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Introduction

Courts play a central role in the child welfare system, especially in serious cases requiring consideration of out of home care. As the Pew Commission on Children in Foster Care pointed out in its 2004 report, “no child enters or leaves foster care without the approval of the court.”¹ Moreover, juvenile court judges can use their authority as leaders and convenors to promote collaboration and coordination in child welfare activities in the community.²

When the Handbook was initially published in 2014, the chapter entitled Judicial Issues in Child Maltreatment was authored by Jesse R. Russell, Nancy Miller and Michael Nash. The chapter, as the authors described it:

...outlines the expectations, legal constraints, and obligations of the juvenile dependency courts; considers the role of the juvenile court judge; discusses judicial leadership and broad system improvement efforts; reviews the current status of research and evaluation in juvenile dependency judicial practice; highlights several current controversial and contested issues for juvenile dependency courts; and offers some concluding remarks.

In this chapter we will build on their excellent work. We will place special emphasis on subsequent developments in child welfare law including several important legislative enactments as well as a number of current issues. These include the following:

- A. Extending juvenile court jurisdiction beyond 18 years of age
- B. Trauma-Informed treatment (ACEs)
- C. Substance Abuse and Treatment Courts
- D. Family Time (Visitation)
- E. Relative Placement and Family Finding
- F. Reasonable Efforts
- G. High Quality Legal Representation in Dependency Cases
- H. The Indian Child Welfare Act (ICWA)
- I. Engaging Fathers in the Child Welfare Process
- J. Psychotropic Medication and Children in Care

¹ Pew Commission on Children in Foster Care (2004) *Fostering the Future: Safety, Permanency, and Well-Being for Children in Foster Care*, p 34. https://www.pewtrusts.org/-/media/legacy/uploadedfiles/phg/content_level_pages/reports/0012pdf.pdf

² See Edwards, L. (2005). *The Role of the Juvenile Court Judge Revisited*. Natl. Council of Juvenile and Family Court Judges. <http://www.judgeleonardedwards.com/docs/RoleRevisited.pdf>

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Legislative Initiatives Impacting Juvenile Dependency Court³

Child abuse and neglect law is generally found in state statutes. However, federal funding requirements imposed by Congress provide the framework and many of the details for state laws. For example, many professionals' first encounter with child abuse and neglect law is through training in mandatory reporting. The adoption of a mandatory reporting law is one of a number of conditions of the Child Abuse Prevention and Treatment Act of 1974 (CAPTA).⁴ CAPTA was the first major federal child welfare initiative following the publication of *The Battered Child Syndrome* in 1962. Although CAPTA funding is a relatively modest proportion of child welfare expenditures, it has been influential in shaping child welfare practice nationally.

The federal statute that established the modern landscape for the court's involvement in child welfare is the Adoption Assistance and Child Welfare Act of 1980.⁵ Most importantly, the Act made federal foster care funding contingent on courts making explicit findings that child welfare agencies made "reasonable efforts" to prevent or eliminate the need to remove the child into foster care and that the court make reasonable efforts to reunify the family following the initial removal. Notably, Congress neither defined nor funded reasonable efforts with the passage of the Act, leaving major federal child welfare funding solely for the maintenance of children in out of home placements. The reasonable efforts requirement is discussed in greater detail later in this chapter.

The court's oversight responsibilities continued to evolve with the passage of the Adoption and Safe Families Act of 1997 (ASFA).⁶ In order to address the problem of children languishing in foster care without permanency, ASFA established new timelines for the initiation of termination of parental rights hearings based on the amount of time a child has been in foster care. ASFA also required that agencies make reasonable efforts to timely finalize a permanent placement for children unable to be reunified with their parents and allowed reasonable efforts to finalize permanency to be concurrent with reunification efforts. In addition, ASFA specified certain types of cases in which states could allow courts to exempt child welfare agencies from the 'reasonable efforts' requirements. These are cases, such as when a parent has caused the death of another child, in which reunification services need not be provided to parents following removal. In these cases, termination of parental rights and subsequent adoption proceedings can be filed sooner in order to achieve legal permanency for the child. In addition, ASFA stated Congress's intent that the child's health and safety are of paramount concern in decisions to remove a child from the home or to return the child thereafter.

Congress allowed states to access federal funds to implement a wide range of child welfare policies with the adoption of the Fostering Connections to Success and Increasing Adoptions Act of 2008.⁷ An extremely important provision allowed states to use federal funds to extend foster care benefits to youth up to age 21 (see sec. III. A. below). Additionally, the Act enabled states to access federal funding to:

- Support guardianships with relatives;
- Require state agencies to collaborate in coordinating health care services for children in foster care;
- Ensure notice to relatives when children are removed from parents;

³ This chapter will use the term "dependency court" as the generic term for the state trial-level court that hears cases involving government child welfare agency intervention to protect children due to allegations of parental abuse, neglect, or abandonment. "Juvenile dependency court" is the most common designation for these courts in the states. In some states, these cases are heard by the "family court" or "family division", although those terms are most often used to designate the court that hears divorce and private custody cases.

⁴ P.L. 93-247

⁵ P.L. 96-272

⁶ P.L. 105-89

⁷ P.L. 110-351

- Widen the number of children eligible for Adoption Assistance payments; and
- Offer to Indian tribes direct access to federal foster care and adoption assistance programs.

The Act also contained provisions designed to promote educational stability (such as allowing children to remain in the same school even if their placement is in another district), placing siblings together whenever possible, and ensuring they can visit each other if placements are separate. Several topics covered in the Fostering Connections Act are addressed in greater detail below, including relative placement, family finding, the interplay between state and tribal jurisdiction, and family time/visitation.

Further changes to federal funding for foster care were enacted in 2014 with the passage of the Preventing Sex Trafficking and Strengthening Families Act.⁸ As the title suggests, the primary focus of the Act was strengthening policies to prevent child sexual exploitation and intervene effectively when it occurs. Responding to testimony on the vulnerability of foster youth to sexual exploitation, the Act requires child welfare agencies to provide targeted services to youth in state care who are victims of sex trafficking or at risk of becoming victims, including youth missing from foster care. Agencies are also required to work with law enforcement to ensure timely reporting of such children to coordinate a response and for transmission of information into the National Crime Information Center database and to the National Center for Missing and Exploited Children.

Among other changes to child welfare policy, the Act eliminated the option of designating “another planned permanent living arrangement” (APPLA) as the permanency plan for a child under 16. APPLA had previously been the designated permanent plan when reunification, adoption, relative placement, and legal guardianship had been ruled out and a child was expected to “age out” of foster care. The Act also placed new responsibilities on social workers, probation

officers, and the juvenile court. The Act states that if the permanency plan is APPLA, the plan must include documentation of intensive, ongoing, unsuccessful efforts for family placement, and redetermination of appropriateness of placement at each permanency hearing. Thereafter, the court must make a determination explaining why APPLA is the best permanency plan and provide compelling reasons why it continues to not be in the best interests of the child to (1) return home, (2) be placed for adoption, (3) be placed with a legal guardian or (4) be placed with a fit and willing relative. These measures to reduce the use of APPLA as a permanent plan for children in out-of-home care marked the continuing evolution of policies valuing stable, family placements for children in out of home care.

The Comprehensive Addiction and Recovery Act of 2016⁹ saw the federal government devote substantial resources to promoting medically assisted treatment (MAT) to address the opioid crisis (see sec. III. C below for more detail on MAT). CARA’s primary direct effect on child welfare came in the form of amendments to CAPTA requiring states to emphasize Plans of Safe Care (POSC) in addressing the health needs of infants affected by prenatal drug exposure or a fetal alcohol spectrum disorder and the substance use disorder treatment needs of the family or caregiver. It is especially important for judges and court professionals to understand the POSC concept because the largest proportion of children entering foster care are infants and toddlers, often due to parental substance abuse issues.¹⁰

CARA requires states to examine statewide policies and procedures, including statutes, to ensure they address the treatment needs and safety of both substance-exposed infants and parents and caregivers with substance use

⁸ P.L. 113–183

⁹ P.L. 114–198

¹⁰ Williams SC, Sepulved K (2019) Infants to Toddlers Are More Likely than Older Children to Enter Foster Care Due to Neglect and Parental Substance Abuse. *Child Trends*. <https://www.childtrends.org/infants-and-toddlers-are-more-likely-than-older-children-to-enter-foster-care-because-of-neglect-and-parental-drug-abuse>

disorders. Statewide policies will in turn inform teams implementing local policies and protocols to create individualized plans at the case level. POSC is intended to go beyond immediate child safety needs to address overall health and development, as well as the treatment needs of the family. POSC are ideally:

1. *Interdisciplinary* across health and social service agencies;
2. Based on the results of a *comprehensive, multidisciplinary assessment*;
3. *Family-focused* to meet the needs of each family member as well as overall family functioning and well-being;
4. Completed, when possible, in the prenatal period to facilitate *early engagement* of parent(s) and communication among provider;
5. *Easily accessible* to relevant agencies; and
6. Grounded in *evidence-informed practices*.¹¹

The enactment of the Family First Prevention Services Act (FFPSA) as part of the Bipartisan Budget Act of 2018¹² is a major step forward in the emphasis on family placements and prevention of removal. The FFPSA is the biggest policy reform in federal child welfare financing in decades. Two aspects of the FFPSA are particularly historic: permitting states to use federal entitlement funds for certain prevention services and limitations on the use of congregate care (non-family) placements.

Before the FFPSA, the largest source of federal child welfare funding, Title IV-E of the Social Security Act,¹³ could only be used to support services for children who are already in the foster care system. As one of the last remaining examples of “entitlement funds” with no budgetary limits, IV-E policy has long been criticized as creating a “perverse incentive” to remove children into foster care.¹⁴ The FFPSA allows these

funds to be used for the prevention of children coming into foster care for the first time. Under the FFPSA, Title IV-E funds can be used to provide evidence-based and trauma-informed mental health, substance abuse treatment, and in-home parenting skills services to families with children at “imminent risk” of entering foster care.

The FFPSA links the new support for prevention services to limitations on the use of congregate care placements for children in foster care. A state may not take advantage of using Title IV-E funding for prevention services, as described above, without also taking specified actions to minimize the use of residential placements, as described below. States were permitted to “opt-in” to the FFPSA (by getting Children’s Bureau approval for the state’s implementation plan) as early as October 1, 2019. If a state fails to opt-in by October 1, 2021, it will lose federal funding for children in group care placements as of that date. The new rules for assessing, approving, and overseeing congregate care placements heavily involve the courts.

With a few exceptions for specifically defined populations, children may be placed in congregate care settings only in a newly designated type of placement called a Qualified Residential Treatment Program (QRTP). QRTPs must be licensed and accredited by national organizations designated by the Department of Health and Human Services. Within 60 days of placement in a QRTP, following a rigorous assessment by an independent expert and family input, the court must approve or disapprove of the placement based on whether it is effective, appropriate, and the least restrictive placement consistent with the child’s short- and long-term goals. The court must make a similar review of the placement at each subsequent hearing while the child remains in a

¹¹ Plans of Safe Care: An Issue Brief for Judicial Officers. Quality Improvement Center for Collaborative Community Court Teams and National Center for State Courts. https://www.childwelfare.gov/pubPDFs/judicial_officers_posc_brief.pdf

¹² P.L. 115–123

¹³ 42 U.S.C. § 670–679c

¹⁴ “The perverse incentives are clear. States that develop effective programs diverting children from foster care receive minimal federal assistance, whereas those that place children in foster care indefinitely obtain maximum aid.” Sankaran V (2007) Innovation Held Hostage: Has Federal Intervention Stifled Efforts to Reform the Child Welfare System? U. Mich. J. L. Reform 41(1): 281–315, 300.

QRTP, including an assessment of the agency's efforts to prepare the child for a less restrictive placement or return home. This protocol is a departure from previous federal law which did not give the court detailed oversight responsibilities over specific foster care placements.

Current Issues

Extension of Dependency Court Jurisdiction Beyond Age 18

As noted above, the Fostering Connections Act of 2008 permitted states to extend federal support for foster youth beyond age 18.¹⁵ As of February of 2018, 26 states and six tribal nations have opted into providing some level of extended foster care through programs that have been approved by the Children's Bureau.¹⁶

Congress gave discretion to the states to develop individual policies on several issues.¹⁷ With few exceptions, jurisdictions that extended foster care also continued juvenile court oversight of the case and youths' access to their attorneys. States vary in the employment and education activities required for youth to participate in extended foster care, as well as the housing options available to them. Another important feature with wide variances among the states is whether youth are allowed to reenter foster care after separating and the requirements for doing so. As a result of these variations, there are significant differences between states in the percentage of youth choosing to remain the child welfare system past age 18.¹⁸

¹⁵ Fostering Connections to Success and Increasing Adoptions Act of 2008 (P.L. 110–351), Title II, §201.

¹⁶ U.S. Government Accountability Office (2019) States with Approval to Extend Care Provide Independent Living Options for Youth up to Age 21 (GAO-19-411, p 9). <https://www.gao.gov/products/GAO-19-411>

¹⁷ See Children's Bureau (2017) Extension of Foster Care Beyond Age 18: State Statutes. <https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/extensionfc/>

¹⁸ For a summary of state statutes on extended foster care under Fostering Connections, see the National Council of

The extension of foster care is a reflection of the scientific proof that a youth's brain development is not complete until age 25 or 26.¹⁹ It is also an acknowledgment that youths aging out of foster care at age 18 often have poor outcomes, frequently experiencing homelessness, incarceration, and/or unemployment.²⁰

There is reason for optimism. A growing body of research has examined the influence on youth outcomes of extending the age at discharge from foster care from the 18th birthday to the 21st birthday.²¹ That research finds that extended care is associated with a wide range of positive outcomes, including increased postsecondary educational attainment, employment and earnings, financial assets, and social support; and decreased homelessness, economic hardship, and criminal justice system involvement.²² Based on these positive results, at least one state

State Legislatures website at <https://www.ncsl.org/research/human-services/extending-foster-care-to-18.aspx>

¹⁹ Hartley CA, Somerville LH (2015) The neuroscience of adolescent decision-making. *Current Opinion in Behavioral Sciences* 5:108–115. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4671080/>

²⁰ VanTol V (2019) Pipeline to Homelessness: Aging Out of the Foster Care System. *invisible PEOPLE*, April 4, 2019. https://invisiblepeople.tv/pipeline-to-homelessness-aging-out-of-the-foster-care-system/?fbclid=IwAR1OtrImSQNj2p-fVNOw3OzXIC-6YmZ-3tr7WmtHd8s8mlRu3YkTa_BkqU

²¹ Courtney ME (2019) The benefits of extending state care to young adults: Evidence from the United States of America. In: Mann-Feder V, Goyette M (eds) *Leaving Care and the Transition to Adulthood: International Contributions to Theory, Research, and Practice*. Oxford University Press, New York. Courtney ME, Okpych NJ, Park S (2018) Report from CalYOUTH: Findings on the relationships between extended foster care and youths' outcomes at age 21. Chapin Hall at the University of Chicago, Chicago, IL. https://www.researchgate.net/publication/329041300_Report_from_CalYOUTH_Findings_on_the_Relationship_between_Extended_Foster_Care_and_Youth's_Outcomes_at_Age_21 Rosenberg R, Abbott S (2019) Supporting Older Youth Beyond Age 18: Examining Data and Trends in Extended Foster Care. *Child Trends*, Bethesda, MD. <https://www.childtrends.org/publications/supporting-older-youth-beyond-age-18-examining-data-and-trends-in-extended-fostercare#:~:text=Extended%20foster%20care%20is%20associated,is%20associated%20with%20better%20outcomes>

²² *Id.*

has introduced legislation to extend jurisdiction up to 25 years of age.²³

Trauma-Informed Courts

The growing understanding of the short- and long-term effects of Adverse Childhood Experiences (ACEs), as described elsewhere in this volume, has led an increasing number of juvenile courts to adopt a trauma-informed approach. This approach acknowledges that service providers, including courts, need to have a complete picture of a subject's life situation—past and present—in order to provide effective services with a healing orientation. Adopting trauma-informed practices can potentially improve client engagement, treatment adherence, and well-being outcomes, as well as provider and staff wellness.

The modern research on ACEs and trauma has important implications for child welfare and juvenile dependency courts. The recent emphasis on preventing entry into foster care and maintaining family and community connections is partly a result of the increasing awareness of the long-term harm of childhood trauma among system professionals and their desire to ameliorate, not unnecessarily contribute to, family trauma.

The National Council of Juvenile and Family Court Judges (NCJFCJ), the oldest judicial membership organization in the country, has made developing trauma-informed family and juvenile courts a major priority in recent years.²⁴ NCJFCJ has conducted numerous “trauma audits” for juvenile and family courts across the country. A trauma audit examines all aspects of court operations, from signage and facilities design to judicial and staff training and observing court hearings, with a “trauma lens” and makes

recommendations for improvements. An important aspect of these trauma audits, and any serious attempt to develop trauma-informed systems, is attending to the well-being of service providers and decision-makers and acknowledging the stress of dealing with others suffering the effects of trauma, sometimes called “secondary trauma.”²⁵ See Table 33.1.

At the time of this writing, the COVID-19 pandemic that began in 2020 is severely adding to the stress on many families. It also presents unique challenges for the effective operations of the court system. The National Center for State Courts has developed many resources for the courts on how they may continue to serve the public during this crisis, including a briefing paper on trauma-responsive practices in child welfare courts during the pandemic.²⁶

Substance Abuse and Family Drug Treatment Courts

Substance use and child welfare involvement are intertwined, and the data on families involved with the child welfare system who are affected by parental substance use disorders are troubling. Research indicates that an estimated 60 to 80 percent of substantiated child abuse and neglect cases involve substance use (alcohol and other drugs - AOD) by a custodial parent or guardian.²⁷

²³ California SB 915 authored by Senator James Beall introduced legislation in 2020 that would extend jurisdiction to 25 years. Due to the Covid-19 pandemic, the Senator had to modify that proposal to provide shorter-term emergency relief to youth who would be aging out during the pandemic.

²⁴ <https://www.ncjfcj.org/child-welfare-and-juvenile-law/trauma-informed-courts/>

²⁵ A summary of findings and recommendations from four years of trauma audits is available at Stoffel E, Korthase A, Gueller M (2019) *Assessing Trauma for Juvenile and Family Court Judges: From Development to Implementation, 2013–2017*. National Council of Juvenile and Family Court Judges, Reno, NV. <https://www.ncjfcj.org/publications/assessing-trauma-for-juvenile-and-family-court-judges-from-development-to-implementation-2013-2017/>

²⁶ Child Protection in Time of Crisis available at https://www.ncsc.org/__data/assets/pdf_file/0028/54991/RRT-CFE-Child-Protection-in-Time-of-Crisis.pdf

²⁷ Young N, Boles S, Otero C (2007) Parental Substance Use and Child Maltreatment: Overlaps, Gaps and Opportunities. *Child Maltreatment*; 12(2): 137–149; Some researchers estimate up to 80%, Seay K (2015). How many Families in Child Welfare Services are Affected by Parental Substance Use Disorders? A

Table 33.1 Questions for courts that NCJFCJ trauma consultations attempt to answer (*Id.*, p.9)

Topic	Questions
Understanding of Trauma	Do judges (and other professional stakeholders) demonstrate an understanding of how trauma (past or present) may affect current actions of parents and youths involved in the system?
Engaging Parents	Are parents and youths engaged in the process? How are they treated in court? Are they treated with respect and given choice/voice? Is there a focus on strengths and maintaining connections? Does the judge show compassion?
Identification of Trauma	Is there a structured trauma-screening protocol in place for victim, parents, and youths who come into contact with the system? Who screens? At what point in the process? What tool is used? Is the judge provided information on potential traumatic history (or present evidence) of victims, parents, and youths? Is there evidence that trauma is considered as part of decision-making?
Resources	Are trauma-informed and evidence-based programs available in the area to treat individuals and families? Are there barriers to families accessing these resources (e.g., no contact with service providers, resource intensive, transportation, no referrals)? Are judicial officers and professional stakeholders aware of these available resources? Are families consistently referred to these resources/services?
Environment	Is the court easy to navigate? Are there efforts to make it less stressful to parties? (Consider getting to court, finding the courthouse, parking, getting through security, locating the courtroom).
Secondary Traumatic Stress	Is there an understanding by all professional stakeholder agencies (CPS, public defender, court) of the emotional toll that hearing about abuse, neglect, and violence may take on staff (secondary traumatic stress, vicarious trauma)? Are there resources available to professionals to cope with this stress?

Moreover, there are an estimated 623,000 adults in the United States with an opioid use disorder living with children.²⁸ Many of these children are the subject of proceedings in the juvenile dependency court.

Drug overdose in the United States resulted in 67,367 deaths in 2018.²⁹ Of these, 46,802 resulted from opioid use.³⁰ The federal government as well as many state governments have responded by dedicating millions of dollars to address this national crisis.³¹ For example, in 2018, California committed \$265 million for the years 2018–2020 and another 210 million for

September 2020 through August 2022. These dollars are, in part, used for trainings about opioid treatment. Statewide trainings focus on the use of Medication Assisted Treatment (MAT). Three medications are FDA approved for opioid disorders: methadone, buprenorphine (brand name Suboxone, Subutex or others), and naltrexone (injectable form is Vivitrol).

For years MAT was not used in prison systems, drug courts, and child welfare systems. Recently, however, because of national efforts to curb the opioid epidemic, the use of MAT has grown, as has awareness of the objectives of substance use disorder treatment and the acceptance of addiction as a treatable condition.

Over the past few years MAT has become the standard of care for opioid use disorders. For parents in the child welfare system with an opioid addiction, MAT may be their best means of retaining or regaining custody of their children. Terminating MAT before it is clinically indicated increases the chance of overdose death significantly. In one study of former inmates who left prison and did not stay on a MAT program, the

Common Question that Remains Unanswered. *Child Welfare*. 94(4):19–51.

²⁸ Clemans-Cope L, Lynch V, Epstein M, Kenney GM (2019) Opioid and Substance Use Disorder and Receipt of Treatment Among Parents Living with Children in the United States, 2015–2017. *The Annals of Family Medicine*, 17(3):207–211.

²⁹ <https://www.cdc.gov/drugoverdose/data/statedeaths.html>

³⁰ *Id.*

³¹ <http://www.ncsc.org/information-and-resources/resource-centers-items/opioids-and-the-courts/resource-center>

former inmates died from opioid overdose at a rate of more than 40 times when compared to the general population.³² In juvenile dependency proceedings, failure to use MAT in a case plan for an opioid addicted parent may be a violation of reasonable efforts to promote reunification.³³

In child welfare settings, Family Treatment Courts (FTCs) (also called collaborative courts) are a relatively recent development in the legal system. The first FTC was created in Reno, Nevada in 1993. They have spread rapidly and now there are approximately 500 FTCs operating in 48 states, the District of Columbia, and the territories of Puerto Rico and Guam, with additional FTCs operating in the United Kingdom and Australia.³⁴

FTCs have been successful in fostering rehabilitation for substance-abusing parents trying to reunify with their children. Studies have demonstrated that parents who participate in FTCs reunify with their children more frequently compared to the traditional family reunification process, their children spend less time in foster care, and returns to the dependency court are reduced. One outcome to note in the Zhang article is “A meta-analysis of 16 evaluations examining FTC outcomes found that families that participated in an FTC were two times more likely to reunify than families receiving conventional services.”³⁵ Moreover, since their creation FTCs have become more sophisticated and

efficient with the development of a wider range of needed family-centered treatment services, mentor parent programs, developmental services for children, infants’ courts, and similar innovations. Several studies indicate that participation in FTCs also has significantly reduced costs to the child welfare system.³⁶

Most FTCs now permit MAT as a treatment model that clients can use as a best practice. In some FTCs, judges have recognized that it would be a violation of the reasonable efforts to prevent removal or facilitate reunification requirement should the agency not provide MAT for parents who suffer from opioid use disorder.³⁷

In its 2019 report, the National Judicial Opioid Task Force, convened by the Conference of Chief Justices and Conference of State Court Administrators, expressed strong support for expanding FTCs and the use of evidence-based treatment practices, such as MAT.³⁸

Family Time (Visitation)

No issue receives as much attention in juvenile dependency court hearings as contact between parents and their children. Traditionally, we have referred to this contact as visitation, but the better term is family time. Usually, parents want to see their children and children want to spend time with their parents. Interestingly, the quantity and quality of that time rarely is the subject of

³² Ranapurwala, SI et al. (2018) Opioid Overdose Mortality Among Former North Carolina Inmates: 2000–2015. *American Journal of Public Health*, 108(9):1207–1213; and see Struger-FD (2019) MAT for Opioid Use Disorder: Overcoming Objections. Issue Brief. California Health Care Foundation. <https://www.chcf.org/publication/mat-for-opioid-use-disorder-overcoming-objections/>

³³ Edwards L. (2020) Juvenile Dependency Court, Opioid Addiction, And Reasonable Efforts. *The Bench*, Summer 2020:6. <http://judgeleonardedwards.com/docs/addiction-reas-efforts-bench-sum-2020.pdf>

³⁴ Children and Family Futures and National Association of Drug Court Professionals (2019) Family Treatment Court Best Practice Standards. Prepared for the Office of Juvenile Justice and Delinquency Prevention (OJJDP) Office of Justice Programs (OJP), U.S. Department of Justice (DOJ).

³⁵ Saijun Z, Hui H, Qi W, Yong L Meirong L. (2019) The impacts of family treatment drug court on child welfare

core outcomes: A meta-analysis. *Child Abuse & Neglect* 88:1–14, 6.

³⁶ Brook J, Akin BA, Lloyd MH, Johnson-Motoyama M, Yueqi Y. Family Drug Treatment Courts As Comprehensive Service Models: Cost Considerations. *Juvenile and Family Court Journal* 67(2):23–43. Burras SWM, Mackin JR, Finigan MW (2011) Show Me the Money: Child Welfare Cost Savings of a Family Drug Court. *Juvenile & Family Court Journal* 62(3) <https://doi.org/10.1111/j.1755-6988.2011.01062.x>

³⁷ Edwards L (2020) Juvenile Dependency Court, Opioid Addiction, And Reasonable Efforts. *The Bench*, Summer 2020:6. <http://judgeleonardedwards.com/docs/addiction-reas-efforts-bench-sum-2020.pdf>

³⁸ National Judicial Opioid Task Force (2019) Convening, Collaborating, Courts as Leaders in the Crisis of Addiction https://www.ncsc.org/__data/assets/pdf_file/0018/15840/njotf_final_report_111819.pdf

appellate review—thus the appellate courts generally leave to the local judge whether the amount and location of that contact is adequate.³⁹

The amount of family time varies greatly in different jurisdictions. In some communities one time a week or less for family time in a supervised setting is all that parents are given in the case plan, while in others two times a week is the average.⁴⁰ Part of the reason for these differences relates to the time pressures on the social workers that make more frequent contact difficult, but usually the quantity of contact is simply a part of the local culture.

Family time between parents and children is an essential service in the reunification process. Some experts argue that visitation is the most important part of any reunification plan. Frequent visiting maintains family relationships, helps families cope with changing relationships, empowers and informs parents, and enhances children's well-being. In addition, it helps families confront reality (the situation in which they find themselves), and it provides a time and place to practice new behaviors. Ongoing contact with the child enhances a parent's motivation to change. Family time also permits others to assess the parent-child relationship and assist parents learn safe and effective parenting behaviors.⁴¹

Studies of children in out-of-home care repeatedly find that children who visit frequently are more likely to be reunited with their parents.⁴² Studies also show the association between

frequent family time and the emotional well-being of both children and parents.⁴³ Even in cases in which the goal is to terminate parental rights, continued contact with the parent benefits the child.⁴⁴ Regardless of the outcome of the legal case before the court, both the child and parents are best served by frequent visitation.⁴⁵

A recent project completed by the Georgia Supreme Court Committee on Justice for Children and the J4C Court Improvement Initiative addressed the importance of family time and made recommendations about the quantity and quality of that time.⁴⁶ While recognizing the barriers of cost and social worker time, the report recommended that

...most stakeholders agree that the child welfare system should strive to provide families with the best possible reunification services and supports and that stakeholders should continue to push for system improvements to meet the needs of children and families.⁴⁷

In spite of the infrequent amount of family time in many Georgia juvenile courts, a survey found that "82% agreed that it would be possible in their jurisdiction for Family Time to occur at least once a week for most families. Forty-eight percent of respondents strongly agreed and 34% agreed that once a week would be possible."⁴⁸

Child development experts argue that the current practice in juvenile dependency courts fails to benefit both parents and children.⁴⁹ First of all, family time should be adjusted to meet the needs of the child. An infant's need for contact with a

³⁹ There are a few appellate decisions on visitation. See Edwards L., *Reasonable Efforts: A Judicial Perspective*, p 49. <http://judgeleonardedwards.com/docs/reasonableefforts.pdf>

⁴⁰ Georgia Family Time Practice Guide (2019) Judicial Council/Administrative Office of the Courts Division of Children, Families and the Courts: Supreme Court of Georgia Committee on Justice for Children, p 62 <http://www.gacip.org/family-time-practice-guide>

⁴¹ *Id.*

⁴² Fanshel D (1982) *On the Road to Permanency*. CWLA, New York; Beckerman A (1998) *Charting a Course: Meeting the Challenge of Permanency for Children with Incarcerated Mothers*. *Child Welfare* 77(5):513–529; Fanshel D, Shinn E (1975) *Children in Foster Care: A Longitudinal Investigation*:85–111 & 486–495. Child Welfare Information Services, New York.

⁴³ Weinstein E (1960) *The Self-Image of the Foster Child*. Russell Sage Foundation, NY; Michigan Parent-Child Visitation Task Force Final Report 2013:14–15; McWey L, Mullis A (2004) *Improving the Lives of Children in Foster Care: The Impact of Supervised Visitation*. *Family Relations* 53(3):293–300.

⁴⁴ Cantos A, Cries L, & Slis V (1997) Behavioral Correlates of Parent Visiting During Family Foster Care. *Child Welfare* 76(2):309–329.

⁴⁵ *Id.*

⁴⁶ Georgia Family Time Practice Guide, *op.cit.*, fn 40.

⁴⁷ *Id.* at p. 64

⁴⁸ *Id.*

⁴⁹ See the extensive list of experts listed in Edwards, *op. cit.* fn 39, p 47.

parent is much different than that of a teenager. An infant needs daily contact with a parent in order to develop an attachment with him or her.⁵⁰ No jurisdiction seems to acknowledge this need, and no appellate court has adopted this position.

Juvenile courts vary widely in the quantity and quality of family time. Some courts recognize that children's need for time with their parents varies depending on their age. The San Francisco juvenile dependency court orders a variety of family time depending on the age of the child.⁵¹ For example, the local court rule specifies that parents spend 6 hours a week with their newborns to five-year-olds each week. Experts support this more sophisticated approach.⁵²

The juvenile court judge must take an active leadership role to ensure improvements occur in local visitation practice. The following steps outline the measures a judge should take to provide children in foster care appropriate visitation:

- Recognize that visitation is a critical element of the family reunification process and be prepared to address visitation at each hearing.
- Ensure that a visit take place soon after the removal as both the parent and child will be experiencing grief over the separation.⁵³
- Oversee the child's initial placement decision to ensure that it supports frequent, meaningful visitation.
- Develop clear, enforceable, written visitation orders for each case.
- Develop local rules that address visitation issues.
- Determine the frequency and duration of visitation by measuring the needs of the child and family rather than the capacity of the agency.
- Encourage cross-systems training for all participants in the juvenile dependency court system to address child development principles and strategies to improve the quality and quantity of visitation.
- Examine best practices and draw from model programs from around the country to improve visitation practices.
- Facilitate collaborative community efforts to improve visitation practices and overcome barriers to successful visitation.⁵⁴
- Work with the agency and community members to make transportation available so that frequent visitation is possible.
- Discuss visitation at court system's meetings so that attorneys and service providers can contribute their ideas.
- Increase the number of children placed with relatives and kin which will make more frequent visitation possible.⁵⁵

One important development over the past few years is the placement of children with relatives. Relative placement can have a significant positive impact on the time that children visit with their parents. Failure to place with relatives can have serious detrimental consequences. The discussion in the Relative Placement section (*infra*) will explain this in greater detail.

At the time of this writing, the COVID-19 pandemic is an especially devastating interference with family time.⁵⁶ Many jurisdictions

⁵⁰ Arredondo D (2003) Guidelines to the developmental needs of children according to age. In: Edwards L (2003) Judicial Oversight of Parental Visitation in Family Reunification Cases. *Juvenile & Family Court Journal* 54 (3):13–14.

⁵¹ Edwards L (2003) [Judicial Oversight of Parental Visitation in Family Reunification Cases](#). *Juvenile & Family Court Journal* 54(3), Appendix D.

⁵² Edwards L (2014) Reasonable Efforts: A Judicial Perspective, p 43–49. <http://judgeleonardedwards.com/docs/reasonableefforts.pdf> 9

⁵³ Fahlberg V (2012) *A Child's Journey Through Placement*. Jessica Kingsley, London, p 141–175. Bowlby J (1973) *Attachment and Loss*. Vol. 2 Separation, New York, Basic Books.

⁵⁴ Edwards L, *op.cit.* fn 51, at 11–12.

⁵⁵ Both Polk County, Iowa, and the state of Maine have developed visitation guidelines that are comprehensive and sensitive to the developmental needs of children. The Iowa guidelines were developed by both the agency and the courts. Tabor N (2001) State of Iowa Court Improvement Project, Resource Manual: Visitation Issues in Juvenile Court, p 22; Maine Department of Human Services (2002) *Child and Family Services Manual*.

⁵⁶ Indeed, in order to continue vital operations safely, courts have had to hold some hearings remotely.

instituted blanket prohibitions on in-person family time at the beginning of the pandemic. Some were slow to develop protocols for remote visits. Meanwhile, the state and federal timelines for hearings and findings in dependency cases marched on. The pandemic's duration forced many courts and agencies to rethink family time norms. For example, more frequent, shorter visits with young children are more appropriate for a virtual schedule and transportation is generally not a problem.⁵⁷ The American Academy of Pediatrics released guidance for safe and effective family time during the pandemic.⁵⁸

Virtual visits should be considered a temporary, emergency measure, however. Courts and agencies should make every effort to ensure children and their parents (and siblings, as applicable) have personal contact whenever possible. We understand that there are efficiencies in virtual visitation; however, there is sufficient data to conclude that while virtual visits can effectively supplement face-to-face visits, they should not be viewed or used as a replacement for them.⁵⁹ For example, it is clear that virtual visitation with infants will not be meaningful to the infants. Even for latency age children and teens, the time spent in virtual visits cannot be equated with the time spent in face-to-face contact. The types of parenting skills that can be supported in virtual visits are more limited than in person visits. Furthermore, the limitations inherent in virtual visits make it more difficult to foster or maintain a healthy, secure parent-child attachment. The benefits of this type of visitation are closely tied to the active involvement of a positively motivated caregiver, a responsibility that is likely

to fall on the shoulders of foster parents. Moreover, a case can be made that virtual visits, as the sole means of parent-child contact, are a violation of the requirement to exercise reasonable efforts to reunify parent and child.⁶⁰

Relative Placement and Family Finding

Federal and state laws regarding placing children in out-of-home care have changed dramatically over the past 100 years. One hundred years ago over 90% of children in care resided in congregate care. After the White House Conference on the Care of Dependent Children in 1909, foster care became the preferred placement. However, it took the remainder of the twentieth Century for foster care to overtake congregate care as the placement of choice by juvenile courts. Now the law favors relatives as the preferred placement if children must be removed from parental care. The data below show that 78% of children in out-of-home care are in family placements, 46% in non-relative care and 32% placed with relatives. Congregate care has slipped to 11% including group homes and institutions. As noted above, the use of congregate care placements will likely continue to fall in the coming years with the implementation of the Family First Prevention Services Act and the Preventing Sexual Trafficking and Strengthening Families Act of 2014. More information and data on this trend can be found on the Every Kid Needs a Family website.⁶¹

Point in Time Data

The estimated 437,283 children in foster care on September 30, 2018, were in the following types of placements:

- 46 percent in nonrelative foster family homes
- 32 percent in relative foster family homes
- 11 percent in institutions and group homes
- 5 percent on trial home visits (situations in which the State retains supervision of a child,

⁵⁷ Wentz R, Virtual Visits: Recommendations by Age and Access Resources. https://cdn.ymaws.com/www.nacchildlaw.org/resource/resmgr/covid_resource_hub/virtual_visits_recommendatio.pdf

⁵⁸ <https://services.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/clinical-guidance/guidance-for-children-and-families-involved-with-the-child-welfare-system-during-the-covid-19-pandemic/>

⁵⁹ Singer J, Brodzinsky D (2020) Virtual Parent-Child Visitation in Support of Family Reunification in the Time of COVID-19, *Developmental Child Welfare*, August 2020.

⁶⁰ *Id.*

⁶¹ <https://www.ncsc.org/everyskid>

the child returns home on a trial basis for an unspecified period of time, and after 6 months the child is considered discharged from foster care)

- 4 percent in pre-adoptive homes
- 2 percent in supervised independent living
- 1 percent had run away⁶²
- These percentages have changed somewhat in the past 10 years.⁶³

Of all children (under 18) in care on September 30, 2019, what number and percent in each state are placed in kinship care? See Table 33.2.

Several jurisdictions have demonstrated that relative placement can be dramatically increased through the use of family finding and improved social worker practice. Examples include portions of Los Angeles, Allegheny and several other counties in Pennsylvania, and Omaha, Nebraska. Using family finding and accelerated procedures, relative placements can be made in a few days rather than weeks or months. These jurisdictions place from 70–90% of children with their relatives. The process is described in the cited articles.⁶⁴

Family Finding was highlighted in the Fostering Connections Act as a best practice.⁶⁵ The Family Finding model, developed by social worker and family advocate Kevin A. Campbell, offers methods and strategies to locate and engage relatives of children who have been removed

from parental care. The goal of Family Finding is to connect each child with a family, so that every child may benefit from the lifelong connections that only a family provides. As Kevin Campbell has written:

1. Every child has a family, and they can be found if we try;
2. Loneliness can be devastating, even dangerous, and is experienced by most children in out-of-home care;
3. A meaningful connection to family helps a child develop a sense of belonging; and
4. The single factor most closely associated with positive outcomes for children is meaningful, lifelong connections to family.⁶⁶

There are additional reasons why relative care is a preferred placement. Data now demonstrate that placement in foster care and congregate care actually has long-term negative effects on children. Over their lifetime these children will have poorer health and mental health outcomes and will die sooner than children at home or with relatives.⁶⁷

One study followed over 160,000 children who were placed in non-parental care for a period during their childhood. The researchers followed their lives for 30 years. One of their conclusions was that children who were placed out-of-home in care reported worse health than children who grew up in a family environment. The authors conclude that “when non-parental care is required, priority be given to non-residential care, especially the child’s extended relatives and friends.”⁶⁸

Other studies confirm the poor health outcomes for children placed in stranger care. These children have been found to have higher levels of emotional, psychological and behavioral

⁶² Annie E. Casey Foundation Kids Count Data Center, Children in Foster Care by Placement Type, <https://datacenter.kidscount.org/data/tables/6247-children-in-foster-care-by-placement-type?loc=1&loct=1#detailed/1/any/false/37/2622,2621,2623,2620,2625,2624,2626/12994,12,995>

⁶³ The percentage of children placed with relatives was 26% and now is 32%. Williams C, Sepulveda, K (2019) The share of children in foster care living with relatives is growing. Child Trends, May 21, 2019.

⁶⁴ Edwards L (2018) *Relative Placement: The Best Answer for Our Foster Care System*. The Bench, p 6, 21–23; Edwards L (2018) *Relative Placement: The Best Answer for Our Foster Care System*. Juvenile & Family Court Journal 69(3) 2018 National Council of Juvenile and Family Court Judges

⁶⁵ Public Law No: 110–351, §102(a)(2).

⁶⁶ Core Beliefs of the Family Finding approach developed by Kevin Campbell, found at <http://www.familyfinding.org/>

⁶⁷ Murray E, Lacey R, Maughan B, Sacker A (2020) Association of childhood out-of-home care status with all-cause mortality up to 43-years later: Office of National Statistics Longitudinal Study. BMC Public Health, (2020) 20–735.

⁶⁸ *Id.* at p 6.

Table 33.2 Number and Percent of Children in Kinship Care by State?^a

State	Number	Percent	State	Number	Percent
Alabama	837	15%	Missouri	4790	38%
Alaska	708	25%	Montana	1616	44%
Arizona	6417	48%	Nebraska	1027	32%
Arkansas	941	23%	Nevada	1838	41%
California	16,545	35%	New Hampshire	375	31%
Colorado	1396	29%	New Jersey	1566	35%
Connecticut	1697	44%	Mexico	556	24%
Delaware	50	9%	New York	4216	27%
District of Columbia	173	26%	North Carolina	2931	27%
Florida	9945	42%	North Dakota	277	19%
Georgia	3356	26%	Ohio	3585	23%
Hawai'i	773	48%	Oklahoma	2443	29%
Idaho	550	32%	Oregon	2190	32%
Illinois	7232	44%	Pennsylvania	5961	49%
Indiana	5221	33%	Rhode Island	811	37%
Iowa	2209	37%	South Carolina	327	7%
Kansas	2458	31%	South Dakota	456	27%
Kentucky	1107	12%	Tennessee	1167	13%
Louisiana	1246	32%	Texas	9788	31%
Maine	794	38%	Utah	736	32%
Maryland	1576	43%	Vermont	297	24%
Massachusetts	2349	24%	Virginia	309	7%
Michigan	4556	40%	Washington	3543	35%
Minnesota	3516	43%	West Virginia	1456	20%
Mississippi	1245	31%	Wisconsin	2934	38%
			Wyoming	282	29%

^aData source: Public AFCARS data available from National Data Archive on Child Abuse and Neglect (NDACAN) at Cornell University.

problems, such as poor well-being, conduct disorder, attention disorder, aggressiveness, depression, and psychopathology.⁶⁹

There is more. Two other studies conclude that children in care are, on average, more likely to die earlier than average in their adult lives. One study followed over 353,000 children who were once in care 42 years later. They concluded that these adults on average had a higher risk of mortality long after they had left care, mainly from unnatural causes.⁷⁰

Another study followed over 15,000 children for 60 years, 9% of whom had been placed in out-of-home care during their childhood. The study found that children in out-of-home care constitute a high-risk group for subsequent mortality. The study also found elevated risk of mortality was particularly pronounced among those who were placed in adolescence and/or because of their own behaviors. Children who were exposed to out-of-home care had increased mortality also when

⁶⁹ McCann J, Wilson A, Dunn G (1996) Prevalence of psychiatric disorders in young people in the care system. *BMJ* 313:1529–30; McMillen JC, Zima TB, Scott DL et al. (2005) Prevalence of psychiatric disorders among older youths in the foster care system. *J Am Acad Sci Child Adolescent Psychiatry* 44:88–95.

⁷⁰ Berlin M, Vinnerljung B, Hjern A (2011) School performance in primary school and psychosocial problems in young adulthood among care leavers from long term foster care. *Child Youth Serv Rev.* 33:2489–97; Leslie IK, Landsverk J, Ezzer-Lofstrom R, Tschann JM, Slymen DJ, Garland AF (2000) Children in foster care: Factors influencing out-patient mental health service use. *Child Abuse Negl* 24: 465–76

compared with those who grew up under similar living conditions but did not experience placement.⁷¹

You may recall from the section on family time/visitation, *supra*, the minimal family time that most jurisdictions permit between parents and children in out-of-home care. If children are placed with relatives, family time is significantly increased and in a more relaxed atmosphere. For example, in Allegheny County the director of placement services stated, “Because we place so many children with relatives, we are able to provide more visitation between parents and their children.”⁷²

Similarly, Jennifer Lopez, Regional Administrator of the Santa Fe Springs Office of the Department of Children and Family Services in Los Angeles stated:

Because we place so many children with relatives, we are able to be much more flexible with visitation. The parents are able to see their children much more than if the children were placed in foster care. Also, it is much less traumatic for the children and a lot of the fathers who are non-offending have the opportunity to be in their children’s lives.⁷³

The conclusion seems clear. The child welfare system must take aggressive, proactive steps to increase relative outreach and placements immediately upon removal from parental care. The judge must be prepared to hold the agency accountable for using due diligence to identify, notice, and engage relatives and to monitor agency actions to ensure they are timely. Best practices are to insist that social worker reports contain information about relatives the social worker has contacted and their responses and asking social workers if they used family finding to locate and notice any absent parent and

relatives. The ‘reasonable efforts’ to prevent removal and facilitate reunification requirements are tools the court can use to ensure agency compliance.^{74,75}

Reasonable Efforts

Federal and state laws require juvenile court judges to oversee the actions of social service agencies by determining whether they have provided services to prevent removal of children from parental care, to facilitate reunification of children with their parents, and ensure timely permanency for children in the child welfare system.⁷⁶ The reasonable efforts finding is the primary legal tool that judges have to monitor the activities of social service agencies. Judges must determine in each case whether the agency has provided reasonable efforts to accomplish the goals of prevention, reunification, and permanency. It is a means of holding these agencies accountable for the monies they receive from the federal government because if the judge rules that the agency did not provide adequate services, the agency will lose federal dollars.⁷⁷

In 2014 a national survey including the juvenile courts from all states and the District of Columbia revealed that the judges in many states have not paid attention to the reasonable efforts requirements.⁷⁸ Some states had few or no appellate cases addressing the reasonable efforts issue

⁷¹ Gao M, Brannstrom L, Almquist Y (2016) Exposure to out-of-home care in childhood and adult all-cause mortality: a cohort study. *International Journal of Epidemiology* 46(3); McCann JB, Wilson S, Dunn G (1996) Prevalence of psychiatric disorders in young people in the care system. *BMJ* 313(1):529–530.

⁷² Email from Dr. Sharon McDaniel. A copy is available from the authors.

⁷³ Email from Jennifer Lopez. A copy is available from the authors.

⁷⁴ See Edwards L (2020) *Reasonable Efforts: Let’s Raise the Bar*. The Guardian (NACC) 42(1). https://cdn.ymaws.com/www.naccchildlaw.org/resource/resmgr/guardian/2020_spring/guardian_2020_v42n01_r8.pdf. As noted in, the discussion of legislative initiatives, *supra*, these reasonable efforts requirements have been in place since the Adoption Assistance and Child Welfare Act was passed in 1980.

⁷⁵ Edwards L (2020) *The Urgency of Placing Children with Relatives*. The Guardian (NACC) 42(04). <http://judgeleonardedwards.com/docs/urgency-placement-nacc-dec-2020.pdf>

⁷⁶ Edwards L (2014) *Reasonable Efforts: A Judicial Perspective* <http://judgeleonardedwards.com/docs/reasonableefforts.pdf>

⁷⁷ CFR §1356.21.

⁷⁸ *Op.cit.* Footnote 76 at Appendix A and CFR §1356.

and almost 99% of all appellate cases that did address reasonable efforts did so only after a termination of parental rights hearing which generally occurs late in the case.⁷⁹

One surprising development over the past few years has been the Children's Bureau's emphasis on the use of the reasonable efforts tool in juvenile court proceedings. For the first time in almost 40 years, the Children's Bureau has been urging attorneys and judges to use the reasonable efforts findings to put pressure on social service agencies to prevent removal of children from their homes and to facilitate reunification when they are removed.⁸⁰ As David Kelly stated "when we fail to take reasonable efforts seriously, we do real harm to children and families."⁸¹

Recent research has revealed that, over the past 7 years, judges and appellate justices in an increasing number of jurisdictions have addressed the reasonable efforts issue more effectively. The Supreme Courts in Massachusetts, Montana, and Wyoming have issued decisions focusing on reasonable efforts.⁸² These appellate decisions outline what trial judges should be doing to comply with the federal and state laws. Appellate decisions in the District of Columbia give evidence that the issue is regularly tried in that

jurisdiction.⁸³ Appellate courts in states including California, Connecticut, Oregon, and New York continue to address the issue regularly. However, for many states the reasonable efforts issue is not litigated in the trial courts except at a termination of parental rights hearing. This may be because judges do not want to penalize the already strapped local child welfare office or because judges are uncomfortable making decisions contrary to social service "experts."

Over the past few years, a best practice has been adopted by many judges. Rather than make a "no reasonable efforts" finding, judges have made that finding, or discussed making that finding, but have continued the case for a few weeks to give the agency an opportunity to provide adequate services. If the agency does so, the judge will set aside the finding. It has been referred to as The Art of the No Reasonable Efforts finding.⁸⁴ As one judge stated to the authors: "I have used the reasonable efforts finding effectively. When I mention that I might find that the agency has not provided adequate services and continue the case, the agency understands and the service is in place when we return to court."⁸⁵ Using this technique, the children and parents are well served and the agency does not lose any federal dollars.⁸⁶

⁷⁹ *Ibid.*

⁸⁰ Milner J, Kelly D (2018) Reasonable Efforts as Prevention. American Bar Association, November 5, 2018 https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/january-december-2018/reasonable-efforts-as-prevention/#:~:text=By%20Jerry%20Milner%2C%20David%20Kelly&text=The%20U.S.%20Children's%20Bureau%20has,of%20child%20welfare%20prevention%20efforts See also, Children's Bureau (2018) Reshaping child welfare in the United States to focus on strengthening families through primary prevention of child maltreatment and unnecessary parent-child separation, (ACYF-CB-IM-18-05, Nov. 16, 2018) <https://www.acf.hhs.gov/sites/default/files/cb/im1805.pdf>

⁸¹ Kelly D (2018) It's Time to Follow the Law and Take Reasonable Efforts Seriously. Rethinking Foster Care. <http://rethinkingfostercare.blogspot.com/2018/10/its-time-to-follow-law-and-take.html>

⁸² *Care and Protection of Walt*, 478 Mass. 212; 2017 Mass. LEXIS 768 (October 2017); *Dunlap v. State (In re BAD)*, 2019 WY 83 (August 2019); *In re R.J.F.*, 443 P.3d 387 (Mont. 2019).

⁸³ *In re T.A.L.*, 149 A.3d 1060 (2016).

⁸⁴ See Edwards L (1995) Improving Implementation of the Federal Adoption Assistance and Child Welfare Act of 1980. *Juvenile & Family Court Journal* 45(3), Appendix C, Resource Guidelines: Improving Court Practice in Child Abuse & Neglect Cases. <http://www.judgeleonardedwards.com/docs/AppendixCImprovingImplementation.pdf>.

⁸⁵ Judge Louis Trosch, North Carolina Superior Court Judge. A copy of that email is available from the authors.

⁸⁶ This technique has been called The Art of the Reasonable Efforts Finding. See Edwards L (1995) Improving Implementation of the Federal Adoption Assistance and Child Welfare Act of 1980, *Juvenile & Family Court Journal* 45(3) Appendix C, Resource Guidelines.

High Quality Legal Representation in Dependency Cases

As noted in the National Council of Juvenile and Family Court Judges' *Enhanced Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases*,⁸⁷ attorneys and other advocates largely determine the information presented to the judge.⁸⁸ A well-functioning court system therefore depends on each party, parents, children, and the child welfare agency, having competent legal representation. The American Bar Association (ABA) has adopted standards of practice for attorneys representing all three parties in child welfare cases.⁸⁹

Another development highlighting the importance of quality legal representation for all parties is the national certification of attorneys specializing in child welfare law. Specialty certification is modeled on well-known protocols long used in medical and other health care fields. The National Association of Counsel for Children (NACC)⁹⁰ is the national body approved by the ABA to certify attorneys as specialists in child welfare law. Successful candidates for certification as Child Welfare Law Specialists (CWLS) must meet minimum experience and training requirements and pass a written examination, as well as be recommended by peers and judges who know their work. As of October 2020, NACC certification is available in 43 states and the District of Columbia, and there are 595 certified child welfare law specialists nationwide.

In 1981, the United States Supreme Court ruled that there is no constitutional right to an attorney for an indigent parent in a termination of parental rights proceeding.⁹¹ Several states have followed this precedent and have not

provided attorneys for indigent parents except in some counties within these states. These appointments are made only in the most serious termination of parental rights hearings at the discretion of the judge hearing the case.⁹²

The great majority of states provide that indigent parents have the right to an attorney in child welfare proceedings either by statute or court rule. The only states that do not provide counsel in these cases by legislation or court rule are Texas, Wyoming, Iowa, Arkansas, Wisconsin, Mississippi, and Georgia.⁹³ In many of these states, some counties, but not all, provide counsel for parents in abuse/neglect cases.⁹⁴ In these states, local practice varies such that, in some counties, the judge will appoint an attorney for a parent in dependency proceedings, but whether the appointment is for the entire case or just for the termination of parental rights hearing varies. The principal reason for the failure to appoint attorneys to represent parents in these cases appears to be financial—the court does not believe limited county or district resources should be spent on legal representation.

Over the past decade there has been an increase in appointment of attorneys for parents in child welfare proceedings, and this has resulted in more family reunifications and children spending less time in foster care.⁹⁵ As Commissioner Melissa Ressa, a Washington state juvenile court judicial officer stated:

[I believe] that the creation of a State agency, OPD (Office of Public Defense) for consistent, quality parent representation in Spokane and throughout the state has been one of the most important developments in the child welfare system in the past 25 years.⁹⁶

⁸⁷ <https://www.ncjfcj.org/publications/enhanced-resource-guidelines/>

⁸⁸ *Id.* at p 42

⁸⁹ https://www.americanbar.org/groups/public_interest/child_law/resources/practice-standards/

⁹⁰ www.naccchildlaw.org

⁹¹ *Lassiter v State Department of Social Services*, 452 U.S. 18 (1981).

⁹² National Coalition for a Civil Right to Counsel, Status Map, Legislation, Termination of Parental Rights (State) Birth Parents, 2020.

⁹³ *Id.* Abuse/Neglect/Dependency – Accused Parents.

⁹⁴ *Id.*

⁹⁵ <https://www.casey.org/quality-parent-representation;> <https://www.sciencedirect.com/science/article/pii/S019074091930088X?via%3Dihub>

⁹⁶ Statement to Judge Leonard Edwards (ret). The entire statement is available from Judge Edwards.

Washington state uses an interdisciplinary law office approach to parent representation in abuse and neglect cases. The law office employs social workers and parent advocates in addition to attorneys to represent and support parents, all paid for by the state. Using a similar law office model, a New York study reported that children spent 118 fewer days on average in foster care during the four years following the abuse or neglect case filing. Moreover, this model also achieved overall permanency, reunification, and guardianship more quickly.⁹⁷

The multiyear study of child welfare cases in New York City courts evaluated whether the kind of legal representation provided to parents can make a difference in case outcomes.⁹⁸ The study traced the outcomes of 9582 families and their 16,280 children through a four-year follow-up period. The study compared case outcomes based on whether parents were represented by sole practitioners who are experienced lawyers appointed by the court or by professionals who are part of a multidisciplinary law office that includes lawyers, social workers, and parent advocates.

The study found that children whose parents were represented by the multidisciplinary office:

1. Spent less time in foster care by about 4 months during the 48 months after a petition was filed;
2. Were just as safe when returning earlier to parental care;
3. Were returned during the first year approximately 43% more often than children represented by solo practitioners and 25% more often in the second year; and

4. Were released to relatives more than twice as often in the first year of placement and 67% more often in the second year.

This research demonstrates that the multi-disciplinary model is a best practice that better serves children and their families as well as saves money for the local jurisdiction.

The American Bar Association also conducted a study of the effects of high-quality legal representation in California. The study found that funding changes helped recruit and retain attorneys, reduced caseloads, and decreased delays in court proceedings.⁹⁹ The Deputy Director of California's Children & Family Services Division of CDSS concluded that

Funding for legal representation is important to reduce caseloads and also to allow attorneys time to work with their clients, engage them in their case, and ultimately achieve better results for the children and families we serve.¹⁰⁰

As these positive results are more well known, it is expected that more states will provide attorneys for parents and children in dependency cases and expand resources for current programs. Several counties in California, Colorado, Massachusetts, Mississippi, and Oregon have started providing social work assistance to attorneys for parents and children.

The Children's Bureau (CB) supports the efforts to provide high quality legal representation for parents and children in dependency cases. In 2017, CB issued a memorandum outlining the imperative for high quality representation for all parties in dependency cases.¹⁰¹ In 2018, the Children's Bureau reversed long-standing policy

⁹⁷ Gerber L, Pang YC, Ross T, Guggenheim M, Pecora PJ, Miller J (2019) Effects of an interdisciplinary approach to parental representation in child welfare. *Child and Youth Services Review* 102:42–55.

<https://www.sciencedirect.com/science/article/pii/S019074091930088X?via%3Dihub>

⁹⁸ Guggenheim M, Jacobs S (2019) Providing Parents with Multi-Disciplinary Representation Significantly Reduces Children's Time in Foster Care, ABA https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/january%2D%2D-december-2019/providing-parents-multidisciplinary-legal-representation-signifi/

⁹⁹ ABA, (2018) Effects of Funding Changes on Legal Representation Quality in California Dependency Cases. https://www.americanbar.org/groups/public_interest/child_law/project-areas/legal-representation/calrep-funding/

¹⁰⁰ ABA, (2018) Executive Summary, Effects of Funding Changes on Legal Representation Quality in California Dependency Cases, p.3. https://www.americanbar.org/content/dam/aba/administrative/child_law/calrep-assessment-summary.pdf

¹⁰¹ Children's Bureau. High Quality Legal Representation for All Parties in Child Welfare Proceedings, ACF, US Department of Health and Human Services, 1/17/2017,

guidance to allow states to use Title IV-E funding¹⁰² in support of parents and children's attorneys in dependency cases (those funds were already available to fund attorneys for the child welfare agency).¹⁰³ In 2020, the Children's Bureau issued further policy to support multidisciplinary practice by clarifying that Title IV-E funds can also be used to support non-attorney staff in parent and children's law offices such as paralegals, social workers, and veteran parent partners.¹⁰⁴

The Indian Child Welfare Act (ICWA)

The Indian Child Welfare Act (ICWA), federal legislation passed in 1978, establishes a different standard for the child protection agency and for juvenile dependency courts when Indian children are the subject of child protection proceedings and seeks to keep Indian children with Indian families, if possible.¹⁰⁵ Because of unique historical issues that impacted Indian families, and Indian tribes' unique status as sovereign nations within the geographic borders of the United States, Congress concluded that removal of Indian children required additional efforts by the state to prevent removal.¹⁰⁶ During the federal legislative hearings that led to passage of the ICWA, Congress heard overwhelming testimony

that state social workers often removed Indian children from their homes without applying any legal standards for removal.¹⁰⁷ Congress stated the policy of the ICWA as follows:

[I]t is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families.¹⁰⁸

The ICWA framework requires notice to tribes that may have a connection to the child as defined by the Act in order that the tribe may assess the child's membership, or eligibility for membership, in the tribe. If the child is a member of the tribe (or is eligible for membership and his or her parent is a member), the tribe may, at its discretion, participate as a party in the state case or require the state court to transfer the case to the tribal legal system.¹⁰⁹

The ICWA requires that before removal or termination of parental rights of an Indian child, the state must prove to the court that "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful."¹¹⁰ "Active efforts" has a "distinctly Indian character" and involves a greater expenditure of resources by the state than those required by the

ACYF-CB-IM-17-02 <https://www.acf.hhs.gov/sites/default/files/cb/im1702.pdf>

¹⁰² See Legislative Initiatives Impacting Juvenile Dependency Court *supra*, on Title IV-E funding and the Family First Prevention Services Act.

¹⁰³ Children's Bureau. Child Welfare Policy Manual, Section 8.1B TITLE IV-E, Administrative Functions/Costs, Allowable Costs - Foster Care Maintenance Payments Program. https://www.acf.hhs.gov/cwpm/public_html/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=36

¹⁰⁴ *Ibid.*

¹⁰⁵ P.L. 95-608; 25 U.S.C. §§1901.

¹⁰⁶ *Id.* Congressional Findings at §1901; Hazeltine S (2002) Speedy Termination of Alaska Native Parental Rights: The 1998 Changes to Alaska's Child in Need of Aid Statutes and Their Inherent Conflict with the Mandates of the Federal Indian Child Welfare Act, 19 Alaska L. Rev. 57.

¹⁰⁷ One report described it as the "wholesale separation of Indian children from their families..." *Establishing Standards for the Placement of Indian Children in Foster or Adoptive Homes, to Prevent the Breakup of Indian Families, and for other Purposes*, H R Rep. 95-1368, at 9 (July 24, 1978); See also *Mississippi Band of Choctaw Indians v Holyfield*, 490 U.S. 30, 32; 109 S. Ct. 1597; 104 L. Ed. 2d 29 (1989); See also H.R. Report No. 1386, 95th Cong., 2d Sess. 23 (1978), reprinted in *U.S. Code Cong. & Admin. News* 7530.

¹⁰⁸ 25 U.S.C. § 1902.

¹⁰⁹ *Ibid.*

¹¹⁰ *Id.* §1911(d) and §1912(d). In California the state must prove it provided active efforts by clear and convincing evidence. *In re Michael G.*, 63 Cal. App. fourth 700 (Cal. App. 1998). A copy of the definition of Active Efforts according to the Federal Regulations is contained in Appendix.

reasonable efforts standard.¹¹¹ These efforts must demonstrate proactive casework and active engagement with the family including more frequent contact with the family and tribe.¹¹² Moreover, active efforts must be culturally appropriate. This should be accomplished by involving and using the available resources of the extended family, the tribe, Indian social service agencies, and individual Indian caregivers.¹¹³ The active efforts standard must be applied by the court regardless of whether the child's tribe has intervened in the proceedings.¹¹⁴

Over the past few years there have been significant developments in the implementation of

¹¹¹ Andrews M (2002) 'Active' Versus 'Reasonable Efforts: The Duties to Reunify the Family Under the Indian Child Welfare Act and the Alaska Child in Need of Aid Statutes. *Alaska L. Rev.* 19:85:87. "The 'active efforts' standard requires more effort than a 'reasonable efforts' standard does."

In re Nicole B., 927 A.2d 1194 (Md. Ct. Spec. App. 2007). "The term active efforts by definition, implies heightened responsibility compared to passive efforts." *In the Matter of A.N. and M.N.*, 325 Mont. 379, 384, 106 P.3d 556, 560 (Montana Supreme Court, 2005); *C.J. v State Dep't of Health & Social Services*, 18 P.3d 1214 (Alaska 2001); *Sandy B. v. State Dept. of Health & Social Services, Office of Children's Services*, 216 P.3d 1180 (Alaska 2009); *M.W.*, 20 P.3d 1146 (Alaska Supreme Court, note 18), 2001; 44 Fed. Reg. 67,584 at D. 2(Nov. 26, 1979); DHS Social Services Manual XIII-3559.

¹¹² Judge April Attebury of the Karuk Tribal Court in Siskiyou and Humboldt Counties, California, tells social workers they should hold the client's hand from start to finish of the case (author's conversation with Judge Attebury). Justice William Thorne (ret.) told the author that the social worker should treat the client as you would your own child and do whatever it takes. (author's conversation with Justice Thorne). Active Efforts Principles and Expectations, Oregon Judicial Department, Citizens Review Board, Salem; Wisconsin statutes state that it is the agency's responsibility to meet the standard defined as "an ongoing, vigorous, and concerted level of case work . . . made in a manner that takes into account the prevailing social and cultural values, conditions, and way of life of the Indian child's tribe and that utilizes the available resources of the Indian child's tribe, tribal and other Indian child welfare agencies, extended family members of the Indian child, other individual Indian caregivers, and other culturally appropriate service providers. Wis. Stat. §48.028(4)(g)(2).

¹¹³ 25 U.S.C. § 1912(d)

¹¹⁴ *In re Jonathon S.*, 28 Cal. Rptr. 3d 495 (Cal. Ct. App. 2005)

the ICWA in the nation's juvenile courts. First, the federal government issued guidelines in 2016 describing the act in detail. The guidelines were followed in 2017 by regulations describing in some detail the meaning of different provisions of the legislation.¹¹⁵ The regulations start with a statement of the purpose of the regulations:

§23.1 Purpose. The purpose of the regulations in this part is to govern the provision of funding for, and the administration of Indian child and family service programs as authorized by the Indian Child Welfare Act of 1978.

Thereafter, over 80 sub-sections describe the meaning of the Act. Of interest to juvenile court practitioners is the definition of "active efforts." This is the first such definition provided by the federal government and has already received attention in appellate case law.¹¹⁶ It stresses the importance of involving the tribal representatives to participate "in providing support and services to the Indian child's family and in family team meetings, permanency planning, and resolution of placement issues."¹¹⁷

Thirteen jurisdictions around the country have created a special ICWA division of the local juvenile court. These courts have been started in the following jurisdictions: Spokane Co., WA; Sacramento Co., CA; Los Angeles Co., CA; Maricopa Co., AZ; Pima Co., AZ; Missoula Co., MT; Yellowstone Co., MT; Adams Co., CO; Denver Co., CO; Bernalillo Co., NM; St. Louis Co., MN; Ramsey Co., MN; Hennepin Co., MN; Erie Co., NY; Tulsa Co., OK. Other ICWA courts are currently in the planning stage.

A study was conducted in a number of ICWA court sites in Montana, Minnesota, and Colorado by the ICWA Baseline Measures Project (BMP). The study revealed that active efforts findings were made at least once in 85% of the cases

¹¹⁵ 81 FR 38777; Regulations are found at 25 C.F.R. Part 23.

¹¹⁶ Edwards L (2019) Defining Active Efforts in the Indian Child Welfare Act. *The Guardian* (NACC) 41(1). https://cdn.ymaws.com/www.naccchildlaw.org/resource/resmgr/guardian/2019_01_january/guardian_2019_v41n01.pdf

¹¹⁷ ICWA Regulations § 23.2

studied.¹¹⁸ In 35% of the cases the court order described what the active efforts were. Active efforts were most likely to be made at the review hearing (80%) and the plea (admit/deny) hearing (77%).¹¹⁹ The study also found that children were returned home sooner than in non-ICWA courts.¹²⁰

The enhanced protection of family integrity afforded by the ICWA, particularly the active efforts requirement, has led many child welfare experts to hold the ICWA up as a model policy for all child welfare cases. In 2013, 18 prominent child welfare organizations filed an amicus brief in the United States Supreme Court arguing that the ICWA represented the “gold standard” for child welfare practice.¹²¹

On the other hand, a case challenging the ICWA on constitutional grounds that originated in the federal court in Texas has been winding its way through the appellate process. Most recently, in April 2021, the Fifth Circuit Court of Appeals issued a 325-page opinion in which various combinations of sixteen judges ruled that certain provisions of the ICWA were unconstitutional and others were valid.¹²² The United States Supreme Court, the next and final step in the appellate process, could clarify the constitutional validity of the ICWA if the court decides to accept the case.

¹¹⁸ Capacity Building Center for Courts, ICWA Baseline Measures, Project Findings Report, 2020. <https://www.wacita.org/wp-content/uploads/2020/03/ICWA-Baseline-Measures-Report-Final-Draft-1.21.2020.pdf>

¹¹⁹ *Id.* at p 2.

¹²⁰ ICWA Baseline Measurement Project, Casey Family Programs, 2020.

¹²¹ *Amicus Brief of Casey Family Programs, et al in Adoptive Couple v. Baby Girl*, U.S. Supreme Court case no. 12–399, https://www.casey.org/media/ICWA_amicus.pdf

¹²² *Brackeen v. Bernhardt*, 2021 WL 1263721, (April 6, 2021).

Engaging Fathers in the Dependency Process

Non-custodial fathers appear infrequently in child protection proceedings. Several reasons stand out including difficulty in locating the father, the mother’s ambivalent feelings about engaging the father, the social worker’s ambivalence about working with the father, state legislation and court rules that may not emphasize engaging the father, the father’s reluctance to engage in court proceedings, and a general feeling throughout the court process that a father’s participation is not valued..¹²³¹²⁴

As one county supervising attorney stated:

I think there is an inherent bias in our system that suggests that no matter what a father does, the father will not gain custody unless the father is married, living with the grandmother, etc. In other words, we accept the concept of single mothers raising kids, but don’t accept the concept of single fathers raising kids.¹²⁵

Based on one author’s many years on the bench hearing thousands of juvenile dependency cases, he is convinced that father involvement is important. For legal, social, economic, and

¹²³ “I think fathers come into system expecting the worst and often get discouraged if they feel like they are not treated fairly... They expect to be discriminated against and often don’t try once they receive the slightest hint that we are relegating them to the traditional role of ‘breadwinner’ and excluding them from more satisfying roles of nurturer and caretaker.” (E-mail from Judge J. Robert Lowenbach (ret.) to author, Sept. 30, 2008 on file with author); “Fathers reported feeling unfairly treated by the child welfare system and courts. Many feel that even when they try to be involved, courts make the process more difficult and unfairly require them to jump through hoops and prove their commitment and sincerity, even when they were not involved in the maltreatment that led to child welfare intervention.” Kendall J, Kessen K, Reynolds J (2007) Engaging Dads in Child Welfare Cases, *Child Law Practice* 26:108–110.

¹²⁴ Edwards L (2009) *Engaging Fathers in the Child Protection Process: The Judicial Role*. *Juvenile and Family Court Journal* 60(2) p 1–13.

¹²⁵ E-mail from Gary C. Seiser, former Supervising Deputy, Juvenile Dependency Division of the San Diego County Office of County Counsel and co-author of *California Juvenile Courts: Practice and Procedure* (email on file with the authors).

developmental reasons, as well as just plain common sense, fathers need to be engaged in the lives of their children.¹²⁶ They are entitled by law to be a part of the proceedings. Fathers give the child a sense of belonging to an entire family. On average the father brings one-half of the child's relatives to the proceedings, relatives who may provide support and possibly a placement. The social workers in Los Angeles report that fathers are the placement for 17% of all removals from the other parent's care. As discussed in the Relative Preference section, placement with a relative has significant health advantages. Moreover, the father often has financial resources that will support the child.¹²⁷

Searches for the father should be vigorous and continuous throughout the case. If the search is inadequate, legal proceedings may come to a halt should the father appear after months of hearings, similar to what happens when it is discovered that a child has Native American heritage after months of hearings. Of course, if the father is dangerous to the mother or the child, the court will have to make protective orders. However, these will likely not be necessary for the grandparents or other relatives, some of whom may want to have custody of the child.

The judge is the person who must take the lead to ensure that the father is given notice and an opportunity to participate in the proceedings. The Appendix to this article contains a list of the actions the judge should take to make certain that the father participates meaningfully in the legal proceedings. If the social worker's efforts to notice and engage the father are not diligent, the court could make a finding that the agency did not exercise reasonable efforts to prevent removal or facilitate reunification.¹²⁸

¹²⁶ "...the evidence is clear that most children do best when they receive the emotional and financial support of both parents." *Parenting Our Children: In The Best Interest of the Nation, A Report to the President and Congress* (submitted by the U.S. Commission on Child and Family Welfare, Sept 1996) at p 1.

¹²⁷ *Op.cit.*, Edwards L, fn 124, at p.5.

¹²⁸ Edwards L (2020) Reasonable Efforts, Let's Raise the Bar. *The Guardian* (NACC) 42(1).

Psychotropic Medications and Children in Care

Psychotropic describes any drug that affects behavior, mood, thoughts, or perception of the subject. It's an umbrella term for many different drugs, including prescription drugs and commonly misused drugs. Psychotropic drugs include those used to treat ADHD, anxiety, depression and psychosis.

Children in foster care are significantly more likely than other children to be given mind-altering drugs, according to a study of five states released by the Government Accountability Office.¹²⁹ The report, which focused on children in the Medicaid program, also found that foster children were more likely to be prescribed five or more psychotropic drugs at an age and at doses that exceed the maximum FDA-approved levels—both of which carry serious health risks. The two-year investigation in Florida, Massachusetts, Michigan, Oregon and Texas found that foster children were prescribed psychotropic drugs at rates 2.7 to 4.5 times higher than other children in Medicaid in 2008.

The dangers of administering psychotropic drugs to maltreated children has been recognized in a number of other studies.¹³⁰ Recent studies emphasize the importance of trauma-informed

¹²⁹ U.S. G.A.O. (2011) Foster Children: HHS Guidance Could Help States Improve Oversight of Psychotropic Prescriptions," United States Government Accounting Office, December 2011 <https://www.gao.gov/new.items/d12270t.pdf>. Raghavan M et al. (2005) Psychotropic Medication Use in a National Probability Sample of Children in the Child Welfare System. *Child and Adolescent Psychopharmacology* 15:97.

¹³⁰ Edwards R (2018) 12 Dangers of Psychoactive Drugs (They're Significant), *Instaread Articles*, February 16, 2018 <https://draxe.com/health/dangers-of-psychoactive-drugs/>; Edelman M (2015) Overmedicating Children in Foster Care. *Children's Defense Fund Child Watch Column*, May 2015 <https://www.childrensdefense.org/child-watch-columns/health/2015/overmedicating-children-in-foster-care/>; Bartosz S (2016) Protecting Foster Youth from Unsafely Administered Psychotropic Drugs ABA, January 2016 <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2016/protecting-foster-youth-from-unsafely-administered-psychotropic-drugs/>

assessments of maltreated children prior to any intervention with psychotropic medications.¹³¹

Courts have taken steps to reduce the inappropriate use of psychotropic medications. The National Council of Juvenile and Family Court Judges passed a resolution regarding their use for children under juvenile court supervision. Their resolution is attached in the Appendix. The American Bar Association has published similar cautions about the use of psychotropic medication on children in care.¹³²

Psychotropic medications can be beneficial for maltreated children, but care must be taken to assess the history of any maltreated child and then to prescribe the correct dosages. Monitoring the impact of any prescribed drug or drugs will ensure that they are having the desired effect. The resolution from the National Council of Juvenile and Family Court Judges in the Appendix offers guidelines for judicial oversight of prescribing psychotropic medications to children under court supervision.

Conclusion

The courts will continue to be significantly involved in the lives of maltreated children. Our hope is that recent developments will provide better care for them. New laws and policies have opened new avenues for family support. Attention to the trauma caused by parental neglect or abuse can be effectively addressed. The impact of removal from parental care can be minimized by involvement of non-custodial fathers and relatives. Relative placement can result in significant increases in family time for the parents. The

¹³¹ Keeshin B, Forkey H, Fouras G, MacMillan H (2020) Children Exposed to Maltreatment: Assessment and the Role of Psychotropic Medication. *Pediatrics* 145(2): e20193751.

¹³² Briton L (2016) Limiting Psychotropic Medication and Improving Mental Health Treatment for Children in Custody," American Bar Association, April, 2016. https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-35/april-2016/limiting-psychotropic-medication-and-improving-mental-health-tre/

use of psychotropic medications can be monitored more effectively, just as evidence-based interventions for substance-abusing parents can help them to be able to provide better care for their children. In court proceedings, high quality legal assistance should result in shorter stays in out-of-home care. Judicial leadership will continue to provide oversight of social service actions, including using the reasonable efforts findings to hold the agency accountable for providing services to families to prevent removal, facilitate reunification, and achieve timely permanency. Judicial leadership will also be able to inform the government and the community of the needs of our most vulnerable children.

Resolution Regarding Judicial Oversight of Psychotropic Medications for Children Under Court Jurisdiction



WHEREAS, Judges recognize that each child under court jurisdiction is unique, valued and entitled to individualized attention;

WHEREAS, Medicaid data indicate children in foster care are prescribed psychotropic medications far more often than children in the general population;

WHEREAS, Judges in child welfare and juvenile justice cases are responsible for overseeing the safety and well-being of children under court jurisdiction;

WHEREAS, the NCJFCJ believes that this oversight responsibility extends to children prescribed psychotropic medications, including ensuring that medications are safe and appropriate; and.

WHEREAS, the NCJFCJ believes that judicial oversight means, at a minimum, that each court:

- Is aware of every child who is being prescribed psychotropic medications, and has the following information:
 - o the names and dosages of all psychotropic medications being prescribed as well as all other medications being prescribed and taken,
 - the reason for the prescription(s),
 - the alternatives to medications that have been considered,
 - the other interventions that should accompany or are accompanying the use of the medications,
 - the actual effects of the medications, both beneficial and adverse, o the name of the medical professionals prescribing the medications and their qualifications, and
 - the individual responsible for administering the medication to the child.
- Ensures a qualified medical professional is timely and thoroughly monitoring the medications.
- Ensures there are protocols in place to maintain the medication regimen without interruption when any placement changes occur.
- Ensures parents are fully involved and informed about the use of the medications and the reason for their use, and have the ability to maintain the regimen or meaningfully decide, in consultation with medical professionals, whether and how to discontinue medications during reunification or upon return to their custody.
- Ensures all other caregivers are fully informed of the use of the medications and the reasons for them and have the ability to maintain the medication regimen in consultation with medical professionals.
- Ensures children have been engaged at the earliest possible time in the medication process, allowing the court to have an understanding of their attitude toward medications and whether additional services or resources will be necessary to assure medication compliance.
- Ensures all children transitioning from child welfare or juvenile justice who are being administered psychotropic medications have been educated sufficiently to maintain their

medication regimen and make decisions about their care, including possible adverse effects of sudden discontinuation of psychotropic medications.

Be it therefore resolved as follows:

NCJFCJ shall promote the exercise of judicial leadership to convene and engage States and other jurisdictions, communities, and stakeholders in the child welfare and juvenile justice systems in meaningful partnerships to encourage and to ensure, when necessary, the appropriate use of psychotropic medications for children and youth under court jurisdiction.

NCJFCJ is committed to development of technical assistance resources to assist judges in fulfilling the oversight role described in this resolution.

NCJFCJ is committed to educating judges on issues related to psychotropic medications, including but not limited to, the safe and appropriate use of psychotropic medications and recommended practices for judicial oversight.

NCJFCJ remains committed to educating judges on the substantial impact trauma can have on children and families and how psychotropic medications are most appropriately used when trauma is present.

NCJFCJ encourages engaging parents, caregivers, and others involved in the care, supervision and treatment of the child to be educated regarding the appropriate use of psychotropic medication for children.

NCJFCJ shall advocate for information sharing among those involved in the care and treatment of children under court jurisdiction and for the development and use of technology to enhance information sharing among all entities responsible for the care of children under court jurisdiction.

NCJFCJ supports the development of consultation resources for those courts that are charged with making decisions regarding the use of psychotropic medications for children under court jurisdiction.

NCJFCJ encourages the further study of, and the continued analysis of available data on,

effective interventions and outcomes for children prescribed psychotropic medications with particular emphasis on disproportionately impacted populations.

adopted by the NCJFCJ Board of Trustees during their Annual Meeting, July 13, 2013, Seattle, Washington.

Definition of Active Efforts: Federal Regulations¹³³

§ 23.2 Definitions

Act means the [Indian Child Welfare Act](#) (ICWA), Pub. L. 95-608, 92 Stat. 3069, 25 U.S.C. 1901 *et seq.*

Active efforts means affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an [Indian child](#) with his or her family. Where an agency is involved in the [child-custody proceeding](#), [active efforts](#) must involve assisting the [parent](#) or [parents](#) or [Indian custodian](#) through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan. To the maximum extent possible, [active efforts](#) should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the [Indian child's Tribe](#) and should be conducted in partnership with the [Indian child](#) and the [Indian child's](#) [parents](#), extended family members, [Indian custodians](#), and Tribe. [Active efforts](#) are to be tailored to the facts and circumstances of the case and may include, for example:

1. Conducting a comprehensive assessment of the circumstances of the [Indian child's](#) family, with a focus on safe reunification as the most desirable goal;
2. Identifying appropriate services and helping the [parents](#) to overcome barriers, including actively assisting the [parents](#) in obtaining such services;
3. Identifying, notifying, and inviting representatives of the [Indian child's Tribe](#) to

participate in providing support and services to the [Indian child's](#) family and in family team meetings, permanency planning, and resolution of placement issues;

4. Conducting or causing to be conducted a diligent search for the [Indian child's](#) extended family members, and contacting and consulting with extended family members to provide family structure and support for the [Indian child](#) and the [Indian child's](#) parents;
5. Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the child's Tribe;
6. Taking steps to keep siblings together whenever possible;
7. Supporting regular visits with [parents](#) or [Indian custodians](#) in the most natural setting possible as well as trial home visits of the [Indian child](#) during any period of removal, consistent with the need to ensure the health, safety, and welfare of the child;
8. Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the [Indian child's](#) [parents](#) or, when appropriate, the child's family, in utilizing and accessing those resources;
9. Monitoring progress and participation in services;
10. Considering alternative ways to address the needs of the [Indian child's](#) [parents](#) and, where appropriate, the family, if the optimum services do not exist or are not available;
11. Providing post-reunification services and monitoring

A Judicial Checklist Regarding Engaging Fathers In Dependency Cases

1. Identify all possible fathers as soon as possible.

¹³³ 25 Code of Federal Regulations, Part 23

2. Question the mother under oath regarding the identity of the father.
3. Determine where the father or potential fathers can be located. Use social media and family finding to locate any potential father.
4. Order the caseworker to follow-up on information gained from the court hearing.
5. Order the caseworker to personally serve each possible father with notice of the legal proceedings.
6. Insist that caseworkers use good faith efforts to identify, locate, and support the father throughout the child protection process. Use the “reasonable efforts” finding if necessary and appropriate.
7. Revisit the question of identity and location of the father at all subsequent court hearings.
8. When a potential father comes to court, let him know that the court is pleased that he has appeared because he is an important person in the child’s life. Let him know that once his paternity is established, he will be treated as a parent in all subsequent court proceedings.
9. Complete the testing for paternity as soon as possible at state expense unless the father has the means to pay for the testing.¹³⁴
10. Appoint counsel for the father at least as soon as paternity has been established, with the possibility of reimbursement considering his financial means.
11. Make it clear that the father may be a placement possibility for the child.
12. Identify the father’s extended family and ensure that they know about the legal proceedings and know that they will be considered as possible placements if placement is necessary.
13. Permit the extended family to participate in group decision-making processes, visitation, and court hearings.
14. Determine if the father is a danger to the mother or to the child and make appropriate protective orders.
15. Encourage the development in the community of services that will meet the needs of fathers. These could include parenting classes for fathers, parent coaching, fathers mentoring fathers, and other gender-based programs.

Judge Leonard P. Edwards is a retired judge now serving as a consultant and educator. Judge Edwards was a Superior Court judge in Santa Clara County, California for 26 years, retiring in 2006. He served as Judge-In-Residence with the California Judicial Council for 6 years. Judge Edwards is a judicial educator having given over 500 invited presentations in 47 states and 13 foreign countries. He is a past president of the National Council of Juvenile and Family Court Judges. In Santa Clara County he founded the Child Advocate Program, the Domestic Violence Council, Kids in Common, and the Dependency Drug Treatment Court which was the first such treatment court in California. His publications and videos can be seen on his website—judgeleonardedwards.com

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Chris is a member of the boards of directors of the National Center for Youth Law and Legal Services for Children, He is also former President of the National Association of Counsel for Children and current President of the Emeritus Board. He is a contributing author to *California Juvenile Dependency Practice* (Continuing Education of the Bar). Chris is a graduate of the University of Michigan Law School where his interest in children’s law began in the Child Advocacy Law Clinic.

¹³⁴ See Edwards L (2012) [Establishing Paternity Promptly in Juvenile Dependency Court](http://www.judgeleonardedwards.com/docs/PaternityTestingTheBench.pdf). The Bench (California Judges Association) <http://www.judgeleonardedwards.com/docs/PaternityTestingTheBench.pdf>