reasonable efforts were made even though in depth reviews of case files did not support that determination.[141]

Other examples from actual DHHS Title IV-E reviews demonstrate the problems of having a purely procedural requirement and of the absence of a clearer definition for reasonable efforts. Massachusetts passed a law, which

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[138] *Improving the Well-Being of Abused and Neglected Children: Hearing Before the Senate Comm.*, *supra* note 71, at 59.

[139] *Id.*

[140] OFFICE OF INSPECTOR GENERAL, *supra* note 126, at 22.

[141] *See* OFFICE OF INSPECTOR GENERAL, DEPARTMENT OF HEALTH AND HUMAN SERVICES, AUDIT OF TITLE IV-E FOSTER CARE ELIGIBILITY IN CALIFORNIA FOR THE PERIOD OCT. 1, 1988 THROUGH SEPT. 30, 1991 (1994).

presumed that courts had made a reasonable efforts determination unless a court order documented otherwise; the state argued that this law should alleviate the need for review of judicial determinations. However, DHHS disagreed that this law alleviated the need for a Title IV-E review of court orders.[142] If Title IV-E reviews went beyond identification of judicial determinations to actually evaluate service provision, the Massachusetts law would have been irrelevant. North Carolina argued that language in court orders determining that state custody was in the *child's best interest* satisfied the requirement for a reasonable efforts judicial determination.[143] However, such statements about a *child's best interest* should not be permitted to substitute the more specific determination of *whether a state has provided services* to meet the reasonable efforts standard.

3. Withholding of Federal Funding Uncommon

The federal government's leverage to encourage and influence good practices in states' child protection services stems almost entirely from the ability to withhold funding from noncompliant states. But the federal government has not effectively used its financial withholding power, leaving states to follow federal guidance only if and when they see fit. At least one federal rule, the Title IV-E state plan requirement, amounted to an end in itself because approval of the plan by the Secretary of Health and Human Services ended federal oversight regarding the plan. That is, the federal government stopped short of the next logical step of ensuring that a state actually implemented the plan.[144]

DHHS has often threatened noncompliant states with some level of withholding or disallowance, but states rarely have experienced actual disallowances, especially of Title IV-B funding. Following passage of the Child Welfare Act in 1980, DHHS spent several years establishing the federal oversight process. As early as 1989, purported concern about the validity of oversight process led Congress to issue a moratorium on disallowances DHHS had scheduled thus far.[145] Congress issued another moratorium in 1993, as part of the Omnibus

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[142] *See* OFFICE OF INSPECTOR GENERAL, DEPARTMENT OF HEALTH AND HUMAN SERVICES, REVIEW OF RETROACTIVE ADJUSTMENTS FILED BY MASSACHUSETTS UNDER THE TITLE IV-E FOSTER CARE PROGRAM 2 (2000).

[143] *See* OFFICE OF INSPECTOR GENERAL, DEPARTMENT OF HEALTH AND HUMAN SERVICES, AUDIT OF TITLE IV-E FOSTER CARE CHILD CARE CLAIMS AT THE NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES' DIVISION OF CHILD DEVELOPMENT FOR THE PERIOD NOV. 1, 1997 TO MAR. 31, 1999 10-11 (2001).

[144] *See* OFFICE OF INSPECTOR GENERAL, *supra* note 126, at 18. ("The Title IV-E State plan was seen as largely a paper exercise. State officials and ACF [federal] officials agreed that it is rarely, if ever, looked at by ACF.").

[145] *See* COMMITTEE ON WAYS AND MEANS, *supra* note 63, at 687-88 (describing the moratoria surrounding the federal review process).

> However, child welfare advocates, State and federal officials, and Members of Congress grew dissatisfied with the early review systems for various reasons, both

Budget Reconciliation Act, barring the government from issuing disallowances until October 1994.[146] In 1994, Congress directed DHHS to develop a new system for federal oversight to begin in 1996.[147] However, the period from 1996 through 2000 evolved into a trial period, permitting DHHS to run pilot versions of its new program while states were again exempt from disallowances.[148]

The Office of Inspector General report also noted the rarity of actual disallowances under Titles IV-B and IV-E:

> Several [s]tate officials mentioned that they had a hard time convincing their legislatures of the need for change without Federal dollars being at risk. Nevertheless even though every [s]tate has had a 427 review, only five [s]tates have failed 427 review since 1988 and, because of Congressional moratoria, no [s]tate has lost Federal funding because of a failure in that time period . . . . States have been somewhat less successful in Title IV-E reviews; nevertheless, of the [s]tates reviewed by ACF, only twelve [s]tates have had major (Stage II) disallowances in Title IV-E foster care reviews and only two [s]tates have had major (Stage II) disallowances in Title IV-E adoption assistance reviews in the last five years.[149]

Penalties for failing federal reviews did not provide strong incentives for states to comply with federal child welfare laws because the federal government rarely enforced those penalties.

> procedural and programmatic, and beginning in 1989, Congress suspended the collection of penalties resulting from these reviews. Procedural concerns included a lack of formal regulations, frequently resulting in confusion about the standards that States were expected to meet. Reviews were conducted retrospectively, sometimes for fiscal years that had long past, so that current practices were not examined. Exacerbating this problem was the late release of final reports by DHHS, so their findings and recommendations were sometimes irrelevant by the time they were issued . . . .
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> Both section 427 and title Iv-E eligibility reviews focused on paper compliance with legal requirements. Moreover, States were sometimes held accountable for circumstances beyond their control, such as the schedule or actions of the courts . . . . The review system contained no mechanism for helping States improve the quality of their child welfare programs, and also were criticized for failing, in some cases, to identify problems in State programs.
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> In 1989, Congress imposed the first in a series of moratoriums, prohibiting DHHS from collecting penalties associated with these reviews.

Id.

[146] *See* 42 U.S.C. § 629 (2000).

[147] *See* Social Security Act Amendments of 1994, Pub. L. 103-432, § 203, 108 Stat. 4398, 4454 (codified at scattered sections of 42 U.S.C.) (1994).

[148] *See* COMMITTEE ON WAYS AND MEANS, *supra* note 63, at 688.

[149] OFFICE OF INSPECTOR GENERAL, *supra* note 126, at 4-5, 8-9.

4. Recent Developments in the Federal Oversight Process

A revamped federal oversight and review process has existed since 2000.[150] Under the new process, oversight of Title IV-B child welfare services programs is far more substantive than the earlier section 427-based reviews. The new process includes three outcome or results-based categories and seven systemic categories. The results-based categories determine whether a state successfully keeps children safe, achieves permanency for children, and improves child and family well-being. Each state's performance in these areas is weighed against national standards. The seven systemic categories assess whether a state has in place the systemic infrastructure necessary for assuring safety, permanency, and well-being.[151]

One problem with the new results-based reviews is that they were not accompanied with increased funding for child welfare services. For states to have positive results in child welfare, they must have adequate funding for necessary services. The new review system may result in states being penalized for poor performance without having been given adequate resources to perform well.

Despite the significant number of changes to section 427 reviews, Title IV-E reviews remained largely unchanged. No changes were made to the reasonable effort component of Title IV-E reviews. Federal reviewers must continue to verify that each case file contains some basic documentation that a state court has determined that the state agency made reasonable efforts.

B. The Supreme Court Precludes Private Enforcement of Reasonable Efforts

Poorly-served children have been unsuccessful in seeking refuge in federal courts. *DeShaney v. Winnebago* involved a claim that the state had failed to sufficiently fulfill its obligations to protect children.[152] In *DeShaney*, a case manager, acting as an agent of the state, observed a pattern of child abuse that ultimately resulted in irreversible brain damage. Despite his awareness of virtually every step in the escalation of abuse, the case manager took no concrete action to rescue or otherwise protect the child.[153]

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[150] *See* 65 Fed. Reg. 4020-93 (Jan. 25, 2000) (making the new regulations effective Mar. 27, 2000).

[151] *See* ADMINISTRATION ON CHILDREN, YOUTH, AND FAMILIES CHILDREN'S BUREAU, ADMINISTRATION FOR CHILDREN AND FAMILIES, U.S. DEP'T OF HEALTH AND HUMAN SERV., CHILD AND FAMILY SERVICES REVIEWS PROCEDURES MANUAL 1-4 (Washington, D.C. 2000). The review includes the following systemic factors: statewide information system; case review system; quality assurance system; staff training; service array; agency responsiveness to community; and foster and adoptive parent licensing, recruitment, and retention. *See id.*

[152] *See* 489 U.S. 189 (1989).

[153] Joshua DeShaney's father had severely beaten him over a period of more than two years, during which time Joshua had made at least four abuse-related hospital or emergency room visits. Following the second emergency room visit, Joshua remained in

Chief Justice Rehnquist framed the issue before the Court as determining "when, if ever, the failure of a state or local government entity or its agents to provide an individual with adequate protective services constitutes a violation of the individual's due process rights."[154] More specifically, did the state have a constitutional duty to protect DeShaney where the CPS case manager knew or should have known the child was a victim of abuse? The Court concluded that the state does not assume a constitutional duty to protect despite its knowledge that a child suffers from abuse. Only by acting in a way that restrains freedom, such as bringing a child into state custody, does the state assume a reciprocal duty to protect the child.[155]

In *Suter v. Artist M.*, the Court more specifically addressed the question of whether an individual child taken into state custody has a federal right to enforce the reasonable efforts mandate directly under the Child Welfare Act, or through an action under 42 U.S.C. § 1983 as a beneficiary of the Child Welfare Act.[156] As a condition of receiving federal funds under the Child Welfare Act, the state of Illinois agreed to make reasonable efforts to prevent removal of children from their homes and to reunify those children with their families should removal become necessary. Artist M., representing a class of plaintiffs including all children who currently reside or will reside in the custody of Illinois' child protective services agency, argued that the state failed to make reasonable efforts by failing to promptly appoint case managers to children entering the CPS system and to promptly reassign children to new case managers when necessary.[157]

The *Suter* Court did not reach the issue of whether the state satisfied its agreement to make reasonable efforts but instead held that individual private plaintiffs did not have a federally enforceable right to reasonable efforts. Rather than private enforcement by individuals, the Court believed Congress intended only the Secretary of Health and Human Services to enforce the reasonable efforts provision because the Child Welfare Act granted the Secretary authority for approving each state's plan, and the reasonable efforts provision was part of that plan.[158] The practical impact of the Court's rationale was to significantly soften

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the temporary custody of the hospital, but the state released him back to his father's custody when the father agreed to comply with certain goals. The father never complied. Over the next year, Joshua's case manager observed injuries to the child's head, realized his father had failed to enroll Joshua in school, and had otherwise failed to comply with the earlier agreement. On two attempts to visit Joshua, his case manager was told the child was too ill to see her. On his final trip to an emergency room, Joshua fell into a coma but did not die. He suffered a series of hemorrhages that left him severely brain damaged, causing him to spend the remainder of his life in an institution for the profoundly retarded. *See id.* at 191-93.

[154] *Id.* at 194.

[155] *See id.* at 200-01.

[156] *See* 503 U.S. 347, 350.

[157] *See id.* at 352.

[158] *See id.* at 360.

enforcement of the Child Welfare Act. Although the Child Welfare Act called for the Secretary to approve each state's plan, the Secretary did not monitor the quality of implementation for those plans.[159]

Shortly after the *Suter* decision, Congress signaled its disapproval by amending the Social Security Act. Congress overturned the Court's method for determining private enforceability while leaving intact the specific holding of *Suter* (that the reasonable efforts provision is not enforceable by a private action).[160]

Suter, and Congress' response[161] to it, marked two crucially important events contributing to the demise of federal level enforcement of reasonable efforts. Both actions represented missed opportunities to define, clarify, and provide measurement indicia for reasonable efforts. Congress could have resolved the Supreme Court's concern about the absence of guidance on reasonable efforts by simply providing factors to be considered in determining whether a state had complied. The Court's decision may have had its greatest impact on the judiciary, where, prior to *Suter*, a number of lower federal courts had permitted private rights of action to move forward.[162] These lower courts were effectively filling a void in the federal enforcement of reasonable efforts, but the *Suter* decision and Congress' inaction halted these efforts.

V. THE UNBALANCED SHIFT AWAY FROM PRESERVATION AND REUNIFICATION SERVICES

The ASFA amendments to the reasonable efforts requirement, like the Child Welfare Act that preceded it, failed to provide states with a comprehensive meaning for and standards by which to measure reasonable efforts. Not that Congress overlooked this matter. On the contrary, Congress seemingly saw fit to leave this aspect of the provision untouched when it amended the Social Security Act in response to the Supreme Court's decision in *Suter*.

None of the new subdivisions under Section 671(a)(15) provide states with

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[159] *See supra* notes 134-143 and accompanying text.

[160] *See* 42 U.S.C. §§ 1301-1320b-13 (2000). The dissenting justices in *Suter* also found the majority's analysis troubling. *See* 503 U.S. at 373 (Blackmun, J., dissenting). Justice Blackmun charged that the majority opinion was based on an analysis the Court had recently rejected in Wilder v. Virginia Hospital Ass'n, 496 U.S. 498 (1990). *See id.* "To be sure, the Court's reasoning is consistent with the dissent in *Wilder*. But it flatly contradicts what the Court *held* in that case." *Id.* (citations omitted)(emphasis in original).

[161] The congressional response to *Suter* was not all that uncharacteristic. The Court decided *Suter* at a time when Congress was actively responding to the Court's statutory interpretation. For a detailed discussion and analysis of Congress overriding the Supreme Court, see William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L. J. 331 (1991).

[162] *See, e.g.*, LaShawn v. Dixon, 762 F. Supp. 959 (D.D.C. 1991); Norman v. Johnson, 739 F. Supp. 1182 (N.D. Ill. 1990); L.J. v. Massinga, 699 F. Supp. 508 (D. Md. 1988); Joseph A. v. New Mexico Dep't of Soc. Servs., 575 F. Supp. 346 (D.N.M. 1983); Lynch v. King, 550 F. Supp. 325 (D. Mass. 1982).

adequate guidance in crafting and reviewing compliance with reasonable efforts. Subdivision (A) only makes explicit that the child's health and safety should be of paramount concern, but this concern already existed, albeit implicitly, in the principles on which the Child Welfare Act was originally based. State intervention by CPS agencies is justified precisely because the state seeks to protect children. Thus, amending the Child Welfare Act to command that a child's health and safety be of paramount concern would add little substantive value.

The exemptions outlined in subdivision (D) of section 671(a)(15) do not include any affirmative duties for states making reasonable efforts, but instead waive the duty to make reasonable efforts under certain conditions. Although hese exceptions to reasonable efforts contribute to several positive developments brought about by ASFA, these developments do not contribute to states' efforts to make reasonable efforts. Instead they significantly contribute to efforts to bypass or end reasonable efforts. Extending reasonable efforts to permanency under subdivision (C) also does not clarify how states must make reasonable efforts to preserve and reunify families.

Finally, authorizing concurrent planning under subdivision (F) actually shifts focus away from reasonable efforts to preserve and reunify the family toward reasonable efforts for an alternative permanency plan. With concurrent planning, real potential for conflict exists between reasonable efforts to reunify families and reasonable efforts to fulfill an alternative permanency plan. This conflict is particularly pronounced where the same case manager must guide both reunification efforts and efforts to bring about an alternative permanency plan. The limited resources of most state CPS agencies suggest case managers will likely be asked to do exactly that. The point is simply that time spent on an alternative permanency plan is precious time *not* spent on reasonable efforts to reunify the family.

ASFA also amended the Family Support and Preservation Program, changing its name to Promoting Safe and Stable Families, and substantively adding "time-limited" reunification services and adoption promotion services. These changes signaled AFSA's new emphasis on permanency. Furthermore, the impact of the reasonable efforts amendments and the amendment creating the Promoting Safe and Stable Families program may psychologically reduce states' obligations to make reasonable efforts. ASFA's clarification of reasonable efforts de-emphasizes the pressure states once felt to provide a framework for understanding the mandate and for providing services. Promoting concurrent planning and the overall push for permanency deflects attention from reasonable efforts to preserve and reunify families. Couple the legislation's softening of the obligation to make reasonable efforts to preserve and reunify with the legislation's new timeline for stays in foster care, ASFA primarily turns out to define when and under what conditions the government may bypass efforts to preserve and reunify families.

Since ASFA directs states to petition courts for termination of parental rights for children who have resided in foster care for fifteen of the most recent twenty-two months, states have limited time to provide reunification services. Indeed,

ASFA refers to these efforts as "time-limited" reunification services. However, fifteen months often will not be enough time to provide quality services. Substance abuse treatment, in particular, may require more time than the legislation permits, and substance abuse problems contribute heavily to child maltreatment cases. Similar time crunches exist for parents serving short-term jail sentences, who are otherwise fit to parent.[163]

While ASFA provides an exception to the fifteen-month timeline in cases where the state has not made reasonable efforts, the structure of this exception misappropriates the rights and obligations of the parties. The obligation to file for termination of parental rights exists *unless* "the [s]tate has not provided to the family of the child, consistent with the time period in the [s]tate case plan, such services as the [s]tate deems necessary for the safe return of the child to the child's home."[164] The first problem with the construction of this exception is that it stresses terminating parental rights over providing services. Moreover, the exception only applies to the failure to provide those services the state deems necessary for reunification. Because removal constitutes an action by the state against the parent, the court or some other independent tribunal ought to determine what services constitute those necessary for reunification. As currently written, the exception asks states to police themselves. In an earlier proceeding, a court should already have ordered the state to provide necessary services. The proper inquiry therefore should not be whether the state has provided services the state deems necessary, but whether the state has provided court-ordered services.[165]

Like this exception, the cumulative impact of ASFA largely neglects the need to assist states in fulfilling their affirmative obligations to provide preservation and reunification services. In many ways, AFSA left states in the dark about how exactly to fulfill the reasonable efforts requirement. Adding to the legislation's disregard for preservation and reunification services, DHHS and the federal courts have not given states any additional incentives to improve preservation and reunification services. The reasonable efforts mandate thus turns out to be a hollow requirement, at least at the federal level.

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[163] *See, e.g.*, Ann Farmer, *Mothers in Prison Losing All Parental Rights*, WOMEN'S E NEWS, June 21, 2002, *available at* http://www.womensenews.org/article.cfm/dyn/aid/947/context/archive.

[164] 42 U.S.C. § 675(5)(E)(iii) (2000).

[165] Reference to "the state" in this exception could conceivably refer specifically to (or at least include) state courts. However, neither ASFA nor the regulations clarify this point. Elsewhere the regulations call for judicial determinations of reasonable efforts, but on this exception the regulations do not call for judicial action. *Compare* 45 C.F.R. § 1356.21(b)-(e) (2001) *with* 45 C.F.R. § 1356.21(i)(2)(iii) (2001).

VI. STATES' LEGISLATIVE IMPLEMENTATION OF REASONABLE EFFORTS AFTER ASFA

The shifting federal emphasis regarding reasonable efforts means the requirement will only carry the weight accorded it by states. State legislatures have the authority to define reasonable efforts, promulgate regulations and policies for implementing reasonable efforts, and set criteria determining whether the state has sufficiently complied with the mandates of the reasonable efforts clause. Although research conducted for this Article did not find that DHHS had identified model reasonable efforts definitions, the Department, through the National Clearinghouse on Child Abuse and Neglect Information, did compile termination of parental rights statutes and reasonable efforts provisions for all fifty states.[166] The following observations and conclusions are based on those statutes.

A. State Statutes Modeling Federal Law

Every state has passed legislation addressing provisions of ASFA.[167] With some differences, nearly all states have legislation requiring state agencies to make reasonable efforts to preserve or reunify families. Some statutes seemingly stress reunification over preservation.[168] On the whole, however, the original conception of the reasonable efforts provision as Congress introduced it in the Child Welfare Act is commonplace among state statutes.[169]

The ASFA amendments introduced three statutory language developments regarding reasonable efforts: 1) that in making reasonable efforts, the child's health and safety is the paramount concern; 2) that state agencies must make reasonable efforts to finalize permanent placement of children; and 3) under certain circumstances, states may bypass the requirement to make reasonable efforts. The extent to which states incorporated each of these three developments

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[166] National Clearinghouse on Child Abuse and Neglect Information, United States Department of Health and Human Services, *Child Abuse and Neglect State Statutes Elements: Termination of Parental Rights* (2000), *available at* http://www.calib.com/nccanch/pubs/stats01/termin.pdf (last visited Feb. 12, 2003).

[167] *See* UNITED STATES GENERAL ACCOUNTING OFFICE, FOSTER CARE: STATES' EARLY EXPERIENCES IMPLEMENTING THE ADOPTION AND SAFE FAMILIES ACT, REPORT TO THE CHAIRMAN, SUBCOMM. ON HUMAN RESOURCES, COMM. ON WAYS AND MEANS, HOUSE OF REPRESENTATIVES 2 (1999) ("By July 1999, all states had laws that mirrored the federal legislation or were more stringent than federal law; some states had legislation already in place before passage of ASFA.").

[168] *See, e.g.*, National Clearinghouse on Child Abuse and Neglect Information, *supra* note 166 (discussing Arizona, Kentucky, Oklahoma, and Virginia state statutes).

[169] Reviewing state statutes with this distinction in mind, a substantial majority of states (at least thirty-nine) provide for reasonable efforts to preserve a family prior to removal; their goal is to prevent or eliminate the need for such removal. Similarly, well over two-thirds (at least forty-three) of the states provide for reasonable efforts to reunify the child with the family and to eliminate the need for oversight and monitoring by the state agency.

in their ASFA-related legislative enactments suggests a softening of the significance of reasonable efforts after ASFA.

This weakening of the reasonable efforts clause can be seen in the strong emphasis states have placed on making health and safety the paramount concern and the relatively weak emphasis states have given to requiring reasonable efforts to finalize a permanent placement. Two years after Congress passed ASFA, more than two-thirds of states had incorporated into their statutes prominent language certifying that the health and safety of the child shall be the paramount concern,[170] while fewer than half the states (approximately eighteen) had amended their laws to add language requiring the state to make reasonable efforts to finalize permanent placement.[171]

Neither the "health and safety" provision nor the provision that, under certain conditions, waives the reasonable efforts obligation impose on states an affirmative duty to provide services. Indeed, both provisions encourage the opposite. Even if none of the conditions that waive reasonable efforts exists, state courts have discretion to waive reasonable efforts to protect a child's health and safety.[172] State courts need such flexibility to respond appropriately to individual cases. Yet, granting such flexibility has had the unintended effect of weakening the requirements of the reasonable efforts clause, demonstrated by the relatively soft legislative emphasis states have placed on reasonable efforts toward permanency and the comparably heavy emphasis they have placed on the provisions that waive reasonable efforts. This suggests that states view ASFA's clarification of reasonable efforts primarily as legislation diluting the obligation to make reasonable efforts.

B. Extending Reasonable Efforts Beyond Federal Law

In enacting statutes after ASFA, the extent to which state lawmakers took action beyond merely modeling federal law reveals a great deal about the message ASFA conveyed to the states. Given the absence in federal law of guidance on reasonable efforts, classifying state statutes on the simple criterion of whether they look like federal law is somewhat limiting. Furthermore, given the history of unreliable federal enforcement, enacting state statutes that mirror federal law may signal nothing more than token compliance. A more useful purpose for reviewing state statutes is to determine whether state legislatures specifically define reasonable efforts in their statutes in a way that clarifies the requirements of the reasonable efforts provision. The more context a statute provides for understanding the affirmative requirements of the reasonable efforts provision,

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[170] For an overview of the specific state reporting statutes, see National Clearinghouse on Child Abuse and Neglect Information, *supra* note 166.

[171] For an overview of these statutes, see *id.*

[172] *See* 42 U.S.C § 678 (2000) ("Nothing in this part shall be construed as precluding State courts from exercising their discretion to protect the health and safety of children in individual cases, including cases other than those described in section 471(a)(15)(D).").

the stronger the statute.

Generally, two patterns emerge from the states. In some states, lawmakers bypassed the opportunity to help define standards by which to assess the provision of child welfare services. Typically, these statutes simply repeat the reasonable efforts provision as it appears in federal law or add language limiting the state's burden to make reasonable efforts.[173] For example, Alabama,[174] Maryland,[175] and Rhode Island[176] all passed statutes nearly identical to the reasonable efforts provision of ASFA, but these states appear to have done little else legislatively to define reasonable efforts.

In a few states, lawmakers have added more context to the reasonable efforts requirement, but the sum of these additions may only limit those states' obligations to make reasonable efforts.[177] For example, Arkansas law provides that the "agency shall exercise reasonable diligence and care to utilize all available services."[178] The limitation in this kind of statute rests in the availability of services; this limitation could relieve the state of making reasonable efforts even if the unavailable service consists of a basic and primary offering within the child protective services field. By limiting a state's obligation to available services, the statute fails to hold a state adequately accountable for services that should be available.

The other pattern that emerged from the states was lawmakers' seizure of the opportunity to give meaning to reasonable efforts, albeit to varying degrees. The statutes that comprise this pattern range from those that generically describe the kinds of services or actions expected of the state agency to those that use much more specificity, sometimes delineating particular services. Many states describe reasonable efforts by providing that the agency must act "diligently" and offer "appropriate services." Florida law provides that "reasonable effort means the exercise of reasonable diligence and care by the department to provide the services ordered by the court or delineated in the case plan."[179] North Dakota

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[173] *See, e.g.*, GA. CODE ANN. § 15-11-58(a)(1)-(3), (5) (Michie 2001); R.I. GEN. LAWS § 40-11-12.2(b)-(d) (Michie Supp. 2002) TEX. FAM. CODE ANN. §§ 262.001(b), 262.2015(d) (Vernon 2002).

[174] *See* ALA. CODE ANN. § 12-15-65(m) (Michie Supp. 2002).

[175] *See* MD. CODE ANN. FAM. LAW § 5-525(d)(1)-(2) (Supp. 1998).

[176] *See* R.I. GEN. LAWS § 40-11-12.2(b)-(d) (Michie 2002).

[177] *See, e.g.*, KY. REV. STAT. ANN. § 620.020(10)-(11) (Michie Supp. 2002) ("'Reasonable efforts' means the exercise of ordinary diligence and care by the Department to utilize all preventive and reunification services available to the community . . . ."); LA. CHILDREN'S CODE ANN. art. 603(17) (West 2002) ("'Reasonable efforts' means the exercise of ordinary diligence and care by department case managers and supervisors and shall assume the availability of a reasonable program of services to children and their families."); MO. ANN. STAT. § 211.183(1)-(5) (West Supp. 2002) ("'Reasonable efforts' means the exercise of reasonable diligence and care by the division to utilize all available services . . . .").

[178] ARK. CODE ANN. § 9-27-303(43)(A)(iv) (Michie 2002).

[179] FLA. STAT. ANN. § 39.521(1)(9)(f)(1) (West Supp. 2002).

defines reasonable efforts as "the exercise of due diligence, by the agency granted authority over the child . . . to use appropriate and available services to meet the needs of the child and the child's family."[180] Employing these variants of the term "diligence" may provide additional guidance to courts in evaluating whether a state has made reasonable efforts because terms such as "due diligence" are common legal standards defined in case law.

New Hampshire law provides that in deciding "whether the state has made reasonable efforts . . . the district court shall consider whether services to the family have been accessible, available, and appropriate."[181] Note here that New Hampshire uses the availability of services as a standard for a reasonable efforts judicial determination rather than a limitation on what the state must do. Pursuant to this statute, the question for the district court could be whether the state made services available, not whether the state used available services.

Some states also enhance the understanding of the reasonable efforts requirement and explicitly clarify that the burden of making reasonable efforts begins not with the parent but with the state, the party intervening in the family. Ohio and other states have added language to their statutes explaining that the "agency shall have the burden of proving that it has made those reasonable efforts."[182] Similarly, Alaska law establishes that the "department's duty to make reasonable efforts . . . includes the duty to: identify family support services . . .; actively offer the parent or guardian, and refer the parent of guardian to, those services; . . . and document the department's actions that are taken . . . ."[183] Although parents must be held accountable for failing to participate in the services provided, the obligation to make reasonable efforts begins with the state, not the parent.

Lastly, lawmakers in a few states define reasonable efforts in ways that clearly exceed the more common and somewhat basic requirements to act diligently and provide appropriate services. Colorado law expands the reasonable efforts definition to include the responsibility "to provide, purchase, or develop the supportive and rehabilitative services" required to prevent placement or achieve reunification.[184] Under South Dakota law, reasonable efforts "mean provision by the department of any assistance or services that: . . . [a]re available pursuant to the comprehensive plan of preventive services of the department; [or] [c]ould be made available without undue financial burden on the department . . . ."[185] New

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[180] N.D. CENT. CODE ANN. § 27-20-32.2(1) (Michie Supp. 2001).

[181] N.H. REV. STAT. ANN. § 169-C: 24-a(III)(c) (West 2002).

[182] OHIO REV. CODE ANN. § 2151.419(A)(1) (Anderson 2002). *See, e.g.*, MO. ANN. STAT. § 211.183(1)-(5) (West 2002) ("The division shall have the burden of demonstrating reasonable efforts); TENN. CODE ANN. § 37-1-166(a)-(d), (g)(1)-(g)(3) (2001) ("[T]he Department has the burden of demonstrating that reasonable efforts have been made . . . .").

[183] ALASKA STAT. § 47.10.086(a)-(b) (Michie 2002).

[184] COLO. REV. STAT. ANN. § 19-1-103(89) (West 2002).

[185] S.D. CODIFIED LAWS § 26-8A-21 (Michie 1999).

York law calls for "diligent efforts" defined as "reasonable attempts" by the agency to "assist, develop and encourage a meaningful relationship between the parent and the child."[186] New York law further provides that the court may order diligent efforts to include assistance "in obtaining adequate housing, employment, counseling, medical care or psychiatric treatment."[187]

State statutes can provide guidance on the reasonable efforts provision in at least two additional ways that deserve mentioning. First, statutes can guide court determinations of whether state agencies have made reasonable efforts. Under Iowa law, the court considers the "type, duration, and intensity of services or support offered or provided . . . ."[188] According to Minnesota statute, courts must consider whether services were relevant, adequate, culturally appropriate, available, accessible, consistent, timely, and realistic.[189] Nevada law instructs courts in determining reasonable efforts to "[e]valuate the evidence and make findings based on whether a reasonable person would conclude that reasonable efforts were made," and to consider "any input from the child."[190] In Wisconsin, a court's consideration of reasonable efforts includes whether "a comprehensive assessment of the family's situation was completed," and whether the family received "financial assistance."[191]

Second, statutes may instruct courts in how to draft orders regarding reasonable efforts determinations. A few states have expanded the meaning of reasonable efforts in the instructions they have provided to state courts reviewing agency compliance.[192] Another handful of states charge courts with a general duty to detail what reasonable efforts were made and why further efforts are not needed. These states generally ask reviewing courts to "enter a brief description of what preventive and reunification efforts were made and why further efforts could or could not have prevented or shortened the separation of the family."[193]

VII. STATE COURTS GUIDING THE IMPLEMENTATION OF REASONABLE EFFORTS

State courts play an instrumental part in the provision of child protective services. Before a state removes a child from the home, state courts must

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[186] N.Y. SOC. SERV. LAW § 384-b(7)(f) (McKinney Supp. 2003).

[187] *Id.* § 392(8) (McKinney Supp. 2003.).

[188] IOWA CODE ANN. § 232.102(10)(a)(1) (West Supp. 2002).

[189] *See* MINN. STAT. ANN. §§ 260.012(a), (b)(1)-(2), (c) (West Supp. 2002).

[190] NEV. REV. STAT. § 432B.393(1)-(2), (4)-(5) (2001).

[191] WIS. STAT. ANN. § 48.355(2c) (West Supp. 2002).

[192] *See* CONN. GEN. STAT. ANN. § 46b-129(k)(2) (West Supp. 2002); IOWA CODE § 232.102(10) (2002); MINN. STAT. ANN. §§ 260.012(a), (b)(1)-(2), (c) (West Supp. 2002); NEV. REV. STAT. §§ 432B.393(1)-(2), (4)-(5) (2001); S.D. CODIFIED LAWS § 26-8A-21 (Michie 1999); WIS. STAT. ANN.§ 48.355(2c) (West Supp. 2002).

[193] OR. REV. STAT. § 419B.340(2) (2001). *See also* FLA. STAT. ANN. § 39.521(1)(9)(f) (West Supp. 2003); LA. REV. STAT. ANN. § 684(C) (West 2002.); W.VA. CODE ANN. § 49-6-5(a)(6) (Michie 2001).

determine that remaining in the home would be contrary to the child's welfare.[194] State courts must also certify in written orders that the state agency has made reasonable efforts to preserve the family prior to removal.[195] The role of state courts in certifying that a state has made reasonable efforts to preserve families is particularly important in light of the federal shift away from preservation and reunification services. Where federal legislators have neglected to do so, state appellate courts can define or clarify the burden the reasonable efforts provision places on the state agency.

This Section reviews court actions, emphasizing appellate courts in four states: Connecticut, Minnesota, Texas, and Pennsylvania. Although the four states discussed are not representative samples of all fifty states, a study of these states gives insight into the various ways courts have dealt with the ambiguity surrounding reasonable efforts. Courts in Connecticut and Minnesota have been more proactive in guiding those states' implementation of reasonable efforts. Courts in Texas and Pennsylvania have taken less active roles. Connecticut offers an example of the function state appellate courts can serve when state lawmakers neglect to specifically define reasonable efforts. Minnesota provides an example of the role appellate courts can play even after the legislature has proactively and specifically given guidance on determining reasonable efforts. In interpreting the requirements of the reasonable efforts clause, Minnesota courts require that case plans be narrowly tailored to solve the problems that precipitated state intervention. Texas appellate courts have done little to guide reasonable efforts determinations. And the courts in Pennsylvania, while reiterating the importance of reasonable efforts, have refused to consider reasonable efforts in termination of parental rights appeals.

The states with more active judiciaries, Connecticut and Minnesota, statutorily require the state agency to prove that it has satisfied reasonable efforts at termination of parental rights hearings. Neither Texas nor Pennsylvania require the state agency to show reasonable efforts at these hearings, and courts in these states seem to have played less significant roles in defining reasonable efforts.

In abuse and neglect cases, states should include reasonable efforts as an element of petitions to terminate parental rights.[196] In most states, termination of

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[194] *See* 45 C.F.R. § 1356.21(c) (2002).

[195] See *id.* § 1356.21(d).

[196] *But see* David J. Herring, *Inclusion of the Reasonable Efforts Requirement in Termination of Parental Rights Statutes: Punishing the Child for the Failures of the State Child Welfare System*, 54 U. PITT. L. REV. 139 (1992) (arguing against state inclusion of the reasonable efforts provision in termination of parental rights proceedings). Professor Herring primarily argues that including reasonable efforts in such proceedings ultimately penalizes the child. He asserts that: (1) juvenile court judges who hear termination petitions are reluctant to grant termination as a final disposition regarding parental rights; and (2) forcing agencies to show reasonable efforts at termination proceedings creates yet another legal obstacle for social workers who are already challenged by working in systems with scarce resources. *See id.* at 179-81. Professor Herring's concerns, however,

parental rights is most commonly based on a parent's failure to improve. Of the reasonable efforts caselaw reviewed in researching this Article, the vast majority of cases addressed reasonable efforts as an element of a termination of parental rights decision. Unlike any other proceeding held after a child has been removed, termination proceedings can lead to permanent loss of parental rights. The "intermediary proceedings" that occur prior to termination of parental rights likely leave parents with hope that their child will eventually return home. Yet, under federal law, state courts need to make reasonable efforts determinations only during those intermediary proceedings. Federal law does not require a similar reasonable efforts determination at termination hearings when the stakes are highest. [197]

Terminating parental rights has historically been the province of state governments.[198] Requiring states to add a reasonable efforts determination to termination of parental rights hearings may intrude to some extent on state sovereignty in this area, but it amounts to no greater an infringement than the rule requiring states to petition for termination of parental rights for children who have resided in foster care for fifteen of the last twenty-two months. Such a requirement would also permit state courts to define reasonable efforts more thoroughly and consistently. Where state lawmakers have not done so, a comprehensive definition or explanation of what satisfies reasonable efforts will result from litigation and court interpretation of the federal clause. Litigants are more likely to appeal termination of parental rights decisions that have permanent consequences than to appeal status hearing decisions that courts may modify in subsequent proceedings. Thus, including reasonable efforts as part of termination of parental rights decisions will promote reasonable efforts as an issue for appeal,

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assume that states would have made reasonable efforts at some earlier point in a child's case. As discussed in Part IV, Section A., the systems for ensuring reasonable efforts earlier in a case have never been fully effective. Note also that Professor Herring's article predates ASFA and the shifting tide of federal child welfare.

[197] An expert work group convened by the United States Department for Health and Human Services was unable to agree on whether termination of parental rights should be allowed in cases where reasonable efforts have not been provided or services are not available to a family. *See* DONALD N. DUQUETTE ET AL., U.S. DEP'T OF HEALTH AND HUMAN SERV., ADOPTION 2002: THE PRESIDENT'S INITIATIVE ON ADOPTION AND FOSTER CARE; GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCE FOR CHILDREN (June 1999), *available at* http://www.acf.dhhs.gov/programs/cb/publications/adopt02/index.htm (last visited April 8, 2003).

[198] Although Congress may regulate child welfare through its spending powers, see 42 U.S.C. § 671(a)(15(B) (2002), the authority of Congress pursuant to the commerce clause is not unlimited. *See* United States v. Lopez, 514 U.S. 549, 556-57 (1995); *see also* United States v. Morrison, 529 U.S. 598, 607-08 (2000). Family law, and domestic relations are areas in which states historically have been sovereign. *See Lopez*, 514 U.S. at 564; Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979) (citing *In re* Burrus, 136 U.S. 586, 593-94 (1890)); Sosna v. Iowa, 419 U.S. 393, 404 (1975).

and permit appellate courts to limit or expand the requirement in the context of actual cases.

A. Connecticut

Under Connecticut law, and in accord with the Child Welfare Act, as amended, courts decide at review hearings, based on the best interest of the child, whether the state has a duty to make reasonable efforts.[199] If the state has such a duty, the court determines the services the state must provide to the parent, the steps the parent should take to bring about reunification, and a time period of six months or less for accomplishing the steps.[200] Also in accordance with ASFA, Connecticut law makes clear that reasonable efforts "shall ensure that the child or youth's health and safety are protected."[201]

Connecticut statutes require the state agency to petition the court for termination of parental rights once a child has resided in the agency's custody for fifteen of the previous twenty-two months.[202] Connecticut has an exception that excuses the agency from the requirement to file a termination petition where the state agency finds that the "parent has not been offered the services contained in the permanency plan to reunify the parent with the child or such services were not available."[203] The trial court must make written findings that include, among other factors, the "timeliness, nature and extent of services offered, provided and made available to the parent and the child by an agency to facilitate the reunion of the child with the parent," and whether the agency "has made reasonable efforts to reunite the family pursuant to the federal Adoption Assistance and Child Welfare Act of 1980, as amended."[204]

Although these statutes provide some guidance, Connecticut law does not explicitly define reasonable efforts. "Neither the word 'reasonable' nor the word 'efforts' is . . . defined by our legislature or by the federal act from which the requirement was drawn."[205] The lack of an explicit definition has led to litigation and court interpretation of the requirement. Perhaps the most significant treatment of the Connecticut reasonable efforts provision occurred in the case of *In re Eden F.*[206] The case addressed whether the state agency met its burden of showing that it made reasonable efforts before a trial court terminated the parental rights of Ann F. to her two children, Eden and Joann. Ann F. had been removed from her parents when she was three months old after her mother was admitted to

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[199] *See* CONN. GEN. STAT. ANN. § 46b-129(k)(2) (West Supp. 2002).

[200] *See id.*

[201] *Id.*

[202] *See id.* § 17a-111a.

[203] *Id.* § 17a-111a(1).

[204] *Id.* § 17a-112(k)(1)-(2).

[205] *In re* Eden F., 710 A.2d 771, 782 (Conn. App. Ct. 1998), *rev'd on other grounds*, 741 A.2d 873 (Conn. 1999).

[206] *See id.*

a psychiatric care facility. Ann F., thus, had spent most of her childhood in foster care. She was hospitalized for psychiatric care at the age of fifteen and on several other occasions thereafter. She was ultimately diagnosed with various mental health problems, including chronic undifferentiated schizophrenia and bipolar disorder with psychotic features.[207]

While admitted for psychiatric care, Ann F. gave birth to Eden; the state CPS agency removed Eden from her mother's care when Eden was five days old. Nearly three years later, Eden began living with Ann F. again, still under state agency supervision. About one and one-half months after that, Ann F. gave birth to Joann. Eden and Joann were both placed in foster care after Ann F. left Eden, then age four, caring for Joann, then seven months old, in the visitor's area of a hospital. Ann F. was again admitted for psychiatric care. Over the following six months, she stabilized and began a progressive visitation schedule with Eden and Joann. Eden was eventually returned to her mother on a trial basis as a part of a reunification plan involving both children.[208]

The Appellate Court of Connecticut found the state's reunification attempt lacking in numerous areas and held that the facts regarding the provided services could not support the trial court's decision that the state had made reasonable efforts. In defining reasonable efforts, the court said that the meaning of the word "reasonable" varies in accordance with the context of its use, but that it "is also synonymous with equitable, fair, just."[209] The state has a particularly high burden in establishing that it has made reasonable efforts; the standard is clear and convincing proof.[210] The appellate court said that this stringent requirement, "which deliberately shifts the risk of an erroneous decision, reflects the view that it is much worse to make an erroneous decision in favor of one party than it is to make it in favor of the other."[211] In effect, the court was saying that the standard reflects the view that it is worse to erroneously terminate parental rights than it is to erroneously leave the family intact. Thus, the standard forces the state to carry a high burden of showing it has made reasonable efforts by clear and convincing proof. Despite this deliberate shift of risks in favor of the parent's rights, the court stated that "whether reasonable efforts have been proven depends on the careful consideration of the circumstances of each individual case. In our view, reasonable efforts means doing everything reasonable, not everything possible."[212]

The appellate court then reviewed two particularly noteworthy aspects of the case: (1) the lack of specificity provided by the trial court in its reasonable efforts rulings, and (2) the lack of planning by the state in its efforts toward reunification of Eden and Joann with Ann F. At review hearings, the trial court's reasonable

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[207] *See id.* at 774.

[208] *See id.* at 774-75.

[209] *Id.* at 783 (internal brackets omitted).

[210] *See Eden F.*, 710 A.2d at 781.

[211] *Id.* at 785.

[212] *Id.* at 783.

efforts determinations included "[r]easonable efforts were made by the state,"[213] and "[r]easonable efforts for reunification were made."[214] At one hearing, the trial court decided, somewhat more extensively, that "in late 1994 and early 1995, the department worked with other service providers to reunify Eden with her mother."[215] The appellate court, however, determined that this did not meet the standard for specific findings concerning the reunification plan. "There is no finding of who these other service providers were or their expertise or of the degree of services any of them were providing."[216] The appellate court believed that the Connecticut statutes required trial courts to do more.

The court determined that the state had not carried its burden of proving reasonable efforts because the state had not put in place adequate services to support a reunification plan. "The reunification initially lacked planning on a number of critical issues including Eden's schooling, respite for Ann F., the crisis telephone line and therapy for Eden."[217] Over a three-week period during which Ann F. maintained exclusive care of Eden, the state failed to resolve issues with the board of education, preventing Eden from attending school. The state did not provide respite care for Ann F. Although the state did set up a crisis phone line while Eden was in Ann F.'s care, the line failed to provide rapid communication with the staff, who did not return Ann F.'s call for five days. Finally, by returning Eden to Ann F., the state deprived Eden of the individual therapy she needed to address mental health concerns.[218] Based on these facts, the trial court could not find that the state had met its reasonable efforts burden with clear and convincing proof. The trial court's summary reasonable efforts determinations in *Eden F.* seemed to have overlooked the quality and extent of services in favor of expediting permanency.

Connecticut statutes make it clear that the state's CPS agency must make reasonable efforts and that reviewing courts must then assess whether the state has in fact made reasonable efforts. In *Eden. F.*, the trial court's summary reasonable efforts determinations arguably satisfied federal rules and would likely suffice as a valid reasonable efforts determination under federal Title IV-E review. However, Connecticut's appellate courts have defined reasonable efforts in a manner that exceeds minimal federal requirements. For reasonable efforts determinations to pass muster with Connecticut's higher courts, the determinations must provide detail regarding the nature of services and the specific party (parent, child, or other person) receiving those services.

Connecticut courts take a more active role in defining reasonable efforts partly because termination of parental rights decisions in Connecticut require the state to prove reasonable efforts. In termination proceedings, the state bears a heavy

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[213] *Id.* at 783 n.25.
[214] *Id.*
[215] *Eden F.*, 710 A.2d at 786.
[216] *Id.*
[217] *Id.* at 785.
[218] *See id.* at 786.

burden because the clear and convincing standard reflects a view that erroneously terminating parental rights is far worse than erroneously leaving the parent-child relationship intact. In Connecticut, the state carries a similarly high burden with respect to reasonable efforts.[219] Connecticut statutes also continue to directly cite the Child Welfare Act appropriately relegating ASFA to amendment status. This structure implicitly reinforces the Child Welfare Act's initial focus on reasonable efforts to prevent foster care placement over ASFA's push for permanency.

B. Minnesota

Minnesota statutes provide extensive guidance for making reasonable efforts and evaluating the state's performance. Once a court determines a child's needs, statutes direct the court to "ensure that reasonable efforts, including culturally appropriate services by the social services agency, are made . . . ."[220] Relative to other states' laws,[221] Minnesota law provides a more specific definition for reasonable efforts. Reasonable efforts is defined as "the exercise of due diligence by the responsible social services agency to use appropriate and available services to meet the needs of the child and the child's family . . . ."[222] The law both expands reasonable efforts by requiring the agency to act with "diligence" and limits reasonable efforts to "available" services. The law also makes clear that the state agency bears the burden of establishing that it has made reasonable efforts and provides a relatively detailed list of factors courts must consider in assessing whether the state carried its burden, including whether the services provided were: "(1) relevant to the safety and protection of the child; (2) adequate to meet the needs of the child and family; (3) culturally appropriate; (4) available and accessible; (5) consistent and timely; and (6) realistic under the circumstances."[223] The careful consideration that Minnesota used in describing reasonable efforts in its statute appears to have limited considerably the need for judicial interpretation.[224]

Recent Minnesota court decisions have dealt less with determining what reasonable efforts means and more with the impact of reasonable efforts in proceedings to terminate the parental rights of parents. In particular, termination of parental rights resulting from abuse and neglect is likely to fall under at least one of three separate statutory provisions, all requiring the state to establish that

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[219] *See id.* at 785, 787-88.

[220] MINN. STAT. ANN. § 260.012(a) (West Supp. 2002).

[221] *See supra* Section V.

[222] MINN. STAT. ANN. § 260.012(b).

[223] *Id.* § 260.012(c).

[224] *But see* Welfare of T.N.L., No. C4-00-1947, 2001 WL 379114 (Minn. Ct. App. Apr. 17, 2001) (finding that services were "culturally appropriate" where state provided an interpreter for Vietnamese parents and the real problem concerned the parents' conduct rather than any language barrier); Matter of Welfare of S.Z., 547 N.W.2d 886 (Minn. 1996) (finding that, in part, reasonable efforts not "realistic" given parents mental illness).

the agency has provided reasonable efforts and that reasonable efforts failed to correct the conditions that precipitated the child's placement. Section 260C.301, 1(b)(2) permits the trial court to terminate parental rights where the court finds "the parent has substantially, continuously, or repeatedly refused or neglected to comply with the duties imposed upon that parent by the parent and child relationship,"[225] but only if "reasonable efforts by the social services agency have failed to correct the conditions that formed the basis of the petition or reasonable efforts would be futile and therefore unreasonable."[226] Section 260C.301, 1(b)(5) permits termination of parent rights if "reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the child's placement."[227] Under this subsection, the court should presume reasonable efforts have failed if: (1) the out-of-home placement has lasted twelve cumulative months within the most recent twenty-two months;[228] (2) the court has approved a case plan; (3) "conditions leading to the out-of-home placement have not been corrected;" and (4) the agency has made reasonable efforts.[229] The statute presumes the third factor, that conditions leading to placement have not been corrected, where "the parent or parents have not substantially complied with the court's orders and a reasonable case plan."[230]

Termination of parental rights under 260C.301, (1)(b)(8), when "the child is neglected and in foster care," likewise requires a showing that reasonable efforts failed to correct the conditions that led to placement. The statute defines "neglected and in foster care" to mean the "parents, despite the availability of needed rehabilitative services, have failed to make reasonable efforts to adjust their circumstances . . . ."[231]

In the case of *In re Welfare of P.R.L.*, the Supreme Court of Minnesota upheld a lower court decision to terminate parental rights under subdivision 260C.301, 1(b)(5).[232] The respondent mother had an extensive history in an abusive relationship, which subjected her and her children to physical harm. The abuse, and, consequently, the children's transitions in and out of foster care, continued for several years. During this time, the court ordered the mother to enforce numerous protective orders against the abuser.[233] The mother complied with several provisions of her case plan by attending parenting classes and maintaining regular contact with her children. Despite the mother's partial compliance, the court upheld the termination because of the mother's failure to end her abusive

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[225] MINN. STAT. ANN. § 260C.301, 1(b)(2) (West Supp. 2002).

[226] *Id.*

[227] *Id.* § 260C.301, 1(b)(5).

[228] Minnesota's twelve-month limit provides a more stringent requirement than federal legislation.

[229] *Id.* § 260C.301, 1(b)(5).

[230] *Id.*

[231] *Id.* § 260C.007, 24(c).

[232] *See* 622 N.W.2d 538, 544-45 (Minn. 2001).

[233] *See id.* at 540.

relationship. "Respondent's relationship with [her abuser] is, and has been for years, the primary basis of her unfitness to be a parent."[234]

The respondent in *P.R.L.* unsuccessfully argued that the portion of the case plan instructing her to have no contact with her abuser exceeded the reasonableness of the case plan. This argument, that the trial court "over-managed" the case plan, found more favor before the Court of Appeals of Minnesota in the case of *In re Child of E.V.*[235] In *E.V.*, like *P.R.L.*, the trial court placed a child in the state's custody as a result of physical abuse by the mother's boyfriend. The boyfriend was convicted of assault and deported.[236] While the state maintained custody of the child, several mental health professionals diagnosed the child with various problems, including Attention Deficit Hyperactivity Disorder (ADHD) and Klinefelter's Syndrome. The mother disagreed that her son needed certain special education services and/or medication for ADHD and refused to continue a number of the services, although she did follow through with Klinefelter's Syndrome treatments. The mother also completed a number of services, including a psychological evaluation, a parenting assessment, individual therapy, a nonviolent conflict resolution workshop, anger management services, and in-home parenting services.[237]

Ruling in favor of E.V.'s mother, the Court of Appeals called the trial court's findings "conclusory," saying that they failed "on a basic level to address whether full compliance with the case plan's requirements was necessary to correct the conditions that led to the out-of-home placement."[238] Appellant's corrections may have been sufficient to correct the conditions. Minnesota's law seemingly gives courts, agencies, and parents so much information about determining reasonable efforts that developing caselaw deals less with whether the state has met its burden and more with whether the state has overstepped its bounds.

There are a number of boilerplate services commonly added to case plans across the country (*e.g.*, parenting classes/counseling) without consideration of whether such services are specifically tailored to address the deficiency that prompted state intervention. While families standing before the court will likely benefit from some of these services, the services could equally benefit other families, the only difference being that the state has intervened in the family standing before the court. Trial courts should not fill case plans with a litany of services unrelated to the conditions that gave rise to intervention and then penalize parents who fail to fulfill these ancillary requirements.[239]

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[234] *Id.* at 545.

[235] *See* 634 N.W.2d 443, 447-49 (Minn. Ct. App. 2001).

[236] *See id.* at 445.

[237] *See id.* at 445-46.

[238] *Id.* at 447.

[239] *See, e.g., In re* Matter of Welfare of M.A., 408 N.W.2d 227, 236 (Minn. Ct. App. 1987).

C. Texas

In Texas, several parts of the family code require the state to make reasonable efforts.[240] When the state takes custody of a child, section 262.201 requires that within two weeks the court shall hold an adversary hearing, and:

> shall order the return of the child . . . unless the court finds . . . (1) there was a danger to the physical health or safety of the child . . .; (2) the urgent need for protection required the immediate removal of the child . . .; and (3)reasonable efforts have been made to enable the child to return home, but there is a substantial risk of a continuing danger if the child is returned home.[241]

Section 263.202, concerning status hearings, provides that the court

> shall review the service plan that the department or other agency filed . . . for reasonableness, accuracy, and compliance with requirements of court orders and make findings as to whether . . . a plan that has the goal of returning the child to the child's parents adequately ensures that reasonable efforts are made to enable the child's parents to provide a safe environment for the child.[242]

Thus, the statutes not only require that the state CPS agency provide reasonable efforts but also that reviewing courts verify the agency's compliance, both early in the case at an adversarial hearing as well as at subsequent status hearings.[243] Actual compliance by Texas' CPS agency in making reasonable efforts is unknown. Texas cases do not specifically address whether trial courts have properly certified that the state made reasonable efforts consistent with sections 262.201 and 263.202.

While the duty to make reasonable efforts stands squarely between family reunification and termination of parental rights, the Texas statute authorizing involuntary termination of parental rights does not adequately acknowledge reasonable efforts. Section 161.001 authorizes courts to terminate parental rights where the court finds that termination is in the child's best interest and the parent has engaged in at least one of nineteen different acts.[244] Of the nineteen different findings, any of which is suitable to support termination, only one, constructive abandonment, requires the consideration of reasonable efforts. Under section 161.001(1)(N), constructive abandonment requires four elements: (1) the child has been in the state's custody for at least six months; (2) the agency has made reasonable efforts to return the child; (3) the parent has not regularly visited or maintained contact with the child; and (4) the parent has demonstrated an inability

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[240] *See* TEX. FAM. CODE ANN. §§ 262.001, 262.101, 262.102, 262.113, 262.2015 (Vernon 2002).

[241] *Id.* § 262.201(b).

[242] *Id.* § 263.202(b).

[243] *See id.* § 263.202(c) (providing that the "court shall advise the parties that progress under the service plan will be reviewed at all subsequent hearings").

[244] *See id.* § 161.001.

to provide a safe environment for the child.[245]

In *Edwards v. Texas Dep't of Protective and Regulatory Services*, the court affirmed an order terminating the parental rights of a father, Matthew Edwards, whose son was born with cocaine in his system.[246] The child's mother used cocaine during her pregnancy, including the day of birth. Edwards admitted to drug addiction and to using drugs with the mother during her pregnancy. Though the baby remained in the hospital immediately after birth, when he was released neither parent went to pick him up. The mother refused to attend drug rehabilitation counseling and at one point physically threatened the child's social services worker. Although the social worker successfully located Edwards several times, Edwards never contacted the worker.[247]

On appeal, Edwards argued the state agency failed to demonstrate reasonable efforts to reunify the family. The court dismissed Edwards' claim without reaching the substantive issue of what qualifies as reasonable efforts, saying, "[w]e find no requirement, either in the Family Code or in case law, that adequate reunification efforts be proven before termination is appropriate. Edwards cites none."[248] Instead the court held that "[i]t is, however, presumed that the best interest of the child will be served by preserving the parent-child relationship. Thus, the requirement to show that the termination is in the best interest of the child coupled with the clear and convincing standard of proof subsumes the reunification issue . . . ."[249]

Texas courts simply have not required the state's CPS agency to prove it has made reasonable efforts before terminating parental rights. In Texas, providing services to reunify a family is not "a condition precedent to the involuntary termination of parental rights."[250] At least one appellant has argued specifically that ASFA requires the provision of reasonable efforts, but a Texas court disagreed, calling ASFA an "appropriations" statute that does not set the standard for decisions to terminate parental rights.[251] Therefore, despite the state's statutory requirement that reasonable efforts be reviewed at all hearings, under most of the nineteen findings suitable to support a termination decision, the court hearing the termination of parental rights petition can bypass a reasonable efforts determination.

Nonetheless, where the court's termination decision relies on constructive abandonment, the court must investigate reasonable efforts.[252] Specifically,

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[245] TEX. FAM. CODE ANN. § 161.001(1)(N).

[246] *See* 946 S.W.2d 130, 139 (Tex. App. 1997).

[247] *See id.* at 133-34.

[248] *Id.* at 139.

[249] *Id.*

[250] Jones v. Dallas County Child Welfare Unit, 761 S.W.2d 103, 109 (Tex. App. 1988).

[251] *See In re* Interest of A.R., No. 06-00-00156-CV, 2001 WL 1143208, at *4 (Tex. App. Sept. 28, 2001).

[252] *See supra* note 245 and accompanying text.

constructive abandonment under section 161.001(1)(N) sets forth the following:

> The court may order termination of the parent-child relationship if the court finds by clear and convincing evidence:
>
> That the parent has: . . constructively abandoned the child who has been in the permanent or temporary managing conservatorship of the Department of Protective and Regulatory Services or an authorized agency for not less that six months, and:
>
> (i) the department or authorized agency has made reasonable efforts to return the child to the parent;
>
> (ii) the parent has not regularly visited or maintained significant contact with the child; and
>
> (iii) the parent has demonstrated an inability to provide the child with a safe environment. . . .[253]

In *In the Interest of P.R.*, P.R.'s mother took him to the emergency room, concerned that he was not digesting his formula.[254] P.R. was two months old. The physicians called the state CPS agency on the mistaken belief that P.R. had a fractured leg. At the state agency's request, P.R.'s mother voluntarily placed him with an acquaintance. One month later, the agency asked the acquaintance to take the child for a follow-up medical examination. The follow-up exam revealed no leg fractures, "but did show four-week-old healing fractures on two of P.R.'s ribs."[255] The agency immediately placed P.R. in state custody and filed a petition seeking termination of parental right only two days later. Eighteen months later, the trial court determined that P.R. was constructively abandoned under section 161.001(1)(N) and terminated his mother's parental rights.

The Court of Appeals of Texas reviewed each of the elements necessary for constructive abandonment. In particular, the appellate court concluded the state made reasonable efforts because the trial court imposed a family service plan which P.R.'s mother failed to fully comply with.[256] The plan required random drug screenings, anger control classes, parenting classes, individualized counseling, and that the mother obtain stable employment and housing for five months. The mother complied with the drug screenings and never tested positive for drug use, but she had a poor attendance record for anger control and parenting classes and for counseling sessions. During the period P.R. was in state custody, his mother had ten different jobs and lived in at least thirteen different locations.[257] The court's analysis focused heavily on the actions of the

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[253] TEX. FAM. CODE ANN. § 161.001(1)(N).

[254] *See* 994 S.W.2d 411, 413 (Tex. App. 1999).

[255] *Id.* at 413.

[256] *See id.* at 416.

[257] *See id.*

parent, largely ignoring the actions of the agency. The fact that the agency filed a petition seeking termination of parental rights so soon in this case indicated the agency had no intention of making reasonable efforts to reunify this family.

In Texas, the requirement to make reasonable efforts diminishes as a CPS case moves toward termination of parental rights. While the state must prove reasonable efforts if it bases a termination petition on constructive abandonment, the state can bypass this requirement by using one of eighteen other possible grounds to support the petition. The requirement that reasonable efforts determinations be made early on somehow dissipates at termination proceedings, when the state's burden and parent's risk are the heaviest.

D. Pennsylvania

Since the passage of ASFA, Pennsylvania has incorporated select portions of the federal act into its state laws, while bypassing other portions. The state has incorporated one part of ASFA by specifying that trial courts may dispense with the reasonable efforts requirement if they find that "aggravated circumstances" exist.[258] Similarly, the state has incorporated the fifteen of the last twenty-two months timeline for filing a termination of parental rights petition, along with the exceptions for relative care, a documented compelling reason, and failure to provide necessary services.[259]

Among the provisions of ASFA that Pennsylvania has neglected to implement are the "health and safety" provision and the provision requiring reasonable efforts to permanently place children. Pennsylvania law calls for county agencies to make reasonable efforts to prevent the need for removal and to reunify families, but, unlike most states, Pennsylvania does not require that the child's "health and safety shall be the paramount concern."[260] Nor did Pennsylvania add that once reasonable efforts to preserve the family are no longer required, the state agency must make reasonable efforts to implement the child's permanency plan.[261] In Pennsylvania's statutes, ASFA appears to be more concerned with finding aggravated circumstances and a fifteen-month termination of parental rights timeline and far less about permanent placement. Aggravated circumstances and the termination timeline both end the need to service the family, and Pennsylvania's focus on these provisions may further demonstrate ASFA's failure to strike the proper balance between preservation, reunification and permanency.

Pennsylvania statutes do not provide a specific detailed definition of reasonable efforts, and courts have not explained how the state must meet this provision. Caselaw, however, affirms the general duty to make reasonable efforts and provides examples of the limits of reasonable efforts. First, in *In the Interest of*

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[258] *See* 42 PA. CONS. STAT. § 6351 (2002).

[259] *See id.* § 6351(f).

[260] *See id.* §§ 6351, 6374(a).

[261] *See id.*

Lilley, a Pennsylvania Court of Appeals affirmed the termination of a mother's parental rights after she sought to block the foster parents of her biological child from adopting the child who had resided in the same foster home for fourteen years.[262] Affirming the termination, the court acknowledged some obligation on behalf of the state agency to make a "reasonable good faith effort" over "a realistic period of time."[263]

Second, in *In the Interest of G.C.*, the court vacated a trial court order granting custody to the child's maternal grandfather.[264] The trial court erred, in part, by failing to assess whether the agency provided reasonable efforts. "The record [did] not disclose the necessary comprehensive review by the trial court of the efforts, if any, taken by the agency or other services to educate and counsel those persons most closely associated with the child at the time of abuse on how to parent and avoid further abuse."[265] Without question, the appellate court found that reasonable efforts requires at least some minimal level of services. "To fulfill its mandate to return the child to its parents or family, the agency must take affirmative action to counsel the caretakers in parenting and resolving personal problems which underlie and precipitated the abuse."[266] The agency's duty to make and the trial court's duty to review reasonable efforts seem clear, but these duties end prior to termination of parental rights.

Reasonable efforts to preserve and reunify families have limitations. In the case of *In re R.T.*, the court decided that the state met its reasonable efforts burden based on the length of time and number of services the agency had previously offered the family.[267] In addition to various mental and psychological disorders with which the mother struggled, the agency removed the children in large part because of the persistent and continuing unsanitary conditions in the home. The court's opinion provides elaborate details of the mother's inability to control the feces of at least twenty animals, some of which she kept in close proximity to her infant child. A legion of cockroaches, dead and alive, infested the home, and the "stench of urine remained pervasive throughout the house."[268] Although the state provided many services to prevent or eliminate the need for removal, the appellant mother argued that the agency failed to continue providing services after removing the children from the home.

The court found the services made available to the family pre-removal so extensive and enduring that the state retained no obligation to continue such efforts post-removal. Prior to removal of the children at issue in this case, the involvement of the state agency with this family dated back eight years. During that period, the agency had "provided or referred [Appellants] with virtually

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[262] *See* 719 A.2d 327, 328, 335 (Pa. Super. Ct. 1998).

[263] *Id.* at 332.

[264] *See* 673 A.2d 932, 945 (Pa. Super. Ct. 1996).

[265] *Id.* at 944.

[266] *Id.*

[267] *See* 778 A.2d 670, 682 (Pa. Super. Ct. 2001).

[268] *Id.* at 674.

every service available in [the county] and some referrals have been made more than once."[269] The court provided a long list of the services made available and conceded that the parents had participated in and completed many of the services offered, but said "an agency is not required to provide services indefinitely when a parent is either unable or unwilling to apply the instruction received."[270] Finally, the court agreed with the trial court's determination that "[i]t is not reasonable to suggest that after eight (8) fruitless years of providing services to the Parents the Agency should be expected to continue providing the same services over and over again."[271]

Pennsylvania statutes provide eight grounds upon which a court may terminate parental rights.[272] While some grounds involve matters such as "illegitimacy"[273] and child support,[274] three of the listed grounds involve termination culminating from abuse and neglect proceedings. The court may terminate parental rights where a parent "has refused or failed to perform parental duties" and when "repeated and continued incapacity, abuse, neglect or refusal" leaves a child without "essential parental care, control or subsistence . . . ."[275] Parental rights may also be terminated if the conditions that led to removal still exist after six months and the "services or assistance reasonably available to the parent are not likely to remedy the conditions."[276] At the very least, the language of subsection (a)(5) seems to assume that the state agency has provided services to the parent prior to the filing of the termination petition. Nonetheless, Pennsylvania courts have held that nothing in the statute requires the state to demonstrate it has made reasonable efforts in termination proceedings.

In the case of *I.R.A.*, the Supreme Court of Pennsylvania held that "proof of rehabilitative aid having been offered is not a prerequisite to termination of parental rights under the statutory scheme."[277] Given this presumed lack of duty, the *I.R.A.* court dismissed the appellant's claim without considering the quality or sufficiency of services provided. The facts of *Adoption of I.L.G.* make the point more clearly.[278] In that case, a trial court refused to terminate parental rights, agreeing with the parent that the CPS agency failed to render rehabilitative services and inform the parent of consequences that could result from failure to comply with her parental duties. Reversing the decision, the Supreme Court of Pennsylvania found that the Pennsylvania Adoption Act assigns affirmative duties

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[269] *Id.* at 675.
[270] *Id.* at 681.
[271] *Id.* at 682.
[272] *See* 23 PA. CONS. STAT. § 2511 (2002).
[273] *Id.* § 2511(a)(3).
[274] *See id.* § 2511(a)(6).
[275] *Id.* § 2511(a)(1), (2).
[276] *See id* § 2511(a)(5).
[277] 410 A.2d 755, 757 (Pa. 1980).
[278] *See* 424 A.2d 1306 (Pa. 1981).

to the parent rather than to the state agency.[279] Although *I.R.A.* and *I.L.G.* were decided under the Adoption Act of 1970, now repealed, they continue to represent current law according to the 2001 Update of the Summary of Pennsylvania Jurisprudence, Second Edition.[280]

In sum, as a case progresses from status hearings to termination proceedings, a dramatic change takes place in the state's burden to show it has made reasonable efforts. Prior to petitioning for termination of parental rights, the state must show it has made a good faith effort to make services available to the parent. Yet, at the termination proceeding, the state's failure to take such good faith steps carries no consequence. The refusal to enforce reasonable efforts at the termination proceeding reduces the obligation to provide services to no obligation at all. Thus, CPS agencies in Pennsylvania and elsewhere conceivably could move from removal to termination without fully accounting for providing services in the interim to prevent such termination.

VIII. CONCLUSIONS AND RECOMMENDATIONS

In practice, implementation of the reasonable efforts requirement has been severely restrained. Significant factors restraining the impact of the reasonable efforts provision include federal legislative, executive, and judicial actions that have stifled or curtailed enforcement. The states' obligation to make reasonable efforts to preserve and reunify families has been an integral, indeed indispensable, part of federal child protection laws at least since 1980. However, subsequent action by Congress, most prominently ASFA, has lightened the burden states once felt to provide preservation and reunification services. Despite years of planning and failed attempts at monitoring state compliance with the reasonable efforts provision, DHHS has been largely unsuccessful in providing effective oversight. The administrative failure in overseeing federal child protection laws has contributed to the law becoming a hollow requirement. When combined with the Supreme Court's foreclosure on private plaintiff lawsuits under the Child Welfare Act and under section 1983, these actions (or inactions) make the reasonable efforts requirement a dead letter.

States have made various responses to the federal scaling back of reasonable efforts. Some states have followed suit, enacting legislation that merely models federal law. Fortunately, a number of states have identified the federal law's failure to define reasonable efforts and have explicitly defined the requirement.

While most states require a demonstration of reasonable efforts prior to approving an agency's petition for termination of parental rights, the lack of a clear definition for reasonable efforts complicates this element. Some state courts

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[279] *See id.* at 1307.

[280] *See* JOHN J. DVORSKE, SUMMARY OF PENNSYLVANIA JURISPRUDENCE § 9:77 (2d ed. 2001) ("A child care agency has no legal obligation to instruct parents as to what is necessary to regain custody of a child . . . . When a child has been placed in foster care, the parent has the affirmative duty to work towards the return of the child.").

have actively assisted litigating parties in understanding what the reasonable efforts clause obligates the state to do prior to filing a termination petition. Other states, unfortunately, have not taken this step.

A. Formally Enact Guidelines

The void in the implementation of reasonable efforts has not gone completely unaddressed by federal authorities. In June 1999, the Children's Bureau, a Division of DHHS, issued "Guidelines for Public Policy and State Legislation Governing Permanence for Children."[281] Unfortunately, the Guidelines do not carry the force of federal legislation or regulations. Instead, the Guidelines only have whatever force states choose to lend them. Nonetheless, the Guidelines offer an instructional framework that state courts should employ in making judicial determinations of reasonable efforts. In particular, the Guidelines call for states to develop a comprehensive catalogue of available services, as well as administrative and judicial policies that define reasonable efforts. The guidelines suggest that states implement laws that require courts to consider the following factors in reasonable efforts determinations:

1. the dangers to the child and the family problems that precipitate those dangers;

2. whether the services the agency provided relate specifically to the family's problems and needs;

3. whether case mangers diligently arranged services for the family;

4. whether the appropriate services for the family were available and timely; and

5. the results of the services provided.

The review of state statutes in this Article reveals that a significant number of states that have defined reasonable efforts are in accord with the guidelines' emphasis on ensuring that services are available and appropriate, and that case managers and agencies responded diligently. Those states that have not yet incorporated these parts of the Guidelines should do so.

Additionally, few states specifically require the second factor promulgated in the Guidelines for determining reasonable efforts, that the services the agency provides be *specifically related to* the family's problems. Minnesota case law enforced this rule in that state. Requiring a substantial relationship between the family's deficiency and the state's intervention is particularly appropriate given the constitutional protection accorded to parental rights. Yet apart from Minnesota's enforcement of this rule, states have rarely made this requirement

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[281] DONALD N. DUQUETTE ET AL., *supra* note 197.

explicit.

The most effective way to promote the five factors discussed in the Guidelines is to include those factors in a legislative amendment to the Child Welfare Act or to include them in the Code of Federal Regulations as a part of the rules states must follow in implementing federal law. In the years these Guidelines have been available to states, their impact appears to be limited at best. To give stronger credence to these factors, Congress should amend legislation requiring reasonable efforts, and/or the DHHS should incorporate the factors into federal regulations. These factors do not affirmatively require specific services, but instead place standards on court review of reasonable efforts. As such, they would place minimal, if any, additional burden on states. Yet, they would move generously toward a more universal understanding of the standard encapsulated in the reasonable efforts clause.

B. Identify Model Statutes/Definitions

Another readily available method for improvement could come from identifying model definitions or model statutes. Ostensibly, Congress and the DHHS expected that states would erect their own definitions and meanings for reasonable efforts, and, therefore, did not define reasonable efforts for the states. But where states have neglected to define reasonable efforts, or where states have merely enacted legislation mirroring federal law, they have not fully complied with the intent of the federal authorities. Federal authorities should encourage these states to be more proactive by identifying model statutes.

C. Require States to Prove Reasonable Efforts in Termination of Parental Rights Proceedings

Whenever an action for termination of parental rights is based on a parent's failure to improve, reasonable efforts should be an integral factor at the termination hearing. Some states, such as Texas and Pennsylvania, still have not implemented this requirement, neither through their legislative bodies or their judiciaries. Reasonable efforts is the primary burden against which states must contend in each CPS case. While it is preferable to require state agencies to show reasonable efforts early on in each case, the requirement is no less important at termination hearings. On the contrary, it is decisions to terminate parental rights where the legal relationship between parent and child suffers the greatest blow. Thus, these hearings, perhaps more than any other, should include a showing of reasonable efforts.

Moreover, to the extent federal authorities have left the interpretation of reasonable efforts to the states, state judiciaries must be permitted to resolve disputes between parents and CPS agencies over whether the actions of the states fully comply with the reasonable efforts clause. Where states do not include reasonable efforts as an element of termination, courts in those states will be severely restricted from effectively resolving these disputes. Unlike judicial hearings that precede termination, termination decisions permanently alter

parental rights.

These are only a few steps federal and state agents can take to begin the process of defining the state's burden when the state acts to protect children believed to be in danger. A number of other steps are readily apparent, although not discussed expansively for this writing. They include changes in the financial structure that undergirds child protection services, reductions in the work requirements expected of case managers, funding for additional case managers, and limits on the number of cases assigned to each case manager. These changes, however, may be slow to come. In the interim, the need pressing upon states to protect children who are victims of or are subject to maltreatment has not subsided. State agencies, courts, parents, and children must fully and adequately understand what is required of the state.