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# THE ADOPTIONS AND SAFE FAMILIES ACT (ASFA)

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The Adoptions and Safe Families Act (ASFA) was passed by the United States Congress in 1997. Using safety and permanency as its primary goals, ASFA amended prior foster care law.

When speaking of ASFA, practitioners may be speaking about the United States Code, which is the text of the original act, the final regulations promulgated at the direction of Congress by the Department of Health and Human Services (HHS) to implement the code, or the comments to the regulations, often called the preamble.

While the code and the regulations have the weight of legal authority, the comments do not. However, the comments give practitioners guidance as to what HHS is expecting when it conducts its reviews of the states' compliance. Should a state fail to show adequate compliance and improvement in their dependency systems, HHS may eliminate or reduce federal funding to that state. Federal funding is integral to Florida's dependency system, as Florida receives more than half of its dependency system funding from the federal government. <sup>i</sup>

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## WHERE CAN ASFA BE FOUND?

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- ASFA is found at 42 U.S.C. §§ 620-679.
- Relevant regulations relating to ASFA are at 45 C.F.R. § 1356.
- Comments to the regulations by the Dept. of Health and Human Services are found at 65 Fed. Reg. 4020-4088.

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## WHAT ASFA REQUIRES

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### **Contrary to the Welfare Findings**

When a child is removed from the home, ASFA requires that the court make a finding that it is contrary to the child's welfare to remain in the home. 42 U.S.C. § 671(a)(15)(B)(i); 45 C.F.R. § 1356.21(c).

The contrary to the welfare finding must be:

- Made at the first court hearing that sanctions, even temporarily, the child's removal. 45 C.F.R. § 1356.21(c);
- Explicitly documented by reference to facts. 45 C.F.R. § 1356.21(d); and
- Made on a case-by-case basis. 45 C.F.R. § 1356.21(d).

The contrary to the welfare finding may not be:

- Made retroactively. 45 C.F.R. § 1356.21(d);

- Made by a mere reference to a court report without citing specific facts from the report. 65 Fed. Reg. 4056 (Jan. 25, 2000); or
- Made by mere reference to a state statute without citing facts from the case. 45 C.F.R. § 1356.21(d).

If the finding is not made at the correct time, or is not adequate, the child loses all eligibility for Title IV-E (of the Social Security Act) funding for the child’s entire stay in foster care. 45 C.F.R. § 1356.21(c). If the child can safely remain in the home, the child should be returned home with services rather than placed in out-of-home care. 42 U.S.C. § 671(a)(15)(B)(i).

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## REASONABLE EFFORTS TO PREVENT REMOVAL FINDINGS

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ASFA requires that the court make a finding that reasonable efforts were made by the department to prevent the child’s removal. 42 U.S.C. § 671(a)(15)(B)(i); 45 C.F.R. § 1356.21(b)(1).

### **The Reasonable Efforts to Prevent Removal Finding Must Be:**

- Made within 60 days of the child’s removal. 45 C.F.R. § 1356.21(b)(1);
- Explicitly documented by reference to facts. 45 C.F.R. § 1356.21(d); and
- Made on a case-by-case basis. 45 C.F.R. § 1356.21(d).

### **The Reasonable Efforts to Prevent Removal Finding May Not Be:**

- Made retroactively. 45 C.F.R. § 1356.21(d);
- Made by a mere reference to a court report without citing specific facts from the report. 65 Fed. Reg. 4056 (Jan. 25, 2000); or
- Made by mere reference to a state statute without citing facts from the case. 45 C.F.R. § 1356.21(d).

If the reasonable efforts finding is not made by the 60-day deadline, or is not adequate, the child loses all eligibility for Title IV-E (of the Social Security Act) funding for the child’s entire stay in foster care. 45 C.F.R. § 1356.21(c). If the child could have remained in the home if the department had provided services, the child should be returned home with services rather than placed in out-of-home care. 42 U.S.C. § 671(a)(15)(B)(i).

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## CASE PLANS

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ASFA requires that the department must develop a case plan “within a reasonable period” which can be no more than 60 days after the removal of the child. 45 C.F.R. § 1356.21(g)(2). The department must involve the parents in the case plan development. 45 C.F.R. § 1356.21(g)(1). If the parents are unwilling or unable to participate in the case plan development, the department must document its efforts to engage the parents in the process. 65 Fed. Reg. 4057 (Jan. 25, 2000).

**The Case Plan Must Include Services for the Child, The Parents, and The Foster Parents to:**

- Assure that the child receives “safe and proper care” and address the child’s needs;
- “[I]mprove conditions in the parents’ home;” and
- Facilitate the child’s reunification or other permanent placement.

42 U.S.C. § 675(1)(B).

**The Case Plan Must Also:**

- Be a written document. 42 U.S.C. § 675(1)(A);
- Describe the child’s placement, including its safety and appropriateness, how it is the most family-like possible, and if the goal is reunification, how the placement is as near the family’s home as possible. The plan must take into consideration the distance of the child’s placement from the child’s school. 42 U.S.C. § 675(1)(A), 42 U.S.C. § 675(1)(C), 45 C.F.R. § 1356.21(g)(3);
- Include the child’s health and education records, including contact information for providers, a copy of the child’s school record and immunizations, and information about the child’s medical conditions and medications. 42 U.S.C. § 675(1)(C);
- Provide services, “where appropriate,” to help children 16 and over to transition to living independently, even if the goal is not independent living. 42 U.S.C. § 675(1)(C);
- Document the steps the department is taking to achieve the case plan goal where the goal is not reunification. 42 U.S.C. § 675(1)(D);
- Describe services offered by the department to prevent the removal of the child and to reunify the family (i.e. attach past case plans). 45 C.F.R. § 1356.21(g)(4); and
- Include “child-specific” recruitment efforts where the goal is adoption. At a minimum, these efforts should include the use of state, regional, and national adoption registries. 45 C.F.R. § 1356.21(g)(5).

Compliance with the case plan must be “reviewed periodically,” but not less than every six months (typically at judicial review hearings. 42 U.S.C. § 675(5)(B). Additionally, the case plan goal, or permanency plan, must be reevaluated and determined at a permanency hearing to be held no less than 12 months after the child has been removed. 42 U.S.C. § 675(5)(C).

**Reasonable Efforts to Reunify Families**

ASFA requires that the states make reasonable efforts to reunify families. 42 U.S.C. § 671(a)(15)(B). However, the regulations do not require specific findings that these efforts were made. The states are excused from making efforts to reunify families where that would be “inconsistent with the

permanency plan for the child.” 42 U.S.C. § 671(15)(C). The code lists examples of circumstances where efforts are not required to reunify the family, but this list is not meant to be exhaustive. 42 U.S.C. § 671(a)(15)(D)(i); 65 Fed. Reg. 4060 (Jan. 25, 2000).

Reasonable efforts are not required to reunify families where:

- The child is an abandoned infant. 42 U.S.C. § 675(5)(E).
- The parent has subjected the child to “aggravated circumstances” such as torture, chronic abuse, sexual abuse, or abandonment. 42 U.S.C. § 671(a)(15)(D)(i).
- The parent has committed, or assisted in the committing of, the murder or voluntary manslaughter of one of the parent’s other children. 42 U.S.C. § 671(a)(15)(D)(ii).
- The parent has committed a felony assault resulting in serious injury to the child or another child of the parent. 42 U.S.C. § 671(15)(D)(ii).
- The parent had his or her parental rights involuntarily terminated to another child. 42 U.S.C. § 671(a)(15)(D)(iii).
- The state has determined that another reason exists that justifies not using reasonable efforts to reunify the family, with the child’s health and safety as the paramount concern. 42 U.S.C. § 671(a)(15)(A), 42 U.S.C. § 671(a)(15)(D)(i), 65 Fed. Reg. 4060 (Jan. 25, 2000).

A permanency hearing must be held within 30 days of a court order that reasonable efforts to reunify the family are not required. 42 U.S.C. § 671(a)(15)(E)(i).

The department must file a termination of parental rights (TPR) petition for abandoned infants, siblings of a child murdered by a parent, and children whose parent has committed a felony assault resulting in injury to the child or the child’s sibling, unless:

- The child is in the care of a relative. 42 U.S.C. § 675(5)(E)(i);
- The Department has documented a “compelling reason” why TPR is not in the child’s best interests. 42 U.S.C. § 675(5)(E)(ii);
- “Adoption is not the appropriate permanency goal for the child.” 45 C.F.R. § 1356.21(i)(2)(ii)(A);
- There are no grounds for TPR. 45 C.F.R. § 1356.21(i)(2)(ii)(B);
- The child is an unaccompanied refugee. 45 C.F.R. § 1356.21(i)(2)(ii)(C); or
- “International legal obligations” or “compelling foreign policy reasons” prevent TPR. 45 C.F.R. § 1356.21(i)(2)(ii)(D).

### **Reasonable Efforts to Finalize The Permanency Plan**

The department must use reasonable efforts to “place the child in a timely manner in accordance with the permanency plan, and to complete whatever steps are necessary to finalize the permanent

placement of the child.” 42 U.S.C. § 671(a)(15)(C). ASFA anticipates that a finding regarding the reasonableness of the department’s efforts will be made at the permanency hearing, as it requires such a finding within 12 months of the child’s removal and every 12 months afterwards. 45 C.F.R. § 1356.21(b)(2)(i).

**The finding that reasonable efforts were used to finalize the permanency plan must:**

- Be made regarding the permanency plan in effect (as opposed to previously abandoned plans). 45 C.F.R. § 1356.21(d); 65 Fed. Reg. 4052 (Jan. 25, 2000).;
- Be “as meaningful as possible and child specific,” and made on a case-by-case basis. 45 C.F.R. § 1356.21(d)(3); 65 Fed. Reg. 4056 (Jan. 25, 2000); and
- Reference specific facts of the case. References to state statutes are insufficient. References to a court report, without citing specific facts from the report, are insufficient. 45 C.F.R. § 1356.21(d)(3); 65 Fed. Reg. 4056 (Jan. 25, 2000).

If there is an insufficient finding, if the finding is that reasonable efforts were not made, or if the finding is not made by the 12-month anniversary of the child’s entry into care, Title IV-E funding is lost for the child until an adequate finding is made. 45 C.F.R. § 1356.21(b)(2)(ii).

**TPR after 15 Months Out Of the Home**

ASFA states that when a child has been in foster care for 15 of the last 22 months, the department “shall file a petition to terminate the parental rights of the child’s parents” unless the child is being cared for by a relative, the state has documented a “compelling reason for determining that filing such a petition would not be in the best interests of the child,” or the state has not made the reasonable efforts necessary to achieve the goal of the case plan where the goal is reunification. 42 U.S.C. § 675(5)(E).

**Compelling Reasons not to File for TPR Include:**

- “Adoption is not the appropriate permanency goal for the child.” 45 C.F.R. § 1356.21(i)(2)(ii)(A);
- There are no grounds for TPR. 45 C.F.R. § 1356.21(i)(2)(ii)(B);
- The child is an unaccompanied refugee. 45 C.F.R. § 1356.21(i)(2)(ii)(C); or
- “International legal obligations” or “compelling foreign policy reasons” prevent TPR. 45 C.F.R. § 1356.21(i)(2)(ii)(D).

Although the code and the regulations require TPR absent a compelling reason, HHS has indicated it will not take federal funds from the states if they do not file for TPR by 15 months if the parent is “diligently working toward reunification and the state and court expect that reunification can occur within a time frame that is consistent with the child’s developmental needs.” 65 Fed. Reg. 4035 (Jan. 25, 2000).

In every case in which the department does not file for TPR after the child has been in care 15 of the last 22 months, the department must document why not filing for TPR is in the child’s best interest. 65 Fed. Reg. 4062 (Jan. 25, 2000).

The calculation of how much time the child has spent in care is cumulative rather than consecutive. 45 C.F.R. § 1356.21(i)(i)(C). Runaway episodes and trial home visits do not count toward the 15 months. Id.

### **Adoption Planning Concurrent with the TPR filing**

ASFA is explicit in requiring the department to begin identifying, recruiting, processing, and approving qualified families for adoption concurrently with filing or joining the petition for TPR. 42 U.S.C. § 675(5)(e); 45 C.F.R. § 1356.21(i)(3). Work to finalize an adoptive placement must be “child-specific,” which, at a minimum, includes using state, regional, and national electronic exchange systems or adoption registries. 45 C.F.R. § 1356.21(g)(5).

Mandating that the department concurrently work toward the adoption goal for children when a TPR is filed was “developed to ensure that a child does not wait unnecessarily between the time a TPR is granted and the child’s permanent placement in a home.” 65 Fed. Reg. 4062 (Jan. 25, 2000).

### **And Much, Much More**

ASFA provides many rights to children, parents and foster parents involved in the dependency system. Some of the many other requirements of ASFA include:

- Mandatory reporting by the department of known or suspected maltreatment of children within the system. 42 U.S.C. § 671(a)(9)(A).
- Ensuring that foster homes and other institutions where children are placed meet national standards regarding admission, safety, sanitation, and civil rights protection. 42 U.S.C. § 671(a)(10).
- Provision of adoption assistance payments and foster care maintenance payments. 42 U.S.C. § 672; 42 U.S.C. § 673.
- Periodic reviews of foster care payments and adoption assistance payments to assure appropriateness, and fair hearings for those who believe their payments are unreasonably denied. 42 U.S.C. § 671(a)(11); 42 U.S.C. § 675(12).
- Ensuring there is no discrimination in foster parent approval or child placement based on race, color, or national origin. 42 U.S.C. § 671(a)(18).
- Criminal records checks of all foster and adoptive parents, and denial of applications where such checks reveal convictions for listed offenses. 42 U.S.C. § 671(a)(20)(A).
- Health insurance provisions for children with special needs to assist with adoptive placement. 42 U.S.C. § 671(a)(21).
- Eliminating delay in placing children out-of-jurisdiction when an available placement is available. 42 U.S.C. § 671(a)(23)(A).
- Preparing foster parents to provide for the child’s needs, including providing the foster parents with the child’s health and education record. 42 U.S.C. § 671(a)(24); 42 U.S.C. § 675(5)(D).

- Periodic (at least yearly) visits from a Department worker for children placed out-of-state. 42 U.S.C. § 675(5)(A)(ii).
- Providing foster parents and pre-adoptive parents with notice and an opportunity to be heard at reviews and hearings regarding the child. 42 U.S.C. § 675(5)(G).

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## WHAT ASFA ALLOWS

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### **Concurrent Planning**

Prior to the adoption of ASFA, most states used a sequential approach to permanency planning – pursuing family reunification first, and only pursuing other permanency options, such as adoption, when all possibility of reunification has been exhausted. Patricia Schene, *Implementing Concurrent Planning: A Handbook for Child Welfare Administrators 1-2* (Barbara Sparks, ed., 2001). The unintended consequence of sequential planning has proven to be longer stays in foster care with a greater number of moves. *Id.* Frustrated with this impact of sequential planning, several states began implementing a model known as concurrent planning – where more than one permanency option, typically reunification and adoption, is pursued at the same time. *Id.* Concurrent planning has led to faster permanency for children, either by reuniting them with their parents, or through placing them in other permanent homes. *Id.*, at 8-14.

Recognizing that concurrent planning improves children’s lives, ASFA specifically allows for the practice. 42 U.S.C. § 671(a)(15)(F); 45 C.F.R. § 1356.21(b)(4);

45 C.F.R. § 1356.21(i); 45 Fed. Reg. 4054 (Jan. 25, 2000) (describing concurrent planning as consistent with good practice.).

### **TPR Prior To the Child Being In Care for 15 of 22 Months**

While ASFA is written to require the department to file for TPR when a child has been out of the home for 15 of the last 22 months, ASFA does not preclude filing for TPR sooner when the circumstances and the best interests of the child necessitate doing so.

HHS made this abundantly clear in the comments by stating:

We would like to clarify that a State continues to have the discretion to file a petition for TPR whenever it is in the best interests of the child to do so. In addition, Congress passed a Rule of Construction at section 103(d) of Public Law 105-89 reaffirming a State’s ability to file a petition for TPR before it is mandated by Federal statute or for reasons other than those indicated in Federal law. Therefore, States should view the Federal statutory time frames of 15 out of 22 months of a child’s stay in foster care as the maximum length of time that can elapse before a State agency must file a petition or document an exception for TPR.

65 Fed. Reg. 4060 (Jan. 25, 2000).

### **Preference for Placement with a Relative**

ASFA requires that the department “consider giving preference to an adult relative over a non-related caregiver” when making placement decisions. 45 § U.S.C. (a)(19). However, nowhere does ASFA state that children must be placed with relatives.

ASFA does support relative placement without adoption by permitting the department to withhold filing for TPR when the child is with a relative. 42 U.S.C. § 675(5)(E)(i). However, in order to promote permanent placements for children, HHS does not allow the case to be closed when a child is with a relative and a permanency option such as adoption or guardianship has not been finalized. 65 Fed. Reg. 4060 (Jan. 25, 2000). “A State must continue to develop and reevaluate a child’s case plan goal and conduct permanency hearings if the State decides not to file a petition for TPR because the child is placed with a relative.” *Id.* The comments to the regulations suggest that relatives should be actively encouraged to legalize the permanency of the child’s placement. *Id.*

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<sup>i</sup> See, Children’s Defense Fund, “Child Welfare in Florida” (available at <http://www.childrendefense.org/childwelfare/financing/factsheets/fl.pdf> as of 8/5/05) (January, 2005).