Permanency, Foster Parents and the Law

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When children are removed from their homes and placed in foster care, their world is thrown off balance. Even though they are leaving a home where they were neglected or abused, they are often scared, ashamed and nervous about the unknown. Good foster parents help restore balance to the child's world. It is the foster parents who comfort the child, determine his needs, provide support, and often, love. Foster parents are the players in the system who are often unseen, laboring behind the scenes to make a home for the child. That can mean getting the child enrolled in school, taking him to doctors and making sure he has contact with his family. Countless day-to-day needs are met by foster parents.

Foster children often become part of the family, confiding in their foster families and turning to them for support. While our legal system recognizes the rights of birth families, foster parents often have no formal rights granted to them by legislatures or courts. It is often up to the foster parent to take the initiative to learn the system, so they can advocate for themselves and the children in their care.

This manual is intended to educate foster parents about the legal process, giving them the knowledge and confidence they need to become active participants in the system. Knowing how to collaborate with the agency and court benefits both foster parents and foster children.

There are many reasons that foster parents should actively participate in agency and court processes. Foster parents are often in the best position to give an account of the child's well-being. Foster parents see the child every day and have an understanding of the child's developmental level, needs, routines, likes and dislikes. That level of knowledge cannot be achieved by courts or agencies, who have limited contact with the child.

By becoming more regularly involved, foster parents can learn about the system, and gain a better understanding of how and when to speak up or take action. If others in the system become used to hearing from foster parents on a regular basis, they will be more comfortable with foster parents participating in the courtroom or at case planning meetings. The court and agency will benefit from the information offered by foster parents and be better able to make sound decisions based on more complete information. Foster parents who are involved and understand the system can be strong advocates for the children in their care, because it is the foster parents who often have the greatest awareness of the child's needs.

There are many reasons foster parents do not participate in the process. Sometimes they are expressly excluded, but often they do not participate because of their own fears and beliefs, or the beliefs and prejudices of others in the system. Foster parents often fear that if they speak up in court they will be reprimanded, or misunderstood, or even anger the judge and/or agency, either of whom may retaliate by removing the child. Learning about the adversarial process can help minimize some of those fears. In later chapters, we will discuss some techniques for presenting oneself effectively in the courtroom.

Improving foster parent presence in the courtroom will make the professionals involved more willing to hear the foster parent's point of view. Others in the system, such as caseworkers, lawyers, or judges, may be wary of hearing from foster parents. They may think foster parents are biased against the biological parents and cannot present an objective viewpoint or they may be concerned that including foster parents would be too time consuming. Judicial resources are often strained. Many courts deal with high caseloads and lack time to devote to each case. Judges may believe that inviting other players in, especially those who are not familiar with the system, may be a needless or ineffective use of time.

While it is true that others within the system must become more educated and aware of the important role that foster parents play, there is a lot that foster parents can do to improve their image. Foster parents can educate themselves about the system, advocate effectively and present themselves as a valuable part of a team that is working toward the best interests of the child.

HOW FEDERAL LAW AFFECTS CHILD WELFARE

In order to understand the foster parent's place in the system, it is important to understand the basic structure of child welfare law, which is driven by federal mandates.

Each state determines its own child welfare laws, but federal law sets forth requirements which states must follow in order to receive federal funding for their child welfare programs.[i] The amount of funding states receive from the federal government is significant, and all states receive federal dollars to fund their programs. So, while the federal government cannot directly control state child welfare laws and programs, it influences state law and policy through funding incentives and penalties.

The federal laws governing foster care discussed below are found in Titles IV-E and IV-B of the Social Security Act.[ii] Foster parents should be aware of the requirements included in the Adoption Assistance and Child Welfare Act of 1980 [also commonly referred to as Public Law (PL 96-272)] and the Adoption and Safe Families Act (ASFA), passed in 1997.

The Adoption Assistance and Child Welfare Act of 1980

The Adoption Assistance and Child Welfare Act of 1980 requires courts to make two types of findings: that the agency has made reasonable efforts to prevent a child from being removed from the home, and a finding that remaining in the home is contrary to the child's welfare. The finding that the agency made reasonable efforts to prevent removal must be made within 60 days of the child's being removed from the home. The law also requires the agency to make ongoing reasonable efforts to reunify children in foster care with their parents.

The judge must make a finding that it is contrary to the welfare of the child to remain in the home in the very first court order authorizing the child to be removed from the home. If timely "reasonable efforts" and "contrary to the welfare" findings are not made, the state may face financial penalties. However, a failure to make the required findings does not affect the child's placement.

Congress enacted these laws out of a concern that middle class social workers might be quick to remove children from homes that did not conform to average middle class standards, and that

they might be too quick to give up on parents before offering them services and supports that could help them remedy the causes of abuse and/or neglect. The reasonable efforts requirements were intended to make removal a last resort and to encourage social workers to work to reunify families.[iii]

The law also addressed concerns that children were lingering in foster care. It provides for initial 6-month and 18-month case reviews and subsequent reviews every 12 months. [iv]

The above requirements reflect one of the main goals in child welfare: balancing the rights of parents to raise their children free from state intervention with the rights of children to grow up in a safe, stable environment. It is sometimes difficult to understand why parents who have abused or neglected their children have rights, but it is well-established law that parents have a fundamental constitutional right to raise their children, and that the state may only intervene in exceptional circumstances, such as when a child has been abused or neglected. Parents cannot be deprived of this fundamental right without due process of law, which basically includes the right to defend themselves and the right to legal representation.[v] Protecting family rights benefits parents *and* children by keeping families together, as long as children are safe.

The reason we place children in foster care is to keep them safe, not to give them access to the advantages they may receive in a foster home. When risk of harm is eliminated, children should remain with their parents. (Reunification and other placement options are discussed in further detail below.)

The Adoption and Safe Families Act (ASFA)

The Adoption and Safe Families Act (ASFA) was enacted in 1997. When it enacted ASFA, Congress was reacting to reports of children languishing in foster care without permanent plans for their future. They were also concerned about children being returned to their parents' homes when those homes were unsafe.

Once ASFA was enacted, states had to amend their own laws to conform to ASFA's requirements. States are not required to use the exact language contained in the federal law. As long as the state law accomplishes the federal goal, it meets the federal requirement. Therefore, if you were trying to locate "ASFA" in state laws, you would not find a section with that title. Rather, each federal requirement has been woven into previously existing state law.

States are also free to enact statutes that are stricter than federal laws, or to use their own definitions of terms used in ASFA but not specifically defined in federal law or regulation. For example, while ASFA requires permanency hearings be held every 12 months, some states hold them more frequently. [vi]

Procedures to accomplish ASFA goals also vary among the states. For example, in some states, the agency may have to bring a motion to obtain certain types of relief, such as review of a permanency plan, while in others, a formal motion may be unnecessary. Another example of how procedures differ is that in some states the court must make certain findings, even where those judicial findings are not required by ASFA. For example, in some states, the court may have to make a finding that a compelling reason exists to choose another planned permanent living arrangement, a permanent placement option which is discussed further below. Under the federal law, however, a compelling reason need only be documented in the case plan.

Federal Reviews

In order to ensure that states are meeting federal expectations, the federal government conducts two separate types of reviews. The review systems are fairly complex, but the basics are explained here to help foster parents understand how federal reviews shape state policy, which ultimately affects even the remotest of local districts.[vii]

The first type of review is referred to as the "IV-E Review," which ensures that cases for which the states claim federal Title IV-E dollars meet the basic eligibility criteria. This is basically a paper review, where federal auditors examine files to be sure that case records contain all necessary documentation, including judicial findings. For instance, court orders must contain the reasonable efforts finding and the finding that it is contrary to the welfare of the child to remain in the home, which were discussed above.

In an effort to conduct more meaningful reviews that measure specific outcomes for children, the federal government has begun conducting child and family service reviews (CFSRs). The CFSR reviews are time intensive. They were begun in 2001 and all states will have been reviewed once by the end of 2004. The reviews are fairly comprehensive, and this manual cannot address all of the technical requirements, but it is important for foster parents to understand how the CFSRs are shaping child welfare, and to

understand how they, as foster parents, may be able to participate in the CFSR process.[viii]

The CFSR process involves four discrete steps: 1) Data sharing, 2) The state's own report, 3) On-site reviews, and 4) Stakeholder interviews. The steps involve collaborative efforts between the states and the federal government.

In the first step of the process, the state agency uses data analysis as a starting point to determine why the state's data may reflect differences or similarities to other states' data.

In the second step the state produces a report after the state and federal governments share data. The report is meant to give a picture of the state's child welfare system.

Thirdly, the on-site reviews are scheduled. The federal government chooses three sites within the state in which to conduct on-site reviews. At least one of those sites must include the state's largest metropolitan area. Teams consisting of both state and federal reviewers conduct the on-site reviews. During on-site reviews, the teams review paper files, and also conduct interviews with the participants in the case in order to get a clearer picture of how particular cases were handled. Interviewees can include almost anyone involved in the case, including agency workers, service providers, the child, the parent, the judge, and the foster parents.

In the fourth step, reviewers conduct stakeholder interviews at local sites in order to learn more about the state's system and how it is operating generally. Stakeholders are people who have contact with the child welfare system, including foster parents.

After the reviews, the federal government rates the state in the areas of child safety, permanence and well-being. The state then drafts its own Program Improvement Plan (PIP), which addresses areas needing improvement.

The states will be re-reviewed after the PIP period (two years), and if a state has not moved toward more positive outcomes, then the federal government will financially penalize that state.

Many states have set up committees to make sure that the state is on track with each phase of the CFSR, including

implementation of the PIP. It may be advantageous for foster parent associations to become involved in the process as stakeholders. Each state has one or more designated persons responsible for CFSR implementation. Foster parent associations may wish to reach out to the state CFSR liaison in order to become part of the planning team, or in order to give input as a stakeholder.

ADOPTION AND SAFE FAMILIES ACT BASICS

The Adoption and Safe Families Act (ASFA) is comprehensive in scope and only the key areas of ASFA most directly related to how cases are handled in court are addressed below. ASFA requirements are contained within the actual law passed by Congress, as well as in the regulations developed by the U.S. Department of Health and Human Services (HHS) that interpret and give guidance to child welfare agencies on how to implement the law. Other materials explain ASFA in further depth.[ix]

1. No Reasonable Efforts to Reunify

The Adoption Assistance and Child Welfare Act of 1980 requires that agencies must always work to reunify families. ASFA somewhat restricts that requirement. Under ASFA, the agency may seek a court order relieving them of the duty to make reunification efforts in some cases. The circumstances under which the agency may choose to seek such an order include: 1) When aggravated circumstances are present, 2) When certain crimes have been committed, or 3) When the parent's rights to another child have been previously *involuntarily* terminated.[x]

ASFA does not define "aggravated circumstances," though it suggests a definition that includes abandonment, torture, chronic abuse and sexual abuse. States have defined aggravated circumstances in different ways. For example, some states include repeated failure to remedy substance abuse as an aggravated circumstance.[xi] Be aware that even though states may use the same term, e.g., "aggravated circumstances," those terms are defined in state statute and case law so states will vary in the interpretation of those terms.

Another ground for waiving the reasonable efforts requirement involves parental conviction for certain serious crimes.

The conviction must have been made in criminal court; a finding by a family court or other court will not apply. When a criminal action is being appealed, the court must weigh the appropriateness of making reasonable efforts in light of the child's developmental needs.[xii]

The third ground for discontinuing reasonable efforts is when rights of a parent to another child have been terminated. This ground does not apply if the parent voluntarily gave up parental rights to a child. It is not necessary that the rights have been terminated in the same state where the ongoing proceedings are taking place. Often, the agency will not know if the parent has other children. If, through discussion with the child or family, the foster parent learns that another child of the parent has been freed for adoption through Termination of Parental Rights (TPR), the foster parent should communicate that to the agency, so that the agency can decide whether to pursue a "no reasonable efforts" order.

It is important to understand that even where the above exceptions to the reasonable efforts requirement applies, the agency may still seek to reunify the family. For example, where rights to another child were terminated many years ago, the agency may decide that circumstances have changed enough to allow the parent, with services and support, to adequately parent the child. This could happen where the agency decides the parent has attained greater maturity, has remedied a substance abuse problem, or in other ways has demonstrated a better ability to parent.

When an agency applies to the court for an order relieving them of the duty to make reasonable efforts to reunify, they may only lawfully stop reunification efforts when ordered by a court. So, if the court disagrees with the agency's position, the agency must continue to make reasonable efforts to reunify, including facilitating parent-child visits, even if one of the exceptions specified in ASFA applies.

2. Mandatory filing of Termination of Parental Rights Petition

ASFA also restricts the amount of time a child stays in foster care without being freed for adoption through a TPR proceeding. The agency is required to file a petition to terminate parental rights when a child has been in foster care for 15 out of the most recent 22 months unless one of the following exceptions applies: 1) The child is placed with a relative, 2) The agency has not been able to

provide the services it has deemed necessary to reunite the family, or 3) A compelling reason not to terminate parental rights exists.[xiii] The federal law only requires that the agency document an exception in the case plan; however, in some states the exceptions are subject to court review. [xiv]

Exceptions to Mandatory Filing of TPR

1. The first exception applies when the child is placed with a relative. The federal government has not defined "relative": state law and/or agency policy determine whether a relative placement is an exception to the TPR requirement. Though the agency is not required to free the child for adoption when placed with a relative, they may certainly choose to go ahead and terminate parental rights where adoption by the relative is the best plan for the child.

2. The second exception applies when the agency cannot provide the services that it has deemed necessary to reunify the child with the birth family. This does not mean that the exception applies when the court or another party in the case argues that the agency has not done everything they can to reunify the family. Rather, it is for use by the agency in the event the agency cannot provide the service *the agency (and not another party)* has deemed necessary. For example, if a parent were on a waiting list to receive services and had not received all the necessary services at the 15-month mark, the agency might choose to document this exception in the case record.

3. The third exception, "when compelling reasons" exist, is the hardest to apply. ASFA does not define "compelling reasons." ASFA regulations specify only that the compelling reasons must be case and child specific.[xv] The agency might decide, for instance, that breaking the bond between the child and parent would be harmful to the child. As long as agency documentation shows very specific facts, for example that a therapist has made this determination, then it will qualify as a compelling reason.

In some states, the compelling reasons are subject to judicial review, so the judge makes the final determination of whether the child should be freed for adoption. Otherwise, the agency makes the final decision. It is important to understand that even though one of the exceptions exists, the agency could still choose to free the child for adoption. The exceptions contained in ASFA are options which the agency *may choose* to apply.

In addition, the agency is always free to file to TPR before the child has been in foster care 15 months, if state law allows it. In some states, the agency is required to file a TPR petition sooner than 15 months.[xvi]

While the deadlines require the filing of a petition, there are generally no requirements that the petition be evaluated by the court within a particular amount of time. While there is a growing recognition that child welfare cases should be handled quickly, some courts still do not have the resources to make that happen.

When cases are delayed in court, the foster parents can play a role in moving the case along by reminding the agency and court that the child is continuing to grow and form attachments while the court case is languishing. For example, letting the parties know how adoption might disrupt the child's school year may motivate the players to move the case more quickly. (How to bring up issues in court is discussed in following chapters.)

The TPR proceeding can also stall during the appeal process. In some states appeals can take a long time, while other states have worked to improve their systems to be more reflective of the ASFA policy of timely permanence.[xvii] If a case is held up on appeal, the court still has to conduct regular reviews in compliance with ASFA timelines. Again, the foster parent should take the opportunity to remind the court, the agency, and the attorneys that the child is continuing to develop and form relationships while the case lingers. While there is little a foster parent can do to expedite a case on appeal, attorneys may have methods to do so. Some of those methods might include opposing other parties' requests for extensions, or asking that the court expedite the case.

3. Permanency Hearing

ASFA introduced a new type of proceeding, the permanency hearing. A permanency hearing must be held within 12 months of the child's entry into foster care, and every 12 months thereafter.[xviii] Some states may require permanency hearings more frequently than every 12 months.[xix]

ASFA does not clearly define "permanency hearing." ASFA regulations do define what permanency hearings are not: they are not paper reviews, out of court proceedings, or mere stipulations.[xx] The intent is that there be a meaningful review by the court, with all the parties present.[xxi] However, the procedure can vary widely

from state to state, or even locality to locality. For example, ASFA does not require that formal testimony be taken, i.e., having witnesses take the stand and swear to an oath, though some courts may require it. In other courts, witnesses may speak more informally.

The purpose of a permanency hearing is to decide the permanency plan for the child. Though it is technically not required, the court usually makes the finding of whether the agency is making reasonable efforts to finalize the permanency plan for the child at the permanency hearing.

Though ASFA added the new requirement to conduct permanency hearings, it did not allot any extra funding. Some courts and agencies have had to strain to find the resources to conduct these extra hearings. There may be some temptation to cut them short and not give them the full attention they deserve. If the foster parent has information necessary to the court, it may be up to the foster parent to bring it to the court's attention.[xxii] (Chapters two and three give specific details on sharing information with the court.)

Determining the Permanency Plan

Under ASFA, there are five acceptable permanency plans. Terms used may vary slightly among states, but the child's placement must fit into one of the following categories: 1) Reunification, 2) Adoption, 3) Guardianship 4) Placement with a relative, or 5) Another planned permanent living arrangement (APPLA).[xxiii] The plans are listed in order from most to least permanent.

The court should carefully review the plan submitted by the agency to ensure that all important factors have been considered. In order to make a sound decision, the judge needs the most current, complete information possible. Foster parents can provide the court with their own observations, or inform the court of important information received from others: caseworkers, therapists, and teachers, for example. The foster parent should not attempt to provide the court with specific reports from others, but, should give the judge enough information to allow her to decide whether to seek further facts from the agency or others in contact with the child. (More on presenting information to the court is contained in the following chapters.) The judge's role is to weigh the information and recommendations presented by all sides and make an independent decision.

Permanency decisions should be made on an individual, case-by-case basis and should take into consideration the child's specific needs and desires. It cannot be emphasized enough that each situation is different, and there are no formulas for determining what is best for a child. That is why it is important that agencies and courts thoroughly examine the child's situation, in light of the most accurate, current information available.[xxiv]

The agency may engage in concurrent planning, which is the practice of exploring two or more plans for the child at the same time. Concurrent planning is becoming accepted as a best practice because it can move a child more quickly to permanency.[xxv] For example, the agency may have concurrent plans of either reunifcation or placement with a relative. If at the permanency hearing it becomes clear that the parent cannot care for the child, the agency does not have to start from scratch to come up with a new plan. The child can be placed with the relative as soon as possible. ASFA does not require, but does allow, concurrent planning.[xxvi] At the permanency hearing the judge need only approve *one* plan for the child, though the agency should make its intentions as to all plans known to the parties, including the child.[xxvii]

Foster parents are often reluctant to let the agency know that they are willing to be a permanent placement resource because they fear they will be seen as opposing the reunification plan. In light of the new trend toward concurrent planning, foster parents should make the agency aware of their desire to make a permanent commitment to the child. However, it is also part of the foster parent's role to support the agency in its permanency planning, including its reunification efforts. This often puts the foster parent in an often uncomfortable role. Following chapters will provide concrete information on how foster parents might make their position known to both the court and the agency in a non-threatening manner.

Plan #1: Reunification

Some mistakenly believe that ASFA unfairly favors termination of parental rights above other plans. But the most preferred permanency option is to reunify the child and parent, when appropriate. Unless a previous determination has been made that reunification efforts should cease, reunification should be ruled out before considering another plan. The ASFA regulations state that reunification can be considered, as long as the parent is working diligently on the case plan, and a time limit can be placed on the time until reunifiction that is consistent with the child's

developmental needs.[xxviii] The judge need not order the child home on the day of the hearing, but can consider extending the reunification plan for a defined period of time.

The foster parent is often in the best position to offer information to help the agency and court assess how an extended period of reunification will affect the child. Helpful information includes whether the child has formed attachments with the foster family or other caretakers and how the child has adjusted to the foster home. The judge cannot determine those things from looking at a legal file unless a thorough case plan includes such information and was sent to the court.[xxix] Often, the agency will prepare a court report, which should be sent to the court and all parties well in advance of the hearing. Foster parents are usually not considered parties and so might not receive a copy of the report. If the foster parent knows what is in the court report, they can limit their own report to important facts that add to, rather than reiterate, what the agency has already written. The best approach is to attempt to coordinate efforts with the agency prior to a court hearing.

Safety is, of course, the most important factor in considering whether to return a child to the parent. There may be disagreement on the standard. Should it be that the parent has completed the service plan, that the child can protect himself, that the cause of the initial abuse or neglect has been remedied? Ideally, all of these things should be considered.[xxx]

The foster parent can be most helpful by giving the judge a "snapshot" of the child that addresses all of these questions. Is the child mature enough to ask for help if neglect or abuse should recur? Can the child feed himself? Be alone for extended periods of time? Does the child have a need for routine? Does he have any special medical or educational needs? It is possible for the parent to have completed a treatment plan but not be able to care for a child's special needs. The foster parent can ensure that the court and agency have information about the child's unique developmental needs.

Plan #2: Adoption

Adoption is the second preferred option. It should be considered and implemented or ruled out in every case unless reunification is certain. Adoption can give the child a sense of belonging and acceptance that less permanent plans cannot.

An adoption can proceed only after both parents' rights have been terminated. The agency should not wait until there is an adoptive family available before filing a TPR petition to free the child for adoption.[xxxi] If the plan is adoption but the child has not yet been freed for adoption, it is often classified as "legal risk," meaning that there is a chance the agency may not prevail at the TPR trial. Some families considering adoption may avoid children in the "legal risk" category, so leaving children in that category could reduce the number of potential adoptive resources. ASFA requires the agency to move swiftly, after a TPR petition is filed, to identify, recruit and retain an aoptive resource for the child, where the plan is adoption.[xxxii]

The court should make a full inquiry into whether there are any adoptive resources for the child. If the foster parents wish to adopt, they should express those intentions to the agency and the court. The agency will ideally engage in concurrent planning by seeking appropriate adoption or long-term placement options for the child while working on the reunification plan with the biological family.

Sometimes, the court decides that adoption is not the best option for the child, based not on the fitness of the prospective adoptive parents, but on the child's bond to the birth family, or the child's statement opposing adoption. Before jumping to a conclusion that adoption is not in the best interests of the child, the child should be counseled on adoption, so he understands what that will mean to him, and so he can work through issues related to detaching from his birth family. The agency (and the child's advocate) should be candid with the child about the chances for reunification.

Where a therapist has determined that the child should maintain a bond with the birth family, and that the family is capable of maintaining that bond, an open adoption may be considered. Most states recognize open adoption.[xxxiii] An open adoption is one in which an agreement is entered into at the time of adoption, which allows some contact between the child and the birth parent. The contact may be as minimal as holiday and birthday cards, or as extensive as regular visits.

An open adoption allows the child to maintain some contact with the birth family while still allowing the child to have the benefits of a safe and stable adoptive family. Preserving connections to the birth family can be very important for some children. Teenagers,

for example, often struggle with identity issues and have a need to maintain some identification with their family of origin.

Open adoption agreements are generally hard to enforce, however. If the case is returned to court for a failure to meet the conditions of the agreement, the standard usually applied is "the best interests of the child" i.e., the court need not enforce the terms of the agreement, but will make a decision based on what is best for the child at that point. A foster parent considering entering into an open adoption should consult an adoption lawyer to clarify the obligations and repercussions of doing so.

While there are advantages to open adoption, it should not be pursued as a path of least resistance. An adoption that severs ties with the birth family may provide necessary closure for a child, safety from possible physical harm, or protection from emotional harm caused by an unreliable or emotionally abusive parent.

A family may be eligible for an adoption subsidy if they adopt a foster child. An adoption subsidy is a federal stipend some adoptive families receive when they adopt a child who meets the federal criteria for receiving such payments. If the foster parent has been denied an adoption subsidy after discussion with the agency, a knowledgeable adoption lawyer may be helpful. The eligibility criteria for adoption subsidies are somewhat complex and a foster parent may need help deciphering them, and assistance in advocating for one if eligible.[xxxiv] It is also not well known that adoption subsidies can sometimes be negotiated and in some states may include things such as counseling, special services and one-time court and legal fees.

Given the high degree of permanence and belonging adoption provides for a child, the inquiry into adoption as the plan should be as thorough as possible. Dismissing it without thorough consideration could result in the child being denied the benefit of a stable, permanent family.

Plan#3: Guardianship

When someone in the child's life wishes to care for him, but adoption has been ruled out after careful consideration, guardianship may be the best plan. The federal definition of guardianship is "a judicially created relationship between child and guardian which is intended to be permanent and self-sustaining as evidenced by the transfer to the guardian of certain parental rights with respect to the child." The parental rights include: 1. Protection,

2. Education, 3. Care and control of the person, 4. Custody of the person and 5. Decision making.[xxxv]

Defining guardianship is complicated because a legal arrangement may meet the federal definition above, and thus be a valid permanency plan, but states may not refer to it as "guardianship." Instead, they may use another term like "custody." On the other hand, some states may have a statute that refers to "guardianship" but it is not permanent enough to meet the federal standard. Basically, to meet the federal standard, the placement arrangement must not be one that is so easily undone that the guardian can return physical custody of the child to the birth parent without the court's consent. To do so could put the child in harm's way if the parent has not changed the conditions that led to the original abuse/neglect.

One disadvantage of choosing guardianship is that it is more easily undone, and therefore less permanent, than an adoption. Another disadvantage is the lack of financial help for families entering into a guardianship. Some states have experimented with providing guardianship subsidies, but at this time the main source of assistance is TANF, or Temporary Assistance to Needy Families,which is subject to income tests and work requirements. A "child only" TANF grant is not based on the family's income, nor does it carry federal work requirements, but it is generally substantially lower than an adoption or guardianship subsidy.[xxxvi]

In addition, the agency may discontinue services to a child once he obtains a guardian. In some places, the agency may have funds to continue to provide services to a child placed under a guardianship. If the foster parent believes the child should continue to receive services, they should inform the agency and then speak up in court. If the agency is reluctant, the court has the authority to order the agency to provide services, as long as there is a means for the agency to provide the services requested. The foster parent should make the agency and court aware of the everyday needs of the child, so services will not be overlooked.

Plan #4: Relative Placement

There are many advantages to placing children with relatives. When a child is removed from the birth parents, placement with a relative can decrease the child's anxiety and provide some continuity and stability. Relatives can preserve a child's sense of identity and belonging. Decisions concerning relatives should not be based on generalizations and assumptions about families. Courts and

agencies should carefully consider the proposed relative placement to decide whether it truly is best for the child.

If the child is placed with a relative from the beginning of the case, it is easier to decide at the permanency hearing what the appropriate plan should be. The main concern at that point will most likely be how to make the relative placement as permanent as possible.

When a relative does not wish to adopt, the reasons should be determined. Relatives sometimes do not wish to adopt because they do not want to see a TPR occur. Sometimes, the relative may not be aware of adoption subsidies, availability of post-adoption services, or the possibility of open adoption. If no one asks what the barriers to adoption are, the child may needlessly remain in a less permanent situation.

It becomes more difficult to make a decision about relative placement when the child has been in a non-relative foster home for a significant amount of time and a relative then expresses an interest in being a resource for the child.

Sometimes there are positive assumptions made about relative placements that are not true in every case. While often there is an emotional bond between the relative and the child, and often there is a true commitment to the child, sometimes that is not true. Relatives sometimes offer to take children because of family or societal pressure. Those working with the child should determine the relative's commitment level.

Negative assumptions about relatives are not always true either: for example, a relative is not as unfit as the birth parent just because they were exposed to the same dysfunctional family dynamics.

As in all placement decisions, the court should have a clear understanding of the child's bonds and attachments when deciding whether to place a child with relatives. A child may not only have a strong bond to the foster family, but also to the community where he lives, his school, friends and extracurricular activities. The court will want to consider the effects of breaking those bonds in order to place the child with a relative.[xxxvii]

The foster parent is in a uniquely situated position to offer information that will help the agency and court make fact-driven,

child-specific determinations, rather than assumption-driven decisions.

Plan #5: Another Planned Permanent Living Arrangement (AAPLA)

Under ASFA, long-term foster care is no longer a permanent option. However, when the more permanent options of reunification, adoption, guardianship or relative placement have been ruled out, another planned permanent living arrangement (called APPLA) may be an option for the child. Because it is the least permanent of the options, an APPLA may be chosen only if the agency has documented compelling reasons to do so, based on the child's unique situation. As discussed in the above section on TPR exceptions, compelling reasons must be child and case specific. The requirement to document compelling reasons applies to both TPR exceptions and the choice of APPLA. However, they are distinct requirements, i.e., compelling reasons not to file a TPR petition must be documented separately from the compelling reasons to choose APPLA.

The ASFA regulations do not define APPLA, but offer some guidance on what constitutes an APPLA. The regulations state that "far too many children are given the permanency plan of long-term foster care, which is not a permanent living situation for the child." [xxxviii]

The regulations also give three examples of acceptable APPLAs: 1. An older teen who requests emancipation, 2. A child with a significant bond to the parent, but whose parent cannot care for the child due to emotional or physical disability and where the child's foster parent has committed to raising the child to the age of majority, and to facilitate visitation with the parent, and 3. Where an Indian tribe has identified an APPLA.[xxxix] Those examples are meant to give guidance but not to create strict guidelines. The regulations are clear that compelling reasons should not be created for broad categories of children.[xxxx] For example, an agency cannot set a policy choosing APPLA for all older teens, or all children whose parents have a disability. The child's own unique circumstances must be considered in formulating a permanent plan.

The permanent plan should include services and supports necessary to make the placement as permanent as possible. This is particularly important in an APPLA because the child will not have an adoptive or birth family to turn to for support after leaving foster care.

The agency should seek connections with supportive adults for the child. That could mean facilitating visitation with distant relatives, or fostering involvement in community or school groups.

ASFA states that permanent foster care is not an APPLA, but it does not rule out a child's living in foster care until adulthood as long as the foster parents commit to raising the child until adulthood, and there are no more permanent options available for the child. It is unacceptable for the child to be placed in foster care and then moved from home to home. If the foster parents need extra supports or services to make a long-term commitment, they should notify the agency and court of their needs.

While APPLA is the least preferred option, it is an option where compelling reasons exist and where no more permanent plan is available. But because impermanent placements are generally recognized as being detrimental to children, APPLA should only be chosen after a close examination of what would be in the child's best interests. It is important not to use the APPLA as a "catch-all" for situations that do not fit the other plans. Rather, it should be a deliberate, thoughtful plan, made in light of the child's unique needs and wishes.

THE INDIAN CHILD WELFARE ACT (ICWA)

The federal laws discussed above apply in all cases, but foster parents should be aware that additional requirements are imposed by The Indian Child Welfare Act (ICWA) in cases involving Native American children. ICWA was enacted to address concerns that Native American children were being taken off reservations and adopted without tribes being given adequate opportunity to plan for them. It is impossible to describe every aspect of ICWA in this manual. More information is available through other resources.[xli] Discussed here are some of the basic provisions that may affect court cases.

The agency must provide notice to the tribe when a child is placed in foster care. Failure to provide proper notice can cause disruption or delays in the case. For example, the agency may be proceeding with a TPR when the tribe learns of the foster care placement. The TPR could be delayed while the agency provides proper notice and the tribe takes time to devise a plan for the child.

ICWA also imposes more stringent requirements on TPR than state laws. Therefore, the agency has a higher burden in a

TPR involving Native American children. Because these and other factors can slow down or even halt the agency's permanent plan for the child, the agency should act swiftly to determine if the child is covered under ICWA and determine how to provide adequate notice under the statute. Foster parents who become aware that the child may have some Native American heritage should make the agency and court aware as soon as possible.

THE CHANGING ROLE OF FOSTER PARENTS

Foster parents play a number of valuable roles within the child welfare system. As our child welfare system develops, the role of foster parents is being reshaped to benefit not only courts, agencies and individual foster parents, but, most importantly, children. As this new role continues to be defined, professionals in the child welfare system have had to rethink some outdated beliefs about the role that foster parents play.

Foster parents may themselves become confused or overwhelmed by the number of hats they are expected to wear. Clear expectations and open communication with the agency can help foster parents sort through their unique, and often challenging, obligations.

At the most basic level, the relationship between the agency and foster parent is seen as a contract. Foster parents do enter into a contract with the agency when they become foster parents. But unlike most other contracts (for example, contracts for the sale of goods) foster parents provide many intangible benefits that cannot be reduced to contract language. Therefore, foster parents should be recognized as providing more than room and board to children, but also valuable information to courts, support to agencies, and well-being, and often permanency, to the children in their care.

Foster parents hold a wealth of information regarding the child's status. But they sometimes do not know what information will be useful, or whether the agency has received the same information through other sources. If foster parents pass on information and receive no feedback from the agency, they may assume the agency has failed to consider the information. The agency should give foster parents guidance on how to provide information, and what information will be useful. Caseworkers

should have a regular and systematic way of receiving information from foster parents. Last-minute information shared right before a hearing or a case plan meeting does not allow the agency to act upon important information and make thorough recommendations to the court. The day-to-day information about children that foster parents provide should be handled and shared in a way that recognizes its importance in case planning.

Foster parents often take a more active role in the case than simply sharing information. The agency sometimes expects foster parents to participate in the reunification plan for the child and the birth family. That may include transporting the child to visitation or actually supervising visitation. In addition, foster parents can play a key role in reunification by acting as mentors to the birth parents. If the agency expects foster parents to actively participate in the reunification plan, there should be clearly stated expectations for them. Foster parents often feel torn when they feel they have a duty to report unsafe behavior by the parents, yet do not want to appear to be opposing reunification. A regular, systematic way for foster parents to report information to the agency should be used, so foster parents do not report only "bad" behavior on the part of the birth parents. (More advice on sharing information with the agency is included in chapter two.)[xlii]

Foster parents often feel conflicted when they become attached to the child and desire to adopt or be a permanent resource. They are expected to be part of the reunification team, yet are expected to show commitment to the child as soon as the agency decides reunification is not the plan. Agencies and other professionals should recognize that the foster parents' commitment contributes to the child's well-being. Because agencies should be engaging in concurrent planning, foster parents should make their feelings about adoption known to the agency, and the agency should be receptive to this information.

The foster parents should be supported in their dual role as mentor to the birth parent and potential adoptive resource. The agency should set clear expectations for the foster parents so they understand exactly how they are to participate in the reunification plan. Failure to communicate clear expectations could cause confusion, or cause the foster parent to be wrongly accused of working against reunification. If the agency is not clear about expectations, the foster parents should put their understanding in writing to the agency (and keep a copy for themselves) to avoid misunderstandings.

The caretaking that foster parents do extends beyond meeting the basic day-to-day needs of the child. They often play the role of advocate. The foster parent, who interacts with the child on a daily basis, holds the much-needed information that courts and agencies should rely on to make sound decisions. Foster parents know about the child's medical needs, educational progress, social connections, emotional state and a host of other factors that are often not seen as "strictly legal." Because of their knowledge about the child's situation, foster parents are in the best position to advocate for services. Courts and agencies should welcome information from the foster parents in order to meet the child's health, safety and well-being needs. Agencies may not be able to meet every request of the foster parent, but given their knowledge of the child's situation, requests from foster parents should be taken seriously.

Fortunately, there is a growing recognition that foster parents have a significant part to play in child welfare cases. The federal Child and Family Service Reviews measure permanency and well-being, which reflect the stability and security of the child's placement. The permanency and well-being outcomes measure whether the child is thriving, not just being kept out of immediate harm's way. A national program, the Annie E. Casey Foundation's Family-to-Family Program, encourages agencies to make foster parents part of a team. State statutes and policies are beginning to recognize the need to include foster parents in the process.

CHILD AND FAMIILY SERVICE REVIEWS

The Child and Family Service Reviews measure several outcomes directly related to foster parents: 1. Foster parent recruitment and retention, 2. Foster parent training, 3. Foster parent input and involvement, 4.Whether the agency has addressed the unmet needs of foster parents, and 5.Whether foster parents are provided with notice and opportunity to be heard at permanency hearings. Additionally, other measures, for example, stability of placement, are related to the child's functioning in the foster home.

Almost all of the states reviewed so far have had to address foster parent issues in their program improvement plans.[xliii] With the federal government signaling the importance of foster parents as a resource, state policies and practice will begin to reflect that consideration as well. A number of state PIPs say that foster parents

will receive additional support in the form of respite care, peer support groups or additional assessment of foster parent needs.[xliv] Other states are making more concerted efforts to include foster parents in case planning.[xlv]

FAMILY TO FAMILY

Family-to-Family is a national practice model developed by the Annie E. Casey Foundation. The model emphasizes actively including foster parents in a team approach to caring for the child, rather than making foster parents take a "backseat" role.

There are currently sites in 35 states in different stages of progress using the model.

In Oregon, the model includes "ice breaker" meetings between the foster family and birth parents within a few days of placement (where not prevented by safety concerns.) In Colorado Springs, foster parents sit on hiring committees for case managers. In Pennsylvania, foster parents sit on a task force with professionals from a range of disciplines. Pennsylvania also uses foster parents as trainers for both fellow foster parents and case management staff. In Santa Clara County, California, the foster parent association is active in Family-to-Family meetings. [xlvi]

The private and government initiatives underway across the country reflect a growing holistic approach to making foster care better for children. That approach recognizes that we cannot separate the well being of children from the quality of their placements. Foster parents should gain confidence from knowing that when they take an active role by advocating for better services, or increasing the court's awareness of the child's needs, they are part of a larger movement that is beginning to recognize their importance in the child welfare system.

[i] Titles IV-B and IV-E of the Social Security Act, 42 U.S.C. δ 620-632, 670-679.
[ii]Ibid
[iii] Legislative history, Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (June 17, 1980).
[iv] In some states, the 6 month review is done by the agency rather than the court.
[v]Stanley v. Illinois, 405 U.S. 645 (1972).
[vi]See, e.g., MD Code Ann. δ10-325 where ongoing reviews are held every 3 months where there hasn't been a TPR or guardianship; Minn. Juv. Prot. R. 42.01 , where an initial permanency hearing for children under eight years of age is held six months after out of home placement; 42 PA Cons. Stat. δ 6351, where the initial permanency hearing is held after the first six months and subsequently every six months.
[vii] Some states have a state-run, county administered system, where the county and states share the responsibilities and costs of the child welfare system. Whether a state is state-run or county-run has no bearing on how it is affected by federal legislation and policy.
[viii] For more information of CFSR's, see http://www.abanet.org/child/rclji/home.html (National Resource Center on Legal and Judicial Issues) and www.acf.dhhs.gov (The Children's Bureau, Department of Health and Human Services.)
[ix]See, e.g., Making Sense of the ASFA Regulations, Washington, D.C. American Bar Association 2001
[x]42 U.S.C. δ 671 (a) (15) (D); 45 C.F.R. δ 1356.21 (b) (3)
[xi] See, e.g, N.D. Cent. Code δ 27-20-02, where one of the definitions of aggravated circumstances includes where the parent "fails to make meaningful efforts to secure treatment for the parent's addiction, mental illness, behavior disorder, or any combination of those conditions for a period equal to the lesser of i. one year, or ii. one-half the child's lifetime, measured in days, as of the date of a petition alleging aggravated circumstances.
[xii] 65 Fed. Reg. 4054
[xiii]42 U.S.C. 475 (5) (E) 45 C.F.R. 1356.21 (i) (D) (iii)
[xiv] See, e.g., Mont. Code Ann.δ 41-3-604 (1) (c) where compelling reasons must be available for court review.
[xv] 65 Fed. Reg. 4059
[xvi] See, e.g, Ariz. Rev. Stat. δ 8-862 where the court shall order the filing of a termination of parental rights motion within ten days of finding it is clearly in the child's best interests.
[xvii] Iowa, for example, has enacted an effective expedited appeal process, contained in the Iowa Rules of Appellate Procedure
[xviii] The federal definition of "entry into foster care" is the earlier of either 60 days after the date the child was physically removed from the home or the date of the finding of abuse or neglect. Many states have simplified this by defining "foster care entry" as the date the child is removed from the home.
[xix]It is also important to note that in some states the ASFA-required 6 month administrative review is conducted by a court, while in other states the 6 month review is conducted by the agency.
[xx] 45 C.F.R. 1355.20 (a)
[xxi] 65 Fed. Reg. 4036
[xxii] The Children's Bureau, *Guidelines for Public Policy and State Legislation Governing Permanency for Children,* Washington, D.C.: U.S. Dept. of Health and Human Services, 1999, IV-25, states that foster parents have valuable information that courts should hear.
[xxiii] See, e.g., Mont. Code Ann. δ 41-3-445, where the plan is called "long-term custody with another planned permanent living arrangement."
[xxiv] For an in-depth explanation of the permanency hearings and choosing permanency plans, see Fiermonte, C., and Renne, J. *Making it Permanent*. Washington, D.C.:American Bar Association, 2002.
[xxv] Discussion in case law reflects the courts' growing acceptance of concurrent planning. See, e.g., In the Interests of Jessica H., 1998 WL 203410, Conn. Super.), unpublished opinion.
[xxvi] 65 Fed. Reg. 4054
[xxvii] Ibid
[xxviii] 64 Fed. Reg. 4035
[xxix] In some states, the case plan must go to the court, in others it may be sent as a matter of custom.
[xxx] For an example of statutory requirements for reunification and a discussion of reunification factors, see N. J.Div. of Youth and Family Servs. vs. C.G. and J.G., N.J. Super., 2004.
[xxxi] 65 Fed. Reg. 4062

[xxxii] 42 U.S.C. δ 675 (5) (E) The Children's Bureau, *Guidelines for Public Policy and State Legislation Governing Permanency for Children*, 1999, II-5.
[xxxiii]Ibid, Guidelines for Public Policy p.II-5
[xxxiv] The North American Council on Adoptable Children (NACAC) www.NACAC.org is a resource for more information.
[xxxv] 42 U.S.C. δ 675 (7)
[xxxvi] *Expanding Permanency Options for Children: A Guide to Subsidized Guardianship Programs*, Washington, D.C., Children's Defense Fund, 2003.
[xxxvii] Mark Bontrager & James Kenny, *Appellate Courts Choose Bonding,*Fostering Families Today, 42, 42-45.
[xxxviii] 65 Fed. Reg. 4036
[xxxix] 45 C.F.R. δ 1356.21 (h) (3) (i) (ii) (iii)
[xl] 65 Fed. Reg. 4035
[xli] B.J. Jones, *The Indian Child Welfare Act Handbook: A Legal Guide to the Custody and Adoption of Native American Children.* Washington, D.C.: American Bar Association, 1995. See also the National Indian Child Welfare Association at www.nicwa.org.
[xlii] See *Toolbox Number 2: Expanding the Role of Foster Parents in Achieving Permanency*, Washington, D.C.: Child Welfare League of America, 2001, for more information on foster parents as part of the child welfare team.
[xliii] Davis-Pratt, E., *Summary of State CFSRs*. Washington, D.C.: American Bar Association, Summer 2003.
[xliv] See, e.g., the PIPs of GA, KS, NM, OK and WY.
[xlv] See, e.g., the PIPs of CT, PA and WVA.
[xlvi] Telephone interview with Denise Goodman, Annie E. Casey trainer, completed by Dianne Kocer, National Foster Parent Association, March 2004.