

ASFA: Has the pendulum swung to the point of sense or nonsense?

"The pendulum of the mind oscillates between sense and nonsense, not between right and wrong."
Carl G. Jung, *Memories, Dreams, Reflections* 154 (1989 Vintage ed.).

Background and Historical Context

The Adoption and Safe Families Act [ASFA] was passed by Congress with wide bipartisan support, in 1997.¹ The Department of Health and Human Services was tasked with the responsibility of turning the new law into regulations for implementation.² The ASFA regulations went into effect on 27 March 2000.³ The law is extremely complex, and there are exceptions to many of the basic rules. Although this paper sets out the most important features of ASFA, any attorney practicing in this area should read the law carefully and in depth, and study materials which have been published to explain the law.⁴

ASFA was not, by far, the first attempt which had been made to address the problem of children whose parents had either become unable to care for them, or who had allegedly abused or neglected them. The history of child welfare in America is best symbolized by a pendulum which swings between two opposing viewpoints: one which believes that when a child's own parents cannot take care of him/her, the child should be given to someone who, ostensibly, can do a better job; and the viewpoint which says that families are important, and should be preserved whenever possible. Under the latter paradigm, it is in the best interests of the child for the parent(s) to be given assistance and some reasonable amount of time to see if they can become better able to take care of their own children. The first group believes that the safety of the child should be the paramount consideration⁵; the second group believes that more children can be safe in their own homes, and that children fare better when they are given an opportunity to maintain their bonds with their parents and their community.⁶ Underlying both philosophies is a strong foundation of Constitutional law which has consistently held that parents have fundamental rights to the care, custody, and control of their own children,⁷ while also recognizing that parental rights are not absolute.⁸

When the history of 'child-saving' is recounted, the story of Mary Ellen is usually told. Legend has it that in 1875, a New York City child named Mary Ellen Wilson was defended by the Society for the Prevention of Cruelty to Animals, because she had been abused by her mother, and there were laws on the books to protect animals, but not children.⁹

In reality, New York had had a law against child abuse since 1833, and the woman accused of beating her was not her mother, but a woman with whom Mary Ellen had been sent to live. Mary Ellen was an illegitimate child, and had been placed by the New York City Department of Charities - - a precursor of today's foster care - - as an indentured servant. She was supposedly under supervision of the Board of Charities when the abuse occurred.¹⁰

From the late 19th century to the early 20th century, as many as 200,000 "orphans" were shipped to the mid-west as part of a plan called the "placing out system." Charles Loring Brace, a minister and forerunner of the social work profession, considered the children of immigrants - - particularly offspring of the Italian and Irish Catholic - - to be racially inferior. He opined that, if these children were removed quickly enough from their "depraved" parents, and placed in rural areas with Protestant families, they might rise above the "inferior culture" into which they had been born, and become responsible citizens.¹¹

Aside from the inherent bigotry, and other glaringly obvious issues and problems with this 'system,' data from historical research indicates that approximately 30-44% of these children were not orphans at all, but had at least one living parent.¹² Allegations were made of child-stealing, and lurking under the more overt appeal to Christian charity was a subtext of free labor, as many of the children who were sent west were used as free farm labor.¹³

To some extent, the 'placing out system' was a reaction to the institutionalization of children in orphanages. One hundred years before the case of Mary Ellen, New York City had opened one of the nation's first poorhouses.¹⁴ Early on, orphaned children were often housed along with the aged and the insane. By the end of the 19th century, some estimate that 100,000 children were living in children's orphanages.¹⁵ The pendulum swung between attempting to keep children near their families, communities, and roots by placing them in orphanages, or sending them away to new homes.

Around the turn of the century, the federal government began to take notice and to involve itself in the welfare of America's children. In 1909, the White House Conference on the Care of Dependent Children was held.¹⁶ The conference asserted that poverty alone did not make a parent unfit. It led to the establishment of a significant government support program which came to be known as the "Mother's Pension," or the "Widow's Pension," based on the tenet that "family life . . . is sapped in its foundations when the mothers of young children work for wages."¹⁷ The 1934 Social Security Act was an outgrowth, and included Title IV, which created Aid to Dependent Children, which in 1964 became Aid to Families with Dependent Children [AFDC].¹⁸

A radical change in the way child welfare was approached came in the early 1960's. In 1961, the term, "battered child syndrome" was coined, and physicians established that a child could continue to suffer physically and emotionally long after bruises and broken bones had appeared to heal.¹⁹ By 1966, all 50 states had passed legislation requiring doctors and other health care workers to report suspected cases of child abuse.²⁰

In 1974, Congress passed the Federal Child Abuse Prevention and Treatment Act. States were required to strengthen mandatory reporting laws or lose federal money. Courts around the nation were flooded with parents accused of intentionally injuring their children.²¹ A philosophical dichotomy emerged between those who believed that children should be protected by being removed from unsafe and potentially unsafe families, opposed by civil libertarians who believed that, "in the haste to ferret out abuse[,] the rights of children and families were being trampled."²²

By 1977, there were in excess of 500,000 children in foster care in the United States.²³ In response to those rising numbers, in 1980, Congress passed the Adoption Assistance and Child Welfare Act [AACWA].²⁴

AACWA attempted to strike a balance between keeping children safe from abuse while at the same time preventing the unnecessary severing of children from their families of origin and their communities. The federal government provided funding to help states pay for both adoption and reunification costs, not just foster care.²⁵ The law required courts to make findings that leaving a child with his/her parent(s) was "contrary to the welfare" of the child, and that "reasonable efforts" had been made to prevent removal.²⁶

Critics of AACWA claimed that it placed too much emphasis on family preservation and reunification, and as a result, caused children to languish endlessly in foster care while their parents were given limitless time in which to cure alleged ills. They believed that under AACWA, children's safety could not be ensured. AACWA supporters, on the other hand, saw children not as sole individuals, but as members of families and communities. They insisted that troubled families deserved an opportunity to try and reunify, and that diligent efforts should be made by the government to help them; but they also reluctantly conceded that once efforts had been made and had failed, children should then be freed for adoption. Within 2 years of the passage of AACWA, the number of children in foster care was cut almost in half from the 1977 figure.²⁷

But, in the early years of the Reagan administration, there were broad-scale reductions in government spending on social welfare programs.²⁸ The Reagan administration attempted to get AACWA repealed, but when that failed, it dramatically cut funding for family preservation and reunification services, but placed no cap on foster care subsidies.²⁹ In 1989, the federal government spent more than \$1 billion on foster care, but no more than \$124 million on preventive services.³⁰ By 1994, foster care roles had dramatically increased, to more than 465,000 children.³¹

So before AACWA was given any reasonable chance of success, the pendulum swung once more, away from the focus on family preservation, and making reasonable efforts at reunifying troubled families, and towards safety as the primary goal. Richard Gelles, a professor of sociology at the University of Rhode Island, was one of the advocates of swinging the pendulum back in the 'safety' direction. He wrote a landmark book called, The Book of David, in which he describes the horror of coming to believe that a small boy was

killed by his mother as a result of a child welfare system which was too focussed on family preservation/reunification and not cognizant enough of safety and the need to protect children from abusive parents.³² He had previously been an advocate of family preservation, but changed his mind as a result of a case he referred to as the "David Edwards case." He asserted that the family preservation model was a failure, that too many children died as a result, and it was necessary to "put children first."³³

Calling for a new "Child-centered Policy," Gelles stated that,

The essential first step in creating a safe world for children is to abandon the fantasy that child welfare agencies can balance the goals of protecting children and preserving families, adopting instead a child-centered policy of family services. This is not a new policy, but rather a return to the policy of the early 1960s that established child safety as the overriding goal of the child welfare system.

If we have learned anything in the past thirty years, it is that we cannot achieve the delicate balance between keeping abused children safe and keeping them with their parents. The data we have on child welfare interventions support a child-centered policy that aims at reducing the risk for children and matching interventions to their needs. More important, the interventions must be applied efficiently enough that children do not languish in administrative limbo while court cases drag on.³⁴

On the opposing side, Richard Wexler has been among the strongest proponents of giving family preservation a reasonable chance. Wexler, author of Wounded Innocents: The Real Victims of the War Against Child Abuse, wrote the following in a law journal article, highly critical of policies put into play by ASFA:

ASFA was the culmination of an assault on safe, effective programs to keep families together that began in the 1990's. The law has caused untold misery for thousands of children. While supposedly intended to solve the problems of the foster care system, it has, in fact, worsened those problems. In the name of promoting adoption, it is creating a generation of legal orphans. And worst of all, in the name of child safety, it has made children less safe.

There is nothing really new about the ASFA approach. Its guiding philosophy can be boiled down to a single sentence: "take the child and run."³⁵

As is often the case, the truth probably lies somewhere in between. There ought to be a way, in the 21st Century, in the wealthiest nation on earth, to both keep most children safe most of the time, AND, at the same time, to preserve most families most of the time. The balance of this manuscript will focus on the most important features and requirements of

ASFA, and how the current interpretation and application of the regulations appear to be having draconian consequences, especially for those living in poverty and for children of color. Some of the promises of ASFA have been realized; other goals either been not realized, or have been achieved at the price of unnecessarily destroying families bonds.

Key Provisions of ASFA

The primary goals of ASFA were to:

- (1) shift the emphasis from making efforts to reunify families to ensuring that children were safe;
- (2) achieve permanent homes more quickly, that is decrease the amount of time which children spend in foster care and move them more quickly either back to their own homes or into adoptive homes; and
- (3) increase the number of adoptions from the pool of children in foster care who are available for adoption.³⁶

To achieve those goals, ASFA set time restrictions which states have to meet in order to receive Title IV reimbursement money from the federal government.³⁷ The federal government reimburses state governments for approximately 65% of their foster care costs.³⁸

Under ASFA, the following deadlines must be met in order for states to receive their federal funding:

- Within 60 days from the date upon which the child is removed from his/her home, a Case Plan must be established.³⁹

The term "case plan" means a written document which includes at least the following: "a plan assuring that the child receives safe and proper care and that the services are provided to parents, child and foster parents in order to improve conditions in the parents' home, facilitate return of the child to his own safe home"⁴⁰

- In the very first court order, the court must make a finding that "continuation in the home is contrary to the welfare of the child."

"Contrary to the welfare findings must be 'detailed' and be in the court order or hearing transcript. Affidavits, *nunc pro tunc* orders, or orders simply referring

to a state law requiring such findings for removal do not meet this requirement."⁴¹

- Within 60 days from the date upon which the child is removed from his/her home, the court must make a finding that "reasonable efforts have been made to prevent the child's removal from home."⁴²

Under certain circumstances, reasonable efforts need not be made. For example, reasonable efforts need not be made when removal is necessary because there is no way to ensure the child's safety while providing services.⁴³

- Within 6 months of the date upon which the child "enters foster care," a six-month periodic review must be held. The date on which the child entered foster care is one of the following, whichever ever occurred first:
 - (a) the date upon which the court found the child to be abused or neglected;
 - (b) 60 days after the child's actual removal from his/her home.⁴⁴
- Within 12 months of the date upon which the child enters foster care, the court must make a finding that the agency has made reasonable efforts to finalize a permanent plan.⁴⁵

"Reasonable efforts findings must be detailed - they must include relevant case facts. These findings must be in the court order or hearing transcript. Affidavits, *nunc pro tunc* orders, and orders simply referring to state laws requiring reasonable efforts for removal do not meet the requirement . . . The exact wording of the federal statute does not have to be used as long as the findings make clear that the agency made reasonable efforts."⁴⁶

Judicial determinations that reasonable efforts have been made are considered "important safeguard(s) against inappropriate agency action" which are not supposed to become "a mere pro forma exercise in paper shuffling to obtain Federal funding."⁴⁷ While specific terminology need not be used, "[i]t must be clear, however, that the court really determined that the agency actually made reasonable efforts."⁴⁸

- If the child remains in foster care for 15 out of 22 months, the agency MUST file a termination petition.⁴⁹ Additionally, if a court determines that a child is an abandoned infant, or has been convicted of a particular felony,⁵⁰ then the agency must file the Petition within 60 days of the date on which the finding is made.⁵¹

These are the only points in time, and the only circumstances under which an agency is REQUIRED to file a TPR Petition. This latter deadline - - mandating that an agency must file a termination petition if the child remains out of his/her home for the previous 15 out of 22 months - - is the most radical and controversial of the ASFA provisions.

The Problems with ASFA

First of all, ASFA is built on a false premise. Statistics show that adoptions climbed steadily through the 1990's, before ASFA was implemented.⁵² So it was not necessary to implement ASFA in order to increase adoptions. Adoptions decreased in 2001, increased slightly in 2002, but then dropped again in 2003.⁵³

The pool of children available for adoptions is constantly being refilled as terminations increase. It is common knowledge that younger children are more likely to be adopted. Children of color are less likely to be adopted than Caucasian children. If states continue to terminate parents' rights at a faster rate than adoptive homes can be found for children, are we doing much more than using the law to bastardize children who could have gone home, safely - - and perhaps more quickly - - had their parents had been provided a little assistance and a little more time? In 2002, there were 67,000 terminations and 53,000 adoptions, nationwide; in 2003, terminations increased to 68,000, but adoptions dropped to 49,000.⁵⁴

A second false premise is the assumption that children must be safer in foster care than they are with their own families. The fact is, no adult - - parent or foster caregiver - - can guarantee a child's safety 100% of the time. As our Supreme Court held in In re Stumbo,

On this record, we have a report of a circumstance that probably happens repeatedly across our state, where a toddler slips out of a house without the awareness of the parent or caregiver -- no matter how conscientious or diligent the parent or care giver might be. While no one wants that to happen, such a lapse does not in and of itself constitute "neglect" under N.C.G.S. § 7B-101. However, a single report of a naked, unsupervised two-year-old in the driveway of her home does not trigger the investigative requirements of N.C.G.S. § 7B-302.⁵⁵

Placement in FC does not guarantee safety. In November 2000, Time Magazine published the results of an investigation which they had conducted, in an article called, "The Crisis of Foster Care." In the article, the author stated that,

Many foster parents . . . continue to act selflessly as important way stations for at-risk kids while their biological parents get their lives together. However, neglect and a quagmire of child-swallowing

bureaucracies plague the system. And the incidence of neglect, physical and sexual abuse of children in the various foster-care systems is feared to be significantly higher than the incidence in the general population. Nobody bothers to keep an accurate count, but in round numbers, more than 7,500 children are tortured under what is technically government protection.⁵⁶

The National Coalition for Child Protection Reform has found statistics to support the conclusion that children are always not safe in foster care: a child is twice as likely to die from abuse suffered in foster care as in the general population. NCCPR cites studies which show that in Baltimore, the rate of substantiated cases of sexual abuse was more than four times higher in foster care than in the general population. A study of foster children in Oregon and Washington state found that nearly 1/3 of the children reported being abused by a foster parent or other adult in a foster home.⁵⁷

Beyond the flawed premise behind ASFA, the problems with the law tend to fall into two categories. There are both inherent flaws, flaws in the way ASFA was written; and there are also flaws in the way ASFA is applied. The most troubling aspect of the way ASFA is structured is that state governments are paid to adopt children out; no incentives are paid for placing a child in any other permanent home, including back with their parents.

ASFA was intended to encourage adoption, so it was written to provide adoption incentive payments to states. A baseline was established for each state, based on an average of the number of adoptions which took place between 1995 and 1997. States receive a bonus for each child adopted above the baseline in a given year. "Regular" children are worth \$4,000; special needs children are worth \$6,000.⁵⁸ In some cities and counties, quotas have been imposed.⁵⁹

As soon as money enters the picture, conflict of interest - - or at least the potential for conflict of interest - - becomes possible. There are no incentive payments or awards for achieving any other permanent plan for a child. Specifically, there is no financial incentive for reuniting children with their own parents. For example, if a sibling-group of 3 children will bring an \$18,000 bonus to North Carolina, and a social worker is sitting on the fence trying to decide whether to recommend either reunification or adoption, isn't there at least the possibility that the money will influence her decision? When deciding where children should live, money shouldn't be the deciding factor. Bonuses should either be eliminated, or should be given not just for adoption, but for achieving any safe permanent home for a child, regardless of what the permanent plan is.

A second problem with ASFA is that the term 'reasonable efforts' is not defined. The law does not provide a list or even any guidelines for what types of efforts are reasonable. Consequently, when social workers draft so-called 'reasonable efforts reports,' they are often replete with items such as, "took Junior to the dentist." Taking Junior to the dentist is not a reasonable effort towards reunifying a family; it is something the government must do,

under the *parens patriae* doctrine because the state has taken away the parent's chance to do it.

Another problem inherent in ASFA is that it treats the cases of abused children the same way it treats cases which involve neglected children. Intentional abuse is a different problem from neglect. Abuse cases should be fast-tracked, and ASFA makes some provision for that, under limited circumstances.⁶⁰ In 2002, the federal government determined that of the approximately 35,000 children reported as maltreated, approximately 90% were substantiated for neglect, and about 7% were substantiated for abuse.⁶¹

This failure to separate abuse of children from neglect of children, and to treat them distinctly differently, however, is at the very root of the argument between the "safety at the expense of family preservation" advocates, and the "family preservation at the expense of safety" advocates. That children should be safe is a given. But how much consideration is ever given to the damage which is done to children by removing them from the only parent(s) they have ever known? "Think for a moment what it means to rip children from their parents and their brothers and sisters and place them in the care of strangers Tearing children from their parents almost always leaves emotional scars."⁶²

Putting children in foster care does not guarantee their safety. And although those of us who represent parent-respondents are inevitably focussed on the rights of our clients, don't children have a right to know their parents, especially when many parents are 'guilty' of nothing more than being economically disadvantaged?

Neglect, as opposed to abuse, is not usually the result of intentional acts, and more often than not, is driven by poverty. Parents who are already struggling because of poverty-related issues should not be further victimized by having their children removed. When children and their parent(s) are living in poverty, then genuine reasonable efforts should be made to keep the family together, a reasonable spectrum services should be provided, and a reasonable amount of time should be allowed for them to make their home environment safe. ASFA does not address the root cause of why most children enter foster care, which is because of poverty-related issues.

In the year 2000, nearly 20% of North Carolina's children were living in poverty.⁶³ "Poverty is confused with neglect . . . because 'it often comes packaged with depression and anger, poor nutrition and housekeeping, lack of education, and medical care, leaving children alone, exposing children to improper influences.'"⁶⁴

Parents who are actively working to regain custody of their children should not have their rights terminated based on the children being in foster care for 15 out of 22 months. It is somewhere between totally unrealistic and impossible for parent(s) living in poverty to overcome the multiple issues which they face in such a short period of time. Often they are told they have only a year - - not 15 months - - to: "find and maintain stable housing," "find and maintain stable employment"; get a substance abuse assessment and follow all

recommendations; overcome addiction; attend parenting classes; attend counseling/training sessions for domestic violence; get a psychological evaluation and follow all recommendations. These are common case plan goals, which parents are frequently expected to complete in 12 months. How can anyone *maintain* stable housing or employment in one year's time (or less)? especially when, more often than not, no reasonable effort at all is being made to assist them.

Too often, parental rights are being terminated in cases like these:

(1) the parent failed to complete her case plan; the mother lived in a rural area, and could not afford a telephone. She could use a neighbor's phone for emergencies, but the case plan required her to call the social worker 3 times a week. When the neighbor got tired of the mother using the phone so often, the mother had to walk 3 miles to get to a pay phone. She could not do it 3 times a week. By 'failing to stay in touch with the social worker,' she failed to comply with the case plan.

(2) the parents were temporarily living in their car; no, of course that is not a good environment in which to raise children. But both parents had only worked factory jobs, and the factory in which they had worked closed. The solution was not to take the children away; the solution was to help the family find safe, affordable housing. The parents looked for work but could not find jobs. They received no assistance with job training, seeking employment, or seeking housing. Their rights to their 3 children were terminated.

(3) Mother smoked marijuana. Yes, of course it is illegal and wrong. However, she never smoked it in front of her two sons. There was no evidence that her marijuana use had any affect on the children. She had used it infrequently for many years, and had never 'graduated' to crack/cocaine/heroine. She was told she had one year to recover from her "addiction." She was put on a waiting list, and could not get into a substance abuse treatment program for 3 months. The brochure from the treatment program says that it cannot be completed in a year, and most people take 2 years. Her rights were terminated because she failed to complete her case plan in a year.

(4) House was "cluttered," with piles of clothing left on beds, and dishes in the sink. Children were removed due to an 'injurious environment, and adjudicated to be neglected.

(5) "Instability;" mother could not afford to buy a car, and could not afford auto insurance. She worked minimum-wage jobs, and was a single parent while her husband was incarcerated. She could not keep any one particular job for any length of time because she lacked reliable transportation. Because she could not maintain stable employment, she moved frequently. Her rights to her son, who was 6 months old when he was removed from her care, were terminated when the child was 22 months old because the mother had not corrected the conditions which led to removal.

Fifteen months is simply not a reasonable period of time in which to fix the long laundry-list of problems often seen in case plans, many of which have no impact on the child, and have nothing to do with making sure children are safe. For example, "instability" - - moving frequently - - almost certainly had less negative impact on the 6-month-old baby than removing him from his mother/primary caregiver did. If instability is a ground for termination, then the rights of nearly every parent serving in the military would need to be terminated.

ASFA has had a disproportionate impact on families of color. Dorothy Roberts, professor at Northwestern University School of Law, and author of Shattered Bonds: The Color of Child Welfare, asserts that white children who are abused or neglected are twice as likely as Black children to receive in-home services, while Black children are far more likely to be removed from their homes.⁶⁵ Once in foster care, Black children tend to remain there longer than white children. "Nearly half of white children who are placed in foster care return home within three months; very few Black children do."⁶⁶

Statistics maintained by the federal Administration for Children and Families show that in North Carolina, in 2002, (the most recent year for which such statistics have been released,) Black children made up 25.9% of the population of children under 18, while on 30 September 2002, 44.7% of the children in foster care were Black. For the same year, 62.2% of children under 18 in North Carolina were White, but 45.5% of the children in foster care were White. So, even though there were approximately 2.5 times as many white children as Black living in North Carolina, there were roughly equal numbers of Black and White children in foster care. Of children waiting to be adopted, 47.2% were Black, while only 43.3% were White.⁶⁷

As stated above, there are also flaws in the way ASFA is applied. First of all, states are free to shorten the deadlines imposed by ASFA. For example, in North Carolina, one ground for terminating a parent's rights to his/her children is if the parent "has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress has been made in correcting those conditions which led to removal" ⁶⁸

ASFA does not require termination under those circumstances; ASFA only requires that social services file a termination Petition if the child has been in placement in state-sponsored foster care for 15 out of the previous 22 months. Further, under ASFA, a child does not "enter foster care" on the date when s/he is removed from his/her parents' home. A child enters foster care on either (a) the date upon which the court found the child to be abused or neglected; or (b) 60 days after the child's actual removal from his/her home.⁶⁹ Therefore, under ASFA, a parent actually has 17 months to turn his or her life around, while North Carolina only allows that parent 12 months.

Further, the Petitioner is supposed to bear the burden of proving, by clear, cogent, and convincing evidence, that grounds exist for termination.⁷⁰ Yet, under the ground for

termination cited above, the burden is shifted to the parent; the parent must prove to the court's satisfaction that s/he has corrected the conditions which led to removal.

It also appears clear that in many cases, no reasonable efforts are being made at all. As stated above,⁷¹ ASFA requires reasonable efforts to be made; it is one of the foundational assumptions on which ASFA is built. In a recent case, a social worker stated that the Department had provided "extensive services." But when cross examined by the mother's attorney, the social worker testified that the mother had been ineligible for emergency financial assistance because the children had been removed, and that the only services which had been provided to the mother was that the Department had drafted a case plan, and that a social worker had given the mother occasional rides to visit with her son, since she did not own a car, and did not have access to public transportation. No reasonable efforts report was included in the court file.⁷² In the author's experience, this is fairly typical.

As stated above, findings that reasonable efforts have been made were considered "important safeguard(s) against inappropriate agency action," and were not supposed to become "a mere pro forma exercise in paper shuffling to obtain Federal funding."⁷³ Yet that is exactly what it has become in many cases in North Carolina. After examination of many court files and transcripts, it is this author's experience that most findings that agencies have made reasonable efforts at reunification are not supported by clear, cogent, and convincing evidence.

An essential key to reunification between children and their parents is sufficient visitation.

Visitation between parents and children in out-of-home placements is vital. Studies show visitation is the most important factor in the reunification process. . . . In addition to assisting in visitation, the caseworker should be making consistent efforts to facilitate a meaningful relationship between parent and child. This includes regularly informing the parent about the child's progress, and including the parent in health and educational decisions.⁷⁴

Yet, in North Carolina cases, parents are frequently restricted to one hour a week of supervised visitation a week, even when the permanent plan for the child is to return home. Making reasonable efforts at reunification should include liberal visits between parents and children.

How are North Carolina's Foster Children Faring Under ASFA?

In April of 2004, the New York Times published an article stating that Federal investigators had found widespread problems in the implementation of ASFA. The article stated that, "No state fully complies with standards established by the federal government to assess performance in protecting children and finding safe, permanent homes for those who have

suffered abuse or neglect."⁷⁵ Further, there are 14 standards, 7 of which "focus on the safety and well-being of children, including the incidence of abuse and neglect, the time they spend in foster care and the stability of their living arrangements." Sixteen states failed to meet all of those 7 standards, and one of the states which failed is North Carolina.

The 7 "outcome areas" in which North Carolina was "out of substantial compliance," include the following:

Safety Outcomes

1. Children are, first and foremost, protected from abuse and neglect.
2. Children are safely maintained in their homes whenever possible and appropriate.

Permanency Outcomes

1. Children have permanency and stability in their living situations.
2. The continuity of family relationships and connections is preserved for children.

Child and Family Well-Being Outcomes

1. Families have enhanced capacity to provide for their children's needs.
2. Children receive appropriate services to meet their educational needs.
3. Children receive adequate services to meet their physical and mental health needs.⁷⁶

In other words, federal evaluators found that, despite implementation of ASFA's mandated priority of "safety first," North Carolina was not doing a sufficient job of keeping children safe, nor was North Carolina doing a sufficient job of maintaining children safely in their own homes whenever possible and appropriate. Additionally, children do not have permanency or stability in their living situations, or continuity with their family relationships and connections.

Another sign of North Carolina's functioning in the environment created by ASFA is that in 2001, North Carolina earned \$623, 679 in adoption bonus money for increasing the number of children adopted.⁷⁷ In 2003, North Carolina's adoption bonus dwindled to \$320,000.⁷⁸ In 2005, North Carolina did not earn any adoption bonus money at all.⁷⁹

In raw numbers, in 2000, the year during which ASFA was implemented, 1,337 children were adopted in North Carolina. In 2001, the number was 1,327 (10 fewer). In 2002, the number was 1,324, another slight decrease from the previous year.⁸⁰ As for children still awaiting adoption, the numbers have declined, but not radically so. In 1999, before ASFA was implemented, there were 3,595 children waiting to be adopted; in 2000, the number increased to 3,709; in 2001, it decreased to 3,329; and in 2002, 3,130 children still waiting to be adopted.⁸¹

Conclusion:

The problems which ASFA was designed to solve will not be solved unless and until the root cause of the child welfare problem is addressed: poverty. There is simply no excuse for 20% of NC children to be living in poverty in 21st Century America. This author does not advocate that we return to a welfare system which involves no responsibility, and hand-outs of government checks. But at the same time, parents living in poverty should be given reasonable amounts of assistance for reasonable amounts of time, and they should be given a legitimate chance to address the issues which create barriers to them living safely with their children.

This is important, not just because parents have Constitutionally protected rights, but also because children should have the right and opportunity to know their parents and siblings and other relatives. In poverty-driven neglect cases, the government should be required to make genuine reasonable efforts. Further, what the government orders, the government should pay for; for example, if a trial court orders a parent to have psychological evaluation as a condition of reunification, and the parent is indigent, the government should pay for the evaluation. Indigent parents should not have their rights terminated if they fail to finish a case plan because they are unable to afford what the government orders them to do

In cases where there is clear evidence of intentional abuse, termination should be should be fast-tracked. If a parent has a subsequent child, after his/her rights are terminated to an abused child, s/he should bear the burden of proof that s/he is fit to parent that subsequent child.

"Permanent termination of parental rights has been described as the family law equivalent of the death penalty in a criminal case."⁸²

This Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to "the companionship, care, custody, and management of his or her children" is an important interest that "undeniably warrants deference and, absent a powerful countervailing interest, protection."⁸³

It is a fallacy to apply either/or thinking to child welfare cases: children should be both safe AND protected from unnecessary severance from their families of origin whenever preservation or reunification is reasonably possible. That is the place in the middle where the pendulum should ultimately settle, and where the law would make sense.

¹ DEBRA BAKER, MAKING SENSE OF THE ASFA REGULATIONS 3 (2001). See, also, Pub. L. 103-89.

² Id. ASFA was codified at 42 U.S.C. §§ 620-679.

³ Id., at 4.

⁴ See, generally, Baker, supra at note 1.

⁵ See, generally, RICHARD GELLES, THE BOOK OF DAVID: HOW PRESERVING FAMILIES CAN COST CHILDREN'S LIVES (1996).

⁶ See, generally, MARIANNE BERRY, THE FAMILY AT RISK: ISSUES AND TRENDS IN FAMILY PRESERVATION SERVICES (1997).

⁷ See, e.g., Troxel v. Granville, 530 U.S. 57 (2000)(holding that the Due Process Clause "includes a substantive component that provides 'heightened protection against government interference with certain fundamental rights and liberty interests.' The liberty interest at issue in this case – the interest of parents in the care, custody, and control of their children – is perhaps the oldest of the fundamental liberty interest recognized by this court.") Troxel, at 65 (citation omitted).

⁸ See, e.g., In re R.T.W., 359 N.C. 539, 614 S.E.2d 489 (2005)(holding that it is possible for parents to forfeit their constitutionally protected rights if they are found to be unfit, or if they behave in a manner which is inconsistent with their constitutionally protected status,) R.T.W. at 543, 614 S.E.2d at 492.

⁹ RICHARD WEXLER, WOUNDED INNOCENTS: THE REAL VICTIMS OF THE WAR AGAINST CHILD ABUSE 30-31(1995).

¹⁰ Id., at n. 2-3.

¹¹ The Adoption History Project: Charles Loring Brace (1826-1890), <http://darkwing.uoregon.edu/~adoption/people/brace.html> (last visited 26 November 2005).

¹² See WEXLER, supra note 4, at 35.

¹³ Id., at 36.

¹⁴ LYNNELL HANCOCK, HANDS TO WORK 78 (2002).

¹⁵ DUNCAN LINDSEY, THE WELFARE OF CHILDREN 13 (2004)

¹⁶ JENNIFER REICH, FIXING FAMILIES: PARENTS, POWER, AND THE CHILD WELFARE SYSTEM 34 (2005).

¹⁷ Id.

¹⁸ Id., at 35.

¹⁹ JOHN HUBNER, SOMEBODY ELSE'S CHILDREN: THE COURTS, THE KIDS, AND THE STRUGGLE TO SAVE AMERICA'S TROUBLED FAMILIES 71 (2003).

²⁰ Id., at 71.

²¹ Id., at 72.

²² Id.

²³ See REICH, supra note 16, at 43.

²⁴ Id., at 42.

²⁵ Id., at 42-3.

²⁶ Id.

²⁷ See LINDSEY, supra note 15 at 83, noting that there were more than 500,000 children in foster care

in 1977, and only 262,000 in 1982.

²⁸ Id.

²⁹ See WEXLER, supra note 9, at 219.

³⁰ Id.

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- ³¹ HHS, Administration for Children and Families, Population Flow Exhibit 8, <http://www.acf.hhs.gov/programs/cb/dis/vcis/ii08.htm> (last visited on Nov. 25, 2005).
- ³² RICHARD GELLES, *THE BOOK OF DAVID: HOW PRESERVING FAMILIES CAN COST CHILDREN'S LIVES* (1996).
- ³³ *Id.*, at 145.
- ³⁴ *Id.*, at 148.
- ³⁵ Richard Wexler, *Take the Child and Run: Tales from the Age of ASFA*, 36 *NEW ENG. LAW REV.* 129, 130 (2001).
- ³⁶ Paul Wilhelm, *Permanency at What Cost? Five Years of Imprudence Under the Adoption and Safe Families Act of 1997*, 16 *NOTRE DAME L. REV.* 617,618 (2002).
- ³⁷ See Baker, *supra* note 1, at 3,4,7.
- ³⁸ Children's Defense Fund: Child Welfare in North Carolina, <http://www.childrensdefense.org/childwelfare/financing/factsheets/nc.pdf> (last visited on 29 Nov. 2005).
- ³⁹ *Id.*, at 8.
- ⁴⁰ 42 U.S.C. 675 (emphasis added).
- ⁴¹ Baker, *supra* note 1, at 9, citing 45 C.F.R. § 1356.21(d).
- ⁴² *Id.*, at 8-9.
- ⁴³ *Id.*
- ⁴⁴ *Id.*, at 7-8.
- ⁴⁵ *Id.*, at 8,10.
- ⁴⁶ *Id.*, at 10, citing 45 C.F.R. § 1356.21(d).
- ⁴⁷ *Id.*, at 33, citing S. Rept. No. 336, 96th Cong., 2d Sess.16 (1980).
- ⁴⁸ *Id.* at 35, citing 65 FR 4056.
- ⁴⁹ *Id.*, at 8, 97, citing 45 C.F.R. § 1356.21(i).
- ⁵⁰ *Id.*, at 251, citing 45 C.F.R. § 1356.21(ii), which lists murder, involuntary manslaughter, and several other felonies as grounds.
- ⁵¹ *Id.*, at 97.
- ⁵² HHS, Administration for Children and Families, Adoptions of Children with Public Child Welfare Agency Involvement . . . FY 1995-FY 2003, http://www.acf.hhs.gov/programs/cb/stats_research/afcars/adoptchild03b.htm (last visited on Nov. 25, 2005), showing that in 1995, 25,693 children were adopted; in 1996, 27,761 children were adopted; in 1997, 31,030; in1998, 37,088; in 1999, 46,870; and in 2000, 51,050 children were adopted.
- ⁵³ *Id.*
- ⁵⁴ The AFCARS Report, <http://www.acf.hhs.gov/programs/cb/publications/afcars/report10.htm> (last visited on Nov. 25, 2005). There were 523,000 children in foster care in fiscal year 2003; 50% of them were age 11 or older. During 2003, 297,000 children entered foster care, but only 281,000 exited. As of Sept. 30, 2003, 119,000 remained in the pool of children waiting to be adopted. *Id.*
- ⁵⁵ *In re Stumbo*, 357 N.C. 279, 283, 582 S.E.2d 255, 258 (2003).
- ⁵⁶ Timothy Roche, *The Crisis of Foster Care*, *TIME MAG.*, Nov. 13, 2000, at 72.
- ⁵⁷ National Coalition for Child Protection Reform, Issue Paper #1, Foster Care vs. Family Preservation: the Track Record on Safety, <http://www.nccpr.org/newissues/1.html> (last visited on Nov. 11, 2005).
- ⁵⁸ DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 110 (2002). See, also, 42 U.S.C. §673(b)(2001)(A State is an incentive-eligible State for a fiscal year if . . . the number of foster child adoptions in the State during the fiscal year exceeds the base number of foster child adoptions for the State for the fiscal year"

⁵⁹ Id., at 111, noting that Children's Services of Roxbury, a private social service agency in inner-city

Boston was given a quota.

⁶⁰ See supra at note 50 and accompanying text.

⁶¹ North Carolina Context Data, http://www.acf.hhs.gov/programs/cb/publications/cw02/state_data/northcarolina.htm (last visited on Nov. 27, 2005).

⁶² Roberts, supra at note 57, at 19.

⁶³ ChildWelfare.com, http://www.childwelfare.com/states/profiles/north_carolina/adoptionrc/Incadoption.htm (last visited on Nov. 30, 2005).

⁶⁴ Roberts, supra note 57, at 27.

⁶⁵ Roberts, supra note 57, at 17.

⁶⁶ Id., at 19, citing a study of the US Department of Health and Human Services

⁶⁷ North Carolina Factsheet, US Dept. Health and Human Services, http://www.acf.dhhs.gov/programs/cb/publications/cwo02/state_data/northcarolina.htm (last visited on 27 Nov. 2005).

⁶⁸ N.C.G.S. § 7B-1111(3).

⁶⁹ See Baker, supra note 1, at 7-8.

⁷⁰ N.C.G.S. § 7B-1109(f).

⁷¹ See supra at note 46, and accompanying text.

⁷² Transcript and case file in the possession of the author, for appellate purposes.

⁷³ See supra at note 47, and accompanying text.

⁷⁴ Jennifer Renne, *Reasonable Efforts to Finalize a Permanency Plan for Reunification*, 19 ABA CHILD LAW PRACTICE 38 (2001).

⁷⁵ Robert Pear, *U.S. Finds Fault in All 50 States & 39 Child Welfare Programs*, N.Y. TIMES, April 26, 2004, p. A17

⁷⁶ *Feds Review Child Welfare System in North Carolina*, FOSTERING PERSPECTIVES, Vol. 6, no. 1, Nov. 2001, http://ssw.unc.edu/fcrp/fp/fp_vol6no1/fedsreview_cw_nc.htm (last visited on Nov. 25, 2005). See also, North Carolina State Final Report/ Detailed Summary of Findings, US Dept. HHS, Administration for Children and Families, <http://www.acf.hhs.gov/programs/cb/cwrp/staterpt/nc.htm> (last visited on April 26, 2005).

⁷⁷ HHS News Release: HHS Awards Adoption Bonuses, 10 Sept. 2001, <http://www.acf.hhs.gov/news/press/adoption.html> (last visited on Nov. 27, 2005).

⁷⁸ HHS News Release: HHS Awards \$14.9 Million in Bonuses to States for Increasing the Number of Adoptions of Foster Children, 12 Sept. 2003, <http://www.acf.hhs.gov/news/press/2003pres/20030912.html> (last visited on Nov. 27, 2005).

⁷⁹ HHS News Release: \$14.5 Million Awarded to States for Increasing Adoptions http://www.acf.hhs.gov/news/press/2005/adoption_incentives.htm (last visited on Nov. 27, 2005).

⁸⁰ North Carolina Context Data, http://www.acf.hhs.gov/programs/cb/publications/cw02/state_data/northcarolina.htm (last visited on Nov. 27, 2005).

⁸¹ Children in Public Foster Care Waiting to be Adopted, <http://www.acf.hhs.gov/programs/cb/dis/tables/waiting2003.htm> (last visited on Nov. 27, 2005).

⁸² *In re Smith* (1991), 77 Ohio App.3d 1, 16, 601 N.E.2d 45, 54.

⁸³ *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 27(1981).
