

ADOPTION AND SAFE FAMILY ACT OF 1997

I. Background

The history of child welfare practice in the United States is a history of pendulum swings. We have had no clear, overriding philosophical perspective that has been consistently applied to our efforts to protect children from harm while at the same time being deferential to the constitutionally protected right of family members to maintain their relationships.

In the time before juvenile courts and active state intervention into family life in an effort to protect children from abuse and neglect, parents, in particular fathers, were permitted unfettered control over their children. Children were for all intents and purposes the property of their parents. In the late 1800's a growing movement of individuals concerned about the welfare of children led to the establishment of the first juvenile court in Chicago in 1899. Over the course of the next few decades every state established one form or another of the juvenile court with the responsibility over juvenile delinquency and dependency cases.

In the late 1950's Dr. Henry Kemp brought to light the "battered child syndrome." The recognition and labeling of this group of symptoms set off a revolution in child welfare. With a clearer understanding of the problem of child abuse, states rapidly established an infrastructure of child protection: statutes authorizing courts to remove children from their parents' care, children's protective service agencies to investigate, and foster care programs to care for children who could not live with their families.

With the infrastructure established, the number of children removed from their family home increased rapidly. By the mid-1970's, there were approximately 500,000 children in foster care. Since there were no requirements to work toward reunifying families or providing alternative permanent homes, many of these children spent years in the temporary foster care of the state. Attendant to this problem was the unique situation of Native American children. At least since the 1870's it had been the policy of the United States government to remove Indian children from their families and place them in boarding school, run either by the government or church organizations.¹

A reform movement consisting of tribal members and child advocates culminated in the passage of the Indian Child Welfare Act (the ICWA)² in 1978 and the Adoption Assistance and Child Welfare Act of 1980 (AACWA)³. The ICWA established rules specific to the handling of cases involving Indian children. These rules include required procedures to transfer jurisdiction to tribes, allowing tribal intervention in state court proceedings, higher standards of proof for temporary or permanent custody, and required expert testimony.

Like the ICWA, the purpose of the AACWA was to reform the method by which child welfare cases are handled. Using financial incentives, the federal government encouraged the

¹ See Roberts, *The Indian Child Welfare Act: Implications For Culturally Competent Service Providers*, 2 Mich Child Welfare L.J. 7 (1998).

² 25 USC 1901 et seq.

³ P.L. 96-272..

establishment of programs for family preservation by requiring that “reasonable efforts” be made to reduce the number of children entering the foster care system. By requiring that “reasonable effort” be made to reunify children with their families of origin and establishing a requirement that Permanency Planning Hearings be held within eighteen months of the child’s removal from his or her home, Congress hoped to reduce the length of time children spent in foster care. Finally, to aid children who could not be returned to their families to be adopted, a program was established to subsidize the costs of adoption (i.e., adoption assistance).

Seventeen years after the enactment of the AACWA, there was a sense in Congress that its mandate to the states had been misunderstood. The “reasonable efforts” requirement, many believed, had resulted in the practice that every conceivable effort had to be expended before a child could be removed from the home or before an alternative permanent plan could be made. This, it was thought, led to the needless injury of many children as “reasonable efforts” was interpreted to mean “every conceivable effort.” Children were again languishing in foster care.

In November, 1997, Congress passed and the President signed The Adoption And Safe Families Act (ASFA). The ASFA is intended to clarify the Congress’s intent with regard to child welfare practice. This section of the training manual will summarize the major changes wrought by the ASFA and discuss their implication for child welfare practice.

II. The Adoption And Safe Families Act

The Adoption and Safe Families Act was signed into law by the President in November of 1997. The act makes significant changes in the federal law relating to child welfare practice. The states have until June 1, 1999 to come into compliance with its provisions.

A. General Principles

Congress had four broad goals in enacting the ASFA. These broad areas of reform include: to assure the safety of children who become known to the child welfare system, to expedite permanency, and, finally, to provide states with more options to achieve permanency. Additionally, ASFA contains a number of miscellaneous reforms that do not fit neatly into one of these categories. Moreover, it is important to note that these categories overlap and interrelate. The reader is encouraged to consider the interaction of these changes with one another as well as with existing law, policy and practice. Each of these broad goals will be discussed in detail below.

Before looking at what changes in the law were wrought by the ASFA, it is important to briefly discuss what it does not do, namely, abandon the commitment to family preservation and reunification when this can be accomplished while assuring the safety of children. What seems to have been lost in much of the discussion of the ASFA is that Congress strongly reaffirmed its commitment to family preservation and reunification. Indeed, not only was this program reauthorized,⁴ the Congress significantly increased its funding. In 1997, for example, \$240,000,000 was allotted to preserve and reunify families. By 2001, that amount will increase

⁴ 42 USC 629(b).

to \$305,000,000.⁵ Moreover, this legislation continues the commitment to the use of “reasonable efforts” to reunify families where out-of-home placement is necessary.

Having reaffirmed its commitment to “reasonable efforts,” however, the new legislation makes clear that in some extreme circumstances “reasonable efforts,” either to preserve or to reunify a family would be unreasonable. Moreover, the ASFA makes clear that in determining what action should be taken in a confirmed case of child abuse or neglect, Congress intends that the welfare of the child—as opposed to the preservation of the family unit—is the most important consideration. That is to say, in those close cases between maintaining a child in the family home or removing the child, the ASFA requires the safety of the child be given primary consideration, tipping the scale toward taking action to ensure the well-being of the child.

Finally, to address the problem of continued “drift” of children in foster care and to ensure that children are moving to permanency in an expeditious fashion, the ASFA tightens the permissible time frames along the child welfare continuum and provides additional financial incentives to place children in adoptive homes.

B. Safety Of Children

In enacting ASFA the Congress sought to clarify its intent relating to the preservation and reunification of families. We will examine each of these changes in turn.

1. Reasonable Efforts Requirement Reaffirmed

As noted above, the general rule continues to be that reasonable efforts must be made to prevent removal and to safely reunify children with their parents. Indeed, Congress authorized⁶ additional money to both support and expand these services. The ASFA, however, makes several important changes in how the reasonable efforts equation is applied.

a. Child’s Safety

The ASFA refines the “reasonable efforts” requirement of the AACWA by indicating that “in determining reasonable efforts to be made with respect to a child . . . and in making such reasonable efforts, the child’s health and safety shall be the paramount concern.”⁷ Thus, in considering what efforts are reasonable with respect to preservation or reunification of a family, state Children’s Protective Services (CPS) workers, foster care workers, and the courts will be required to give additional consideration to the welfare of the child as the most important concern. In essence, rather than considering preservation of the family and safety of the child as equal considerations, the law will require that the child’s physical health and well-being be given elevated status in determining whether to take protective action.

⁵ Id.

⁶ Note that this does not necessarily mean that the states will see an increase in funds. “Authorization merely permits the Congress to “allocate” up to the authorized amount. Each year’s budget must actually “allocate” a specific number of dollars to this particular program.

⁷ 42 USC 671(15)(A).

An example may help to illustrate this point. Imagine a case where CPS substantiates physical abuse in a case of excessive discipline, a mother who, while under the influence of alcohol, hits her son 8-10 times with a belt leaving numerous bruises and abrasions on the child's buttocks, upper legs and lower back. An in-home services program is put into place to work intensively with the family. Mother is involved in outpatient treatment for an assessed alcohol abuse problem, she receives and cooperates with parenting instruction aimed at increasing her repertoire of disciplining techniques, and the family engages in conjoint counseling. After four or six weeks, the case is closed. Then two months later, the CPS again substantiates abuse based on a very similar set of facts. Rather than reinstitute in-home services, the agency will need to seriously consider whether, giving additional weight to the "health and safety" of the child as the primary consideration, it must take more assertive action to protect the child. The action may include a voluntary placement of the child with a relative or a court petition seeking wardship and out of home placement.

In determining what response is reasonable, the agency workers must give elevated consideration to the child's need for a safe home environment. As a result, cases that used to automatically trigger an in-home program will require consideration of more aggressive protective action. Cases that present close questions between protection and preservation should come down in favor of protecting the child rather than preserving the family unit.

b. Applied To Permanency Plan

As previously noted the law for the past two decades has required reasonable efforts to preserve and reunify families. When these primary objectives could not be achieved, the law provided for termination of parental rights. Many cases in fact resulted in termination, unfortunately efforts to achieve permanency for the child after termination were not aggressively pursued. Many children languish in temporary placements as permanent wards of the state.

In an effort to ensure children move expeditiously to permanent homes, the ASFA engrafts a reasonable efforts requirement onto the post termination phase of child protection proceedings. Specifically, "reasonable efforts shall be made to place the child in a timely manner in accordance with the permanency plan, and to complete whatever steps are necessary to finalize the permanent placement of the child."⁸ Thus, where the court determines that reasonable efforts to reunify the family are no longer required, the agency must then establish that it has taken those steps reasonably calculated to achieve the alternative permanent plan as soon as possible.

Imagine a case where the agency recommends to the court, and the court agrees, that continued efforts to reunify a family will not serve the child's interest. Rather, everyone agrees that the alternative plan will be for a relative to adopt the child. The agency will have to establish that reasonable efforts have been made to achieve the permanent plan (e.g., the child is placed with the relative, a petition to terminate parental rights been filed, the adoptive home assessment been completed, an adoption petition been filed). If the court finds that the child has not been placed consistent with the permanency plan or that steps necessary to institute the permanency plan

⁸ 42 USC 671(15)(C).

have not been made, the court will be forced to find that reasonable efforts have not been made. Such a finding may jeopardize federal funding.

c. When Not Required

Under the AACWA “reasonable efforts” were required. The statute contained no exceptions, so therefore many states interpreted this requirement as mandating “reasonable efforts” in every case. With the passage of the ASFA, Congress has clarified its intentions by specifically indicating that in some circumstances “reasonable efforts” are not required. That is, Congress has determined that in egregious cases “reasonable efforts” are by definition unreasonable.

1. Aggravated Circumstances

ASFA establishes that “reasonable efforts . . . *shall not* be required to be made with respect to a parent of a child if a court of competent jurisdiction has determined that—(i) the parent has subjected the child to aggravated circumstances.”⁹ (Emphasis added.)

The statute then grants the individual states the authority to define “aggravated circumstances.”¹⁰ Having done so, Congress then gives the states some guidance as to what it means by “aggravated circumstances.” The “definition may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse.”¹¹ Thus, for example, a state may determine that in every case where a parent sexually abuses a child and that abuse involves penetration a petition for permanent custody must be filed with the court. Later in this section we will examine your state’s definition of “aggravated circumstances.”

2. Specific Instances When Reasonable Efforts Not Required

After providing the individual states with an opportunity to define “aggravated circumstances,” ASFA then defines more specifically cases in which reasonable efforts are not required.¹²

Federal law no longer requires “reasonable efforts” be made in cases where: 1) a parent has murdered¹³ or committed voluntary manslaughter¹⁴ upon another child of the parent; 2) a parent has “aided or abetted, attempted, conspired, or solicited to commit” murder or voluntary manslaughter of the child or a sibling of the child;¹⁵ 3) a parent commits “a felony assault that results in serious bodily injury to the child or another child of the parent;”¹⁶ or 4) where “the parental rights of the parent to a sibling have been terminated involuntarily,”¹⁷ the state is under no obligation to provide “reasonable efforts” to either prevent removal or to reunify the family.

⁹ 42 USC 671(15)(D)(i).

¹⁰ Id.

¹¹ Id.

¹² 42 USC 671(D)(ii).

¹³ 42 USC 671(D)(ii)(I).

¹⁴ 42 USC 671(D)(ii)(II).

¹⁵ 42 USC 671(D)(ii)(III).

¹⁶ 42 USC 671(D)(ii)(IV).

¹⁷ 42 USC 671(D)(ii)(V).

Additionally, the new federal law contains this general rule of construction:

Nothing in this part shall be construed as precluding State courts from exercising their discretion to protect the health and safety of children in individual cases, including cases other than those [listed above].¹⁸

2. Reaffirmation That Federal Law Is A Funding Statute

The principle of Federalism, the division of powers between the individual states and the federal government, prohibits the federal government from *requiring* that the states take specific actions. Since the federal government frequently cannot mandate actions which they want to see happen, they often use financial incentives to entice the states in to taking the desired actions. Pursuant to this method the AACWA was implemented by saying to the states, essentially, “If you do A, B, and C, we will give you X dollars.” Thus, if states implemented programs to prevent the unnecessary removal of children from their homes, utilized reasonable efforts to reunify children with their parents, held permanency planning hearings in timely manner, the federal government would give them money for their programs. The amount of money at issue could be tens or hundreds of millions of dollars, a strong incentive to make your program comply with these federal “requirements.”

To clarify the Congress’s intention that the “reasonable efforts” requirement is a part, albeit it an important part, of a funding scheme and not a mandate in each case, the ASFA states:

Nothing in this part shall be construed as precluding State courts from exercising their discretion to protect the health and safety of children in individual cases. . . .”¹⁹

This rule applies both to those situations where the federal law requires that the state petition for termination of parental rights, as well as those cases that individual states may establish as being exempt from the “reasonable efforts” requirement.²⁰

7. Mandatory Petitions To Terminate Parental Rights

For the first time, the federal law, as a condition of receiving federal financial support for child abuse prevention and foster care services, mandates that under certain circumstances the states *must* either file or join, if another party files, a petition to “terminate the parental rights of the child’s parents.” There are several circumstances under which required action must be taken:

¹⁸

¹⁹ 42 USC 678.

²⁰ Id.

- a. The child has been in foster care for 15 of the most recent 22 months;²¹
- b. The parent has committed murder of another child of the parent;
- c. The parent committed voluntary manslaughter of another child of the parent;
- d. The parent aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter upon a child of the parent;
- e. The parent committed a felony assault upon the child or another child of the parent that results in “seriously bodily injury;”
- f. The court with jurisdiction determines the child is an “abandoned infant.”

This section of the statute also requires the state “concurrently, to identify, recruit, process, and approve a qualified family for an adoption.”²²

To understand how this would work, consider the following examples:

1. A father attending to a crying infant in the middle of the night loses his temper, shakes the child, resulting in shaken baby syndrome that causes the child’s death. The state would as a general rule be required to file a petition to terminate the parental rights of both the father and the mother of their other children.
2. A mother beats a child in a manner that would a) constitute a felony assault under state law and b) results in serious bodily injury to the child. Again, the state would generally be required to file a termination petition to terminate the parental rights of both parents.
3. The child was placed in foster care, returned to the parent, then put returned to foster care such that she has spent 15 of the last 22 months in foster care. Here, again, the state must seek to terminate the parental rights of the parents.

In each of these examples the state would also be required to pursue an alternative permanent placement while seeking to terminate parental rights. But consider how the law would work in the following situation, two cases with almost identical fact have been decided recently by the Michigan appellate courts:²³

²¹ Note that the ASFA establishes an elaborate scheme to provide states sufficient time to come into compliance with this requirement as it applies to children who were in foster care at the time ASFA was enacted. It is sufficient for our purposes that the reader understand that the states are given a period of time to phase in the requirements of this provision.

²² 42 USC 675(5)(E).

²³ *In re Ramsey*, 229 Mich App 310; 455 Mich 861 (lev app den, remand for consideration as if on appeal)(1998); *In re Huisman*, Mich App (1998)(Court of Appeals No. 206872, June 19, 1998).

The parents of a young child are divorced. While with the non-custodial parent for parenting time (i.e., visitation), the non-custodial parent attempts to kill the child. (In the Michigan cases one effort was via asphyxiation the other was by putting poison in the child's milk.) Under the general rule established by the ASFA, the state would be required to seek to terminate the parental rights of "the child's parents," i.e., the custodial as well as the non-custodial parent. This would be true even if, as was true in the Michigan cases noted, the custodial parent initiated proceedings to have the non-custodial parent's rights terminated. To avoid injustices such as this, the law provides three exceptions to the mandate to file or join a petition to terminate where:

- a. the child is being cared for by a relative (e.g., a parent or a grandparent);
- b. the state has documented a compelling reason that filing a petition to terminate would not serve the child's best interests;
- c. the situation requires that the non-offending parent be provided reasonable efforts to reunify and those efforts have not been provided.²⁴

In these situation the state child protective agency may advocate for alternatives to termination to protect the child.

8. Criminal Records Checks

ASFA generally requires that before a foster or adoptive parent may be finally approved for placement of a child, that individual must have undergone a criminal records check.²⁵ Conviction of a *felony* relating to any of the following will bar the individual from *ever* being approved for placement of the child:

1. Child abuse or neglect;
2. Spousal abuse;
3. A crime against a child, which specifically includes child pornography;
4. The following crimes of violence:
 - a. Rape;
 - b. Sexual assault;
 - c. Homicide
 - d. This group does NOT include any other physically assaultive crimes.²⁶

²⁴ 42 USC 675(E)(i), (ii), and (iii).

²⁵ 42 USC 671(a)(20).

²⁶ 42 USC 671(20)(A)(i).

In addition to this grouping, which, again, bars the individual from ever being approved to take a child as a foster or adoptive parent, another group of crimes bars an individual from being approved as a foster or adoptive parent if that individual has been convicted of a *felony*²⁷ in the five years before the check is conducted. The five-year restrictions include the following:

1. Felony physical assault or battery (e.g., felonious assault, assault with intent to commit great bodily harm);
2. Any drug-related felony.²⁸

NOTE: While the ASFA *generally* requires a state's plan for providing child welfare services to contain these bars to the placement of children, this provision is one of the few areas where the state may opt out without suffering a penalty.²⁹ Thus, your individual state may chose not to require such checks or may not require that a potential foster or adoptive parent be barred from providing care based in one or more of these circumstances.

C. Expedited Permanency

A second major theme in ASFA is to tighten the time frames to achieve permanency for children who must be removed from their families. As we shall see, it does so in several ways.

1. Definition Of "Entered Foster Care"

The various states have defined the date at which a child enters foster care differently. This is an important point since it establishes the date from which the time requirement for the permanency hearing will be held. Michigan provides a good example of how this worked. In Michigan, the Permanency Planning Hearing was required to be held at least 364 days after the court entered it's initial dispositional order,³⁰ a date that could be six months or more after the child had been removed from the parent's care. As a result, children spent much longer in temporary foster care placement than intended.

Congress has sought to remedy this unintended consequence by defining what it means for a child to enter foster care. It has done so thusly:

a child shall be considered to have entered foster care on the earlier of—
(i) the date of the first judicial finding that the child has been subjected to child abuse or neglect; or
(ii) the date that is 60 days after the date on which the child was removed from the home.³¹

²⁷ Note that a felony is a serious crime, generally one for which a person could be sent to prison for more than one year.

²⁸ 42 USC 671(20)(A)(ii).

²⁹ 42 USC 671(20)(B).

³⁰ MCL 712A.19a(1). NOTE that this section of the statute was recently amended, which will be discussed in detail later.

³¹ 42 USC 675(5)(F).

To illustrate, imagine that a child enters foster care on January 1, 1999, and that the case is adjudicated on February 22, 1999. That child, for federal funding purposes, will be deemed to have entered foster care on February 22 since this date is before the expiration of 60 days. If, however, the adjudication of the case did not take place until April 16, 1999, the child will be deemed to have entered foster care on March 1, 1999, 60 days after removal from the home.

2. Permanency Planning Hearings

Coupled with defining when a child enters foster care is a shortened period of time from the “date the child is considered to have entered foster care” for the state court to hold a permanency planning hearing.³² Before the enactment of ASFA, a permanency planning hearing was required to be held within eighteen months of “original placement.” With ASFA, the permanency planning hearing must now be held within twelve months of the date the child “entered foster care” as discussed above.

Continuing with the example from above, the permanency planning hearing must now be held on or before March 1, 2000. Prior to ASFA, the hearing would not have been held until at least August 22, 2000, and may have been held as late as October 16, 2000.

3. Expedited Permanency Planning Hearings

When a court with jurisdiction over child abuse and neglect proceedings determines that reasonable efforts are not required, ASFA requires that a permanency planning hearing be held within 30 days.³³ Once the decision that reasonable efforts to reunify are not necessary, the reasonable effort requirement shifts to achieving the permanency plan.³⁴ Thus, caseworkers will be required to demonstrate to the court that they have taken the necessary steps to move toward the permanent plan.

Moreover, and perhaps more importantly, the ASFA requires that *in all cases* the Permanency Planning Hearing (PPH) must be held within 12 months of the initial placement in foster care.³⁵ This requirement replaces the prior requirement that the PPH be held with 18 months of placement in foster care.

4. Concurrent Planning

The ASFA permits child welfare agencies to use reasonable efforts to simultaneously pursue inconsistent permanency goals for a child. The text of this provision provides:

[R]easonable efforts to place a child for adoption or with a legal guardian may be made concurrently with reasonable

³² 42 USC 675(C).

³³ 42 USC 671(E)(i).

³⁴ 42 USC 671(E)(ii).

³⁵ 42 USC 675.

efforts [to reunify the family]³⁶

In many jurisdictions concurrent planning is an entirely new concept. It has been described as follows:

Traditionally, case management in child welfare has consisted of efforts at parental rehabilitation which, if unsuccessful, are followed by the introduction of alternative permanent plans (adoption, relative placement, foster parent guardianship, etc.). Typically, an agency might spend 1-3 years providing services to parents before turning to “permanency planning” [SIC] i.e., filing a petition to terminate parental rights, recruiting an adoptive home or permanent relative placement, research in service delivery over permanent relative placement. Research in service delivery over permanent relative placement. . . .

Concurrent planning was developed as an alternative to the above-described sequential planning. It is both a philosophy and a case management method emphasizing candor, goal setting and time limits in our work with neglectful and abusive parents. It is based on the belief that foster care outcomes are determined as much by the agency’s approach as by the parental situation. *What we do will create foster care drift or prevent it.*

Concurrent planning provides for reunification services while simultaneously developing an alternative plan, in case it is needed. The approach follows logically from family-centered practice, as parents are involved in decision-making and are given candid feedback from their worker throughout the process. It depends on accurate assessment and culturally sensitive interviewing.³⁷ (Emphasis in original, internal citations omitted.)

5. Documentation of Permanency Efforts

To aid in achieving a permanent home for children unable to return to their family of origin, the ASFA requires the states to have in place procedures for documenting efforts to place a child permanently. Thus, the caseworker must document

“the steps the agency is taking to find an adoptive family or other permanent living arrangement for the child, to place the child with an adoptive family, a fit and willing relative, a legal guardian, or another planned permanent living arrangement, and to finalize the adoption or legal guardianship.³⁸

³⁶ 42 USC 671(F).

³⁷ Katz, Linda, M.S.W., Norma Spoonemore, M.S.W., Chris Robinson, M.S.W., Concurrent Planning: From Permanency Planning To Permanency Action (1994, Lutheran Social Services of Washington and Idaho).

³⁸ 42 USC 675(1)(E).

While the statute does not specifically define the form this documentation must take, the information must include at least the “child specific recruitment efforts such as the use of state, regional, and national adoption exchanges including electronic exchange systems.”³⁹

6. Adoption Incentives

The amended statute establishes a program of financial incentives to encourage each state to move children out of foster care and into adoptive homes.⁴⁰ **[DOUBLE CHECK THIS CITE]** That is, the more children a state places from foster care into adoptive homes in the current year, the more money it will receive from the federal government to run its program in the following fiscal year.

a. Incentive Eligibility

If a state is an “incentive eligible” state, it will receive additional money to support its programs. A state is “incentive eligible” if it meets the following criteria:

1. The state has a plan approved by the Secretary of Health and Human Services to assure that children in foster care are moving into adoptive homes;
2. The number of adoptions during the year⁴¹ exceeds the base number of adoptions as established by a formula (which will be discussed in detail below);
3. The state has used prescribed methods to:
 - a. Determine the number of children adopted from foster care; and
 - b. Determine the number of special needs children adopted from foster care;
4. If there is an adoption assistance agreement in place for special needs adoptees (i.e., children already adopted), the state provides health care coverage as part of that assistance agreement;

The adoption incentive program is in place for the years 1998 through 2002. The law authorizes \$20,000,000 for the program for each fiscal year through 2002. Recall, however, that the amount of money actually made available will depend on the appropriation the Congress and President agree to in each of those years. If less than the \$20,000,000 is appropriated, a state will actually receive a pro rata share of the money it would have received had all the money been appropriated.

1. Brief Discussion of the Program

The adoption incentive program requires that each state establish a base number of adoptions for each year. For every adoption in excess of that base number, the state will receive from the

³⁹ Id.

⁴⁰ 42 USC 673b.

⁴¹ Note that “year” for the purposes of this discussion of adoption incentives means fiscal rather than calendar years.

federal government an additional \$4,000. Likewise, each state must establish a base number of special needs adoptions for the year. For each special needs adoption achieved beyond that base number the state will get another \$2,000. Thus, a state may receive up to \$6,000 for each finalized adoption of a special needs child beyond its base number. The base number for a given year may go up, but it cannot go below the original base number. Therefore, each year the state will need to achieve adoption of more children from foster care to be eligible for the incentive money.

2. A Closer Look

An example will help to illustrate how this program will work. Imagine that the State of Grace, a state in the United States, has the following adoption numbers:

<u>Year</u>	<u>Adoptions From Foster Care</u>	<u>Special Needs Adoptions</u>
1995	256	113
1996	213	119
1997	222	136
1998	230	112
1999	231	138
2000	264	156
2001	301	141

To establish its base numbers of adoptions in the first year of the program, 1998, we average the numbers of adoptions from the three previous years, 1995, 1996, and 1997. After 1998, we look for the highest number of adoptions between 1997 and the prior year. Thus, in 1998's base is:

$$256 + 213 + 222 = 691/3 = 230$$

However, 2000's base is the 231 established in 1999, the largest number of adoptions from 1997-1999.

As just established the base of all adoptions for the State of Grace in 1998 is 230. Since the number of adoptions it achieved in 1998 was also 230, it has no adoption incentive eligible adoptions for 1998. The State of Grace needs to work harder to get its foster children adopted. The State of Grace's 1999 base number is determined by the higher of 1997 and 1998. Since it had 8 more adoptions in 1998 (230) than in 1997 (222), its 1999 base is 230. In 1999, the State of Grace achieved 231 adoptions, so it has one adoption that is eligible for an incentive payment. The state will receive an additional \$4,000:

$$(\text{Number of Incentive Eligible Adoptions}) \times (\text{Incentive Payment}) = (\text{Total Incentive Payment})$$

$$1 \times \$4,000 = \$4,000$$

If that one incentive eligible adoption involved a special needs adoption, the state would get an additional \$2,000:

(Number of Incentive Eligible Adoptions)

$$\begin{array}{l} \times (\text{Special Needs Adoptions Above Base}) \\ = (\text{Special Needs Incentive Payment}) \end{array}$$

In our example:

$$\begin{array}{r} 1 \\ \times \$2,000 \\ \hline \$2,000 \end{array}$$

With special needs adoptions, the two incentives are added together, so the State of Grace will receive a total of \$6,000 for 1998.

Let's look at how the State of Grace did in the year 2000:

The base number for 2000 is established by the highest number of adoptions in the years 1997 through 1999. Thus the base number for 2000 is 231, established in 1999. To determine the number of incentive eligible adoptions, we subtract the base number from the current year's number:

$$(\text{Current Year Adoptions}) - (\text{Base Year Adoptions}) = (\text{Incentive Eligible Adoptions})$$

$$264 - 231 = 33$$

In the year 2000 the State of Grace has 33 incentive eligible adoptions resulting in an incentive payment of \$132,000:

$$33 \times \$4,000 = \$132,000$$

To establish the special needs adoption base for 2000, we must use the highest number of special needs adoptions the state achieved from 1997 through 1999:

1997	136
1998	112
1999	138

Thus, we must use 1999's number of 138 as our base for 2000. We must then subtract that base number from the number of adoptions achieved in 2000:

$$156 - 138 = 18$$

We now know that 18 of the special needs adoptions achieved in 2000 are eligible for the special needs adoption incentive payment of \$2,000:

$$18 \times \$2,000 = \$36,000$$

This \$36,000 special needs adoption incentive payment is added to the \$132,000 incentive payment for non-special needs foster children (notice that the Adoptions From Foster Care number includes the Special Needs Adoptions number)⁴²:

$$\$36,000 + \$132,000 = \$168,000$$

The State of Grace's total year 2000 adoptive incentive payment is \$168,000.

b. Technical Assistance to States

The ASFA authorizes \$10,000,000 for the Department of Health and Human Services to issue grants or contracts to provide the states with technical assistance to the states to enhance their ability to expedite the adoption or other permanent placement of foster children.⁴³ That technical assistance may take one of these forms:

1. Develop best practice guideline;
2. Models to encourage concurrent planning;
3. Develop specialized units to expedite adoptions;
4. Develop risk assessment tools;
5. Develop "fast track" adoption for infants;
6. Develop programs to place children in pre-adoptive homes before termination of parental rights has taken place.

At least one-half of the money appropriated for technical assistance must be target state courts.

7. Cross-Jurisdictional Adoption

To ensure that children who are eligible for adoption are given the best possible opportunity to achieve permanency, the ASFA requires that the states implement "plans for the effective use of cross-jurisdictional resources to facilitate timely adoptive or permanent" homes.⁴⁴ (By "cross-jurisdictional" the law means across state or county lines.) It does not, however, stop there. Rather, the law goes on to provide for financial penalties if the state either fails to place a child

⁴² Notice that because of this fact a state could receive the \$4,000 payment for a special needs child because it was able to adopt sufficient numbers of children from foster care but not be eligible for the additional \$2,000 special needs adoptions incentive if it did not exceed the base number of special needs adoptions.

⁴³ 42 USC 673(b)(i).

⁴⁴ 42 USC 622(b)(12).

across state or county lines or delays a placement across state lines when a family in another jurisdiction has been approved.⁴⁵ Moreover, the state must give a potential adoptive parent a “fair hearing” if that individual alleges that cross-jurisdictional placement has either been denied or unnecessarily delayed.⁴⁶ Again, there is a financial penalty if the state fails to provide such a hearing.

So if siblings Johnny and Suzie are available for adoption in Michigan and a suitable home is available in Indiana, Michigan will suffer a financial loss if it delays or denies the adoptive placement due to the cross-jurisdictional nature of the adoption. Likewise, if the State of Grace, a state in the United States has a child available for adoption in Nirvana County and an adoptive home available in Harmony County, the state will suffer a loss of its federal support if it delays this cross-jurisdictional placement.

8. Study Ways to Achieve Cross-Jurisdictional Adoption

The law charges the Comptroller General of the United States with conducting a study and submitting to Congress its findings regarding ways to expedite adoptions across state and county lines.⁴⁷

9. Health Insurance for Children With Adoption Subsidies

The new law requires that the state have in place a plan for services to children that provides health care insurance as part of adoption assistance program. Such insurance must cover children’s special “medical, mental health or rehabilitative care.”⁴⁸ Since these benefits are generally provided through a state medicaid grant, which requires matching funds to be provided by the state, some states were either reducing, particularly mental health benefits, or eliminating medical subsidies as part of their adoption subsidy programs. This provision seeks to reverse that trend.

10. Continuation of Subsidy if Initial Adoption Breaks Down

The ASFA requires that in situations where a child is eligible for an adoption subsidy, is adopted, and that adoption breaks down (whether the adoptive parents’ rights are terminated or because of the death of the adoptive parents), the child will remain eligible for a subsidy in a second adoptive home.⁴⁹

11. Standards of Care

A new provision of the law requires that each state establish standards of care for children in foster care placements, whether public or private.⁵⁰ The purpose of these standards of care are

⁴⁵ 42 USC 674(e)(1).

⁴⁶ 42 USC 674(e)(2).

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⁴⁸ 42 USC 671(a)(21).

⁴⁹ 42 USC 673(a)(2).

⁵⁰ 42 USC 671(a)(22).

“to ensure that children in foster care . . . are provided quality services that protect the safety and health of the children.”⁵¹

D. Expanded Permanency Options

1. Guardianship As A Permanent Plan

In most jurisdictions, legal guardianship is intended to be a temporary arrangement to provide for the care of a child when a parent is unwilling to do so.⁵² Generally, the court which granted the guardianship has either the right or the obligation to supervise the child welfare while under the guardianship.⁵³ Indeed, under some states’ laws, a legal guardian may request to adopt the child⁵⁴ or petition for termination of parental rights.⁵⁵

As noted above, in passing the ASFA Congress authorized concurrent planning and, in doing so, indicated that among the permanency options that should be available to the states is the placement of a child under a legal guardianship.⁵⁶ To make its intention clear that guardianship may be used as a permanency plan, the Congress defined guardianship as:

A judicially created relationship between a child and caretaker which is intended to be permanent and self sustaining as evidenced by the transfer to the caretaker of the following parental rights with respect to the child: protection, education, care and control of the person, custody of the person, and decision-making. The term ‘legal guardian’ means the caretaker in such a relationship.⁵⁷

At this writing, the Children’s Bureau of the Department of Health and Human Services is in the process of promulgating administrative rules that would encourage the states to establish a means of granting guardianships that are intended to be permanent. For those states that choose to establish such statutes, that would mean that the establishment of a guardianship with, say, a relative or foster parent would provide a final resolution to the case by providing a home that is indeed permanent.

As noted above, the categorization of the changes in the law overlap one another. Notice how providing for a permanent guardianship statute both expands the state’s options for achieving permanency and also expedites permanency.

⁵¹ Id.

⁵² Consider, for example, the guardianship statutes of Indiana, , IC 29-3-3-1 et seq., and Michigan, MCL 700.401 et seq.

⁵³ See, e.g., MCL 700.424b.

⁵⁴ MCL 700.401 et seq.

⁵⁵ MCL 712A.19b(3)(d), (e) and (f).

⁵⁶ See d, above.

⁵⁷ 42 USC 675(7).

E. Miscellaneous Provisions

The ASFA contains numerous miscellaneous provisions which are attendant to the primary areas of change. These will be considered here.

1. Notice To Caretaker

Federal law now requires that the child's caretaker—whether foster parent, preadoptive parent, or relative—receive notice of review hearings. This includes the right to be heard during the conduct of those hearings. This provision does not make them a party to the case.⁵⁸ As a result of this change, the individual who has the responsibility for day-to-day care of the child must be provided notification of the time and place of a review hearing regarding a child in his or her care. At that hearing the court must provide the caretaker the chance to address the court as to his or her concerns regarding the case. This does NOT give the caretaker the right to be represented by an attorney, ask questions of witnesses, or to call witnesses to support his or her position.

2. Parent Locator Service

The Federal Parent Locator Service is a nationwide data bank that is used to help states, courts, and agencies to locate parents who owe child support or who have child custody or visitation disputes.⁵⁹ This data bank includes information such as the person's name, address, employment information, income information, and information related to an individual's assets. ASFA permits the state child protective services agency to access this data bank for the purposes of locating a child's parent.⁶⁰

3. Annual Report

The Secretary of Health and Human Services (HHS) is directed to:

- a. Use the Adoption and Foster Care Analysis and Reporting System to develop *outcome measures* to assess the performance of the states in operating their child protection and child welfare programs;
- b. Develop a *system of rating the states'* performance relative to those outcome measures;
- c. Require that the states provide the necessary information so that HHS can rate them. This requirement is tied to the state receiving funding for its child welfare system;
- d. Make an annual report to Congress regarding the performance of each state relative to the outcome measures. The report must assess the reasons for good and

⁵⁸ 42 USC 675(G).

⁵⁹ 42 USC 653.

⁶⁰ 42 USC 653(c)(4).

poor performance and make recommendations for improvement of performance..⁶¹

Additionally, the HHS must study, develop, and recommend an incentive-based system for the provision of support to the states for child abuse related programming.

4. Report on Kinship Care

The ASFA requires that the Secretary of HHS convene the advisory panel and submit to the panel a report as to the extent to which children in foster care are placed in the homes of relatives.⁶² By June 1, 1999, HHS must submit a final report to the Congress regarding policy recommendations the use of kinship care for foster children. The report must include information from each state regarding each state's:

- a. kinship care policy;
- b. characteristics of kinship providers such as age, race, ethnicity, income, and the provider's relationship to the child;
- c. household characteristics of the providers such as number of persons in the household and family composition;
- d. the child's access to the parent from which the child was removed;
- e. cost of kinship and source of funds used for kinship care;
- f. permanency plan for the child and what actions the state has taken to achieve that goal;
- g. services provided to the parent from whom the child was removed;
- h. services being provided to the kinship caregiver.

HHS must convene an advisory panel of parents, foster, parents, relative caregivers, former foster children, state and local child welfare officials, private child welfare agency representatives, tribal governments and courts. The group must review the report regarding kinship care and comment on it to HHS.

⁶¹ 42 USC 42 USC 679b.

⁶² See 42 USC 5113.

5. Substance Abuse and Child Welfare

The Secretary of HHS is charged with submitting to Congress “a report which describes the extent and cope of the problem of substance abuse in the child welfare population.”⁶³ Additionally, the report must examine the services provided to this population, the outcomes attributable to those services, and make recommendations for legislation to address the problem.

⁶³ 42 USC 613.

II. IMPACT ON STATE LAW, POLICY, AND PRACTICE

The enactment of the Adoption and Safe Families Act will cause most states to make adjustments in their law and practice regarding child protection, child welfare, and adoption. The precise amount of change will depend upon the individual states' statutory scheme, policy and practice. Clearly, too, some general changes can be anticipated. Since the statute weighs the placement equation in favor of protecting children, there is likely to be some increase in the numbers of children removed from their homes. In cases involving close questions about removal, action will be favored over family preservation. As a result of the new definition of when a child enters foster care and the earlier permanency planning hearing, in some states children should remain in temporary care for shorter periods of time.⁶⁴ Given the redoubling of efforts to find permanent homes and the expanded options for declaring a child permanently placed, children should achieve adoption, permanent guardianship, or other permanent placement more quickly. The required use of the Parent Locator System and the focus on kinship should result in children who are removed being placed with relatives more often and more quickly. Use of the Parent Locator System should also get putative fathers and other absent parents located and involved more quickly.

Beyond these general predictions, specific changes will depend upon the precise changes in the individual state laws, policies, and practice. In this section, we will consider your state's specific situation.

A. INDIANA

In early 1998, the Indiana legislature passed legislation, to *become effective on July 1, 1999*, which will bring it into compliance with the requirements of the ASFA. Specifically, the new statutory provisions make the following changes:

1. The Division of Family and Children is charged with the responsibility of developing programs that comply with the requirements of federal law, assisting the juvenile court, and providing permanency planning services "in a timely manner"⁶⁵
2. Defines an "abandoned infant" consistent with ASFA's requirement that a petition to terminate parental rights be filed in such cases. A child under one year of age will be deemed an abandoned infant if the parent, guardian, or custodian of the child "knowingly or intentionally" leaves the child in an "environment that endangers the child's life or health or in a hospital or medical facility" if he or she "has no reasonable plan" for the care, custody, or control of the child."⁶⁶ Notice

⁶⁴ Some states already require the permanency planning hearing to be held within 12 months, Michigan is an example.

⁶⁵ IC 12-13-5-1.

⁶⁶ IC 31-9-2-0.5.

that there is no minimum period of time associated with the act of leaving the child;

3. Defines the state's policy relative to child protection. These broad policies include recognition of the importance of families and children to society, to remove children from their families only when doing so will serve the child's best interests, to provide for adoption as "a viable permanency plan for children who are adjudicated children in need of services," and to provide a continuum of services to families and children;⁶⁷

4. Requires that child protection service's (CPS) report be available to the court, prosecuting attorney, or law enforcement. Where child abuse or neglect is substantiated by CPS, it must forward a copy of its report to the prosecuting attorney's office.⁶⁸

5. That a detention hearing be held within 48 hours after the child's removal from the parents' care. The 48 hours is calculated excluding Saturday, Sunday, and holidays. So, if a child is removed on Saturday night, the court has until the close of business on Tuesday to hold the detention hearing. If that removal takes place on July 4 and the court is closed for the holiday on Monday, the court has until the close of business on Wednesday to hold the detention hearing. If the hearing is not held within this timeframe the child must be released to the parent;⁶⁹

6. The amended law requires that the court must find clear and convincing evidence that a basis to terminate parental rights exists before entering an order terminating parental rights. The court may, however, dismiss a petition to terminate parental rights if there is sufficient reason to do so consistent with ASFA (i.e., child is placed with a parent, stepparent, grandparent, an adult sibling, an adult aunt, an adult uncle, or any relative if that relative is the child's legal guardian; a compelling reason exists not to terminate parental rights; or the agency has not yet provided appropriate services to the family AND the case does *not* involve a situation where termination of parental rights is mandatory, e.g., where a parent has murdered a child.);⁷⁰

7. Requires periodic court review of cases "In accordance with federal law," and establishes that such a review must be held at least once every six months. Reviews may be held more frequently if the court so directs. Moreover, each such review must be conducted as a formal court hearing;⁷¹

8. Require that foster parents, relative care takers, "suitable" relatives, relatives with "significant relationships" to the child, prospective adoptive parents, and

⁶⁷ IC 31-10-2-1.

⁶⁸ IC 31-33-8-9.

⁶⁹ IC 31-34-5-1.

⁷⁰ IC 31-35-2-4.5.

⁷¹ IC 31-34-21-2.

any other person providing care to the child be given notice of review hearings and be provided the opportunity to address the court at that hearing;⁷²

9. Effective July 1, 1999, all case reviews must be conducted by the court. Such reviews will no longer be conducted by administrative panels;⁷³

10. That regarding the use of “reasonable efforts” the “the child health and safety are of paramount concern,” and that as a general rule “reasonable efforts” must be made to prevent removal of a child from the family home and to reunify the family;⁷⁴

11. Establishes, consistent with the ASFA, a number of circumstances under which reasonable efforts to preserve or reunify the family are not required. These include *convictions* for the following criminal offenses if either the convicted person’s child or stepchild or a parent of the child is a victim: murder, causing suicide, voluntary manslaughter, rape, criminal deviate conduct, child molesting, child exploitation, sexual misconduct with a minor, incest. Note that if a parent kills his or her stepchild, this is a basis for termination regarding that individual’s biological children. Likewise, where domestic violence between adults results in a conviction as described, the offending parent’s rights may be terminated (in essence, the state legislature has deemed this to be an aggravated circumstance under ASFA). Additionally, reasonable efforts are not necessary if there is conviction for aiding, attempting or conspiring to commit one of the offenses listed here. Nor are reasonable efforts necessary if the parent’s rights in another child have been involuntarily terminated. Finally, the court may terminate parental rights relating to an abandoned infant if the court does four things: a) appoints a guardian ad litem or a court appointed special advocate; and b) receives a written report from the child’s advocate; and 3) holds a hearing; and 4) finds that making reasonable effort to locate or reunify the family will not serve the interests of the child.⁷⁵ Consistent with this determination, the law will permit a petition to terminate parental rights to be filed in these circumstances.⁷⁶ Additionally, after July 1, 1999, a petition to terminate must be filed if circumstance exist that federal law requires a petition to be filed;⁷⁷

12. Whenever reasonable efforts are not required, the agency must develop and seek the court’s approval of a permanency plan. The agency need not prepare a predispositional report regarding the parents’ participation in a treatment plan and the court need not enter a dispositional order regarding this issue or whether reasonable efforts were made in the case;⁷⁸

⁷² IC 31-34-21-4.

⁷³ IC 31-34-21-5.

⁷⁴ IC 31-34-21-5.5.

⁷⁵ 31-34-21-5.6. Note that under this provision, the conviction may take place under Indiana law or the comparable law of another state.

⁷⁶ IC 31-35-2-4(b)(2)(A)(ii).

⁷⁷ IC 31-35-2-4.5.

⁷⁸ IC 31-34-21-5.7

13. When reunification is not the permanency plan for a child, the agency must, with court approval, make reasonable efforts to place a child permanently and to take the steps necessary to finalize that placement. Consistent with the change in permanency plan, no progress report or review is needed to determine progress toward reunification of the biological family or that the child is placed close to the biological parents;⁷⁹

14. The new law mandates that the court convene a permanency planning hearing as required by federal law:

a. Within 30 days after the court determines efforts to reunify the family are not necessary;

b. Every twelve months after the earlier of the: 1) the date the child was removed from the home; or 2) the date of the initial dispositional decree.

The court may hold the PPH earlier. The new law presumes that temporary jurisdiction over a child should not last beyond twelve months. This presumption can be overcome by the state showing the objectives of court intervention have not been accomplished, that efforts to reunify the family should continue, and that it is in the child's best interest to continue the temporary jurisdiction. If the state does not show these three things, the agency must either establish a new permanency goal or the child must be returned to the care of the parent, guardian, or custodian.⁸⁰ A permanency plan must contain the intended long-term care arrangements for the child. This long-term care plan may include reunification with the natural parents, initiating termination of parental rights, placement for adoption, placement with an appropriate relative, appointment of a legal guardian (this provision creates a permanent guardianship), or placement in another permanent living arrangement. The plan must also contain a time schedule for achieving the permanency goal as well as information pertaining to the care of the child while the permanency plan is being implemented.⁸¹

15. As of July 1, 1998, when a petition for termination of parental rights is authorized by the court, the agency must place nonidentifying information (i.e., no name or photo) about the child on the internet. The agency must update the information periodically;⁸²

16. Provides that in those circumstances where termination must be considered, a hearing must be held without a party requesting a hearing. In circumstances where a termination petition may be filed—but is not mandatory—a party must still request that a court set a hearing on the petition.⁸³ If a hearing is requested by a party, it must be held within 90 days of the request.⁸⁴

⁷⁹ IC 31-34-21-5.8.

⁸⁰ IC 31-34-21-7.

⁸¹ IC 31-34-217.5.

⁸² 31-34-21-7.3.

⁸³ IC 31-35-2-6.

⁸⁴ IC 31-35-3-7(b).

17. Require that foster parents, relative care takers, “suitable” relatives, relatives with “significant relationships” to the child, prospective adoptive parents, and any other person providing care to the child be given notice of **review hearings** and be provided the opportunity to address the court at that hearing;⁸⁵

18. Allows the following persons to file a petition to terminate parental rights:

- a. County’s attorney;
- b. Prosecuting attorney;
- c. Child’s court appointed special advocate; or
- d. Child’s guardian ad litem.⁸⁶

Provides for the state to join a petition to terminate parental rights if the petition is filed by the child’s Court Appointed Special Advocate or by the child’s Guardian *ad litem*;⁸⁷ In those circumstances where a party must request termination, the court must hold a hearing on that request.

Provide for dismissing a termination of parental rights petition, consistent with the ASFA, if the child is placed with a relative or if there is a compelling reason not to terminate the parental rights;⁸⁸

19 The amended statute permits the court to terminate parental rights if a child has been in foster care 15 of the most recent 22 months.⁸⁹ It also establishes that the date from which this period of time is calculated begins either when the child is declared a child in need of services or 60 days after removal from the parental home.⁹⁰ Additionally, after July 1, 1999, the CPS will be required to provide the child’s parents with written notice that it must file a petition to terminate parental rights if a child under this section;⁹¹

20. Establishes a procedure for the court to hold hearings required by the federal amendments;⁹²

21. Effective July 1, 1999, if the court finds the allegations contained in a petition to terminate parental rights to be true, it must terminate the parental rights of the parents. If the allegations are found to be untrue, the court must dismiss the petition.⁹³

⁸⁵ IC31-35-2-6.5.

⁸⁶ IC 31-35-2-4(a).

⁸⁷ IC 31-35-2-4.5(c).

⁸⁸ IC 31-35-4-2-4.5(d)(1) and (2).

⁸⁹ IC 31-35-2-4(b)(2)(A)(iii).

⁹⁰ IC 31-35-2-4.5(a)(2)(B).

⁹¹ IC 31-34-4-6(a)(5). This section also requires that the written notice provide the following information: the parent’s right to have a detention hearing within 48 hours, the right to be represented by an attorney, to cross examine witnesses and to present evidence to the court. If the parent cannot afford to hire an attorney, the court must appoint an attorney to represent the parent.

⁹² IC 31-35-2-6.

⁹³ IC 31-35-2-8.

22. If the juvenile court terminates parental rights, the juvenile court may refer the case to the court having jurisdiction for adoption or make another appropriate dispositional order.⁹⁴

23. The recent amendments require that any money the state receives as a result of the ASFA must be used to facilitate the adoption of children in need of services and for post adoption services.⁹⁵

⁹⁴ IC 31-35-6-1.

⁹⁵ IC 31-40-3-4.

B. MICHIGAN

With the enactment of the Binsfeld legislation in December of 1997 and its implementation on April 1, 1998, Michigan's statutory framework is largely in compliance with the ASFA. Indeed, in most particulars, Michigan's law is either consistent with or more rigorous than the federal legislation. There are but a few areas where our statutes will need to be amended to conform with the new federal legislation. The first of these is that we must make petitions for termination of parental rights mandatory when a parent has committed voluntary manslaughter upon a child. Additionally, the Juvenile Code will need to be amended to require a petition to terminate be filed when a child has been in foster care for 15 of the previous 22 months.

