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Eulogies, Effigies, & (and) Erroneous Interpretations: Comparing Missouri's Child Protection System to Federal Law

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Law Summary

Eulogies, Effigies, & Erroneous Interpretations: Comparing Missouri's Child Protection System to Federal Law

I. INTRODUCTION

As you know, today the public child welfare system sees more children than ever who are in crisis. This increase is threatening to overwhelm our ability to make a positive difference in the lives of troubled children and their families. . . . We recognize that more needs to be done to improve and strengthen the child welfare system and that state agencies cannot do it alone.¹

Societal views regarding the status and rights of children and the duty of states to provide for their welfare and protection have evolved significantly over the past several decades. Children, once seen as property of their parents, now are recognized to have constitutional rights that essentially mirror those of adults.² Additionally, federal and state courts have recognized that parents have constitutionally protected rights to raise their children free from undue interference by the states.³ Balancing the rights of parents with the rights of children in their care has proven to be difficult, though necessary, in the evolution of a society that recognizes the importance of a safe and stable environment for children as they mature into adulthood.

1. *On Behalf of the American Public Welfare Association Before the Subcomm. on Social Security and Family Policy Comm. on Finance, U.S. Senate on Child Welfare Reform*, 105th Cong. (May 21, 1997) (statement of Gary J. Stangler, Director of the Missouri Department of Social Services), available at 1997 WL 10572021.

2. See *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) (stating that “[m]inors, as well as adults, are protected by the Constitution and possess constitutional rights”); Barbara Bennett Woodhouse, *“Who Owns the Child?”: Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1042-46 (1992) (providing an overview of children as parental property).

3. See *Pierce v. Soc’y of the Sisters*, 268 U.S. 510, 534-35 (1925) (striking down a statute as an unconstitutional interference with parental ability to direct “the upbringing and education of children under their control”); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (recognizing a parent’s due process liberty interest in establishing a home and bringing up children); *In re K.A.W.*, No. SC 85683, 2004 WL 616342, at *7 (Mo. Mar. 30, 2004) (en banc) (stating “[a] parent’s right to raise her children is a fundamental liberty interest protected by the constitutional guarantee of due process.”).

Gary Stangler, former Director of the Missouri Department of Social Services, offered the statement at the beginning of this Law Summary in support of the federal Adoption and Safe Families Act of 1997 (“ASFA”).⁴ ASFA aimed to improve the child welfare scheme while providing incentives for states to increase the likelihood of a permanent home for foster children.⁵ This Law Summary addresses the legislative history leading up to the current federal child welfare legislation, corresponding Missouri statutes enacted or amended to comply with federal law, and notable court decisions that affect the state’s child protection system.

Due to a number of factors, state courts and child protection agencies are diluting the purposes of ASFA. State agencies and courts that deal with child welfare are faced with serious budget constraints, overwhelming caseloads, and varying judicial interpretations of state statutes.⁶ While efforts to implement child protection systems struggle in many respects, state courts further injure the systems by contravening legislative intent through statutory interpretations. Recent developments within Missouri threaten to degrade the intent of ASFA and could cause further harm to a system that, while well-intentioned and supported by a laudable legislative scheme, continues to decay.

II. LEGAL BACKGROUND

The current state and federal legislation aimed at child protection is still in its infancy, emerging in recent years due to increased social and political pressure to provide permanent homes for the increasing number of children that were placed in foster care due to abuse or neglect. Although the first juvenile court systems in America began near the beginning of the twentieth century,⁷ attention to the plight of abused and neglected children did not become an issue of mainstream importance until professional associations began disseminating information on reports of “battered child syndrome.”⁸ Media attention to these reports garnered public concern and support for legislation aimed at the prevention and detection of child abuse and neglect.⁹ This Part reviews prior

4. See *supra* note 1 and accompanying text.

5. Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified as amended in 42 U.S.C. §§ 603, 613, 622, 629, 645, 653, 671-72, 673(b), 674-75, 677-78, 679(b), 901, 1305, 1320, 5113 (1998)).

6. See *infra* Part IV.

7. DOUGLAS E. ABRAMS & SARAH H. RAMSEY, CHILDREN AND THE LAW: DOCTRINE, POLICY AND PRACTICE 1057-58 (2d ed. 2003).

8. See C. Henry Kempe et al., *The Battered-Child Syndrome*, 181 J. AM. MED. ASS’N 17 (1962). This influential medical report discussed characteristics of injuries inflicted on battered children, linking the trauma to abuse and neglect by parents. *Id.* at 17-18.

9. See ABRAMS & RAMSEY, *supra* note 7, at 287.

legislation that led to ASFA, the impact that legislation had on children and child protection systems, the policies underlying ASFA, and the problems it was intended to correct.¹⁰

A. Early Legislation

In 1935, Congress established Titles IV-A and IV-B of the Social Security Act.¹¹ These amendments to the original Social Security Act gave limited funding for state social services to assist impoverished families.¹² Subsequent amendments to the Social Security Act channeled federal funds toward states to allow maintenance payments for children in foster care and to provide for abuse and neglect prevention and treatment programs.¹³ This funding also assisted states with adoption services.¹⁴ Although federal funding increased over time, states retained a large amount of discretion over the child welfare laws and the manner in which state employees implemented those laws.¹⁵

Congress enacted the Child Abuse Prevention and Treatment Act of 1974 ("CAPTA") to help states establish standards for identifying and reporting child mistreatment and to fund state child abuse and neglect reporting systems.¹⁶ To receive the funds, states were required to establish statutes that created a central registry to receive reports of child abuse and neglect, while allowing immunity for persons who reported allegations.¹⁷ States were also required to create laws that provided immediate help to children that were the subject of substantiated reports.¹⁸ CAPTA also created the National Center on Child Abuse and Neglect, which provided training materials and assistance to child protection agencies.¹⁹ While most states had already implemented reporting laws prior to the enactment of CAPTA, the federal legislation expanded the types of mistreatment that should be reported if states wished to receive federal funding.²⁰ Although the federal

10. For a general description of steps followed within state child protection systems, including the interaction between state child protection agencies, juvenile offices and other parties, see *id.* at 309, Figure 4-3.

11. See Social Security Act § 521, Pub. L. No. 74-271, 49 Stat. 620 (1935) (current version at 42 U.S.C. §§ 620-628, 670-679(a) (2000)).

12. See Social Security Act Amendments §§ 2-7, Pub. L. No. 87-31, 75 Stat. 75, 76-78 (1961); ABRAMS & RAMSEY, *supra* note 7, at 289.

13. See ABRAMS & RAMSEY, *supra* note 7, at 289.

14. *Id.* at 290.

15. Robert M. Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 MINN. L. REV. 637, 642-43 (1999).

16. Pub. L. No. 93-247, 88 Stat. 4, 5 (1974).

17. *Id.* at 6-7.

18. *Id.* at 6.

19. *Id.* at 5.

20. See ABRAMS & RAMSEY, *supra* note 7, at 291. The Child Abuse Prevention,

legislation provides some standards for defining and reporting abuse, state laws vary.²¹ States differ as to who is required to report, what should be reported, and what types of sanctions are available if a “mandatory reporter” does not report suspicions of child abuse or neglect.²² This legislation and the incentives for states to comply heralded the start of federal review of state efforts to prevent and treat child abuse.

B. The Adoption Assistance and Child Welfare Act of 1980

For several reasons the amendments to the Social Security Act and CAPTA did not lead to the results that Congress desired. Although Congress authorized some funding for states that complied with prior federal mandates, most states funded their child protection systems almost entirely on their own and were struggling financially.²³ The federal government also failed to carefully monitor state programs, causing states not to receive millions of dollars for which they were otherwise authorized.²⁴ States struggled to manage the costs of foster care, and used the limited federal money almost entirely to supplement the costs of foster care and adoption subsidies rather than on services to enable potential family reunification.²⁵ Children languished in foster care without finding

Adoption and Family Services Act of 1988 further expanded the definition of maltreatment as “the physical or mental injury, sexual abuse or exploitation, negligent treatment, or maltreatment of a child by a person who is responsible for the child’s welfare, under circumstances which indicate that the child’s health or welfare is harmed or threatened.” *Id.*; see Child Abuse Prevention, Adoption and Family Services Act of 1988, Pub. L. No. 100-294, 102 Stat. 102 (1988) (current version at 42 U.S.C. §§ 5106a-h, 10413 (2000)).

21. ABRAMS & RAMSEY, *supra* note 7, at 291.

22. *Id.* A “mandatory reporter” is generally a member of a certain profession that has access to children and would be in a good position to recognize abuse, such as a teacher, doctor, or social worker. *Id.*

23. See S. REP. NO. 96-336, at 1 (1979), reprinted in 1980 U.S.C.C.A.N. 1448, 1450.

24. *Id.* at 1449. Pursuant to ASFA provisions, the Secretary of Health and Human Services, working together with state governors, legislatures, and other public officials, is required to create a system to rate states’ compliance with the federal mandates and annually submit a report to Congress regarding states’ performances. 42 U.S.C. § 679b (1997).

25. See Alice C. Shotton, *Making Reasonable Efforts in Child Abuse and Neglect Cases: Ten Years Later*, 26 CAL. W. L. REV. 223, 224 (1990) (“While lost in a system that could neither return them to their families nor place them with adoptive parents, these children often moved from foster home to foster home, becoming more and more disturbed with each move.”).

permanent homes, and eventually Congress recognized the detriment to children that lacked a stable and permanent living situation.²⁶

In response to these problems, Congress enacted the Adoption Assistance and Child Welfare Act of 1980 ("AACWA").²⁷ The legislation aimed to encourage states to find permanent homes for children and to reduce the number of children in foster care.²⁸ AACWA continued to provide funds for foster care maintenance, but also offered financial support for family reunification services.²⁹ To receive AACWA funding, states were required to comply with several provisions and have a plan for services approved by the Secretary of Health and Human Services.³⁰ States were required to maintain case plans for every child in their care, and were mandated to establish a case review system setting specific deadlines for judicial or administrative reviews.³¹ Legislators intended for the review system to quicken the pace of decisions regarding permanent placement for children, thereby reducing the time spent in foster care.³² Congress required the state to present a plan containing provisions that mandated child protection workers to make "reasonable efforts" to prevent the child's removal from his or her home, and after removal, to make "reasonable efforts" toward family reunification.³³

The two-pronged "reasonable efforts" requirement, while supported by practical legislative purposes, was not defined. The states had discretion to determine what efforts were reasonable; unfortunately, the results were contrary to the policies underlying the Act.³⁴ The number of children in foster care increased after the enactment of AACWA, as more children entered the child protection system yearly than exited.³⁵ Soon it became clear that the "reasonable efforts" requirement was being interpreted by state child protection workers as giving priority to services for family reunification rather than to childrens' need

26. S. REP. NO. 96-336 (1979), *reprinted in* 1980 U.S.C.C.A.N. 1448, 1459; *see* Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 836 n.37 (1977) (highlighting the growing concern that children remained in foster care for increasing lengths of time, and that this seriously damaged the children's development).

27. Adoption Assistance and Child Welfare Act, Pub. L. No. 96-272, 94 Stat. 500, 502 (1980) (codified in scattered Sections of 42 U.S.C.).

28. S. REP. NO. 96-336, at 12 (1979), *reprinted in* 1980 U.S.C.C.A.N. 1448, 1461.

29. 45 C.F.R. § 1357.15(e)(2) (1995) (superceded). Services included daycare, vocational rehabilitation, and counseling. *Id.* However, nothing in the requirements mandated that a state provide such services.

30. 42 U.S.C. § 671 (Supp. III 1991).

31. *Id.* §§ 671(a)(16), 675(1).

32. H.R. REP. NO. 96-136, at 11 (1979).

33. 42 U.S.C. § 671(a)(15) (Supp. III 1991).

34. *See supra* note 26 and accompanying text.

35. Mary O'Flynn, *The Adoption and Safe Families Act of 1997: Changing Child Welfare Policy Without Addressing Parental Substance Abuse*, 16 J. CONTEMP. HEALTH L. & POL'Y 243, 254 (1999).

for a permanent home.³⁶ Child protection workers were leaving children in unsafe homes, leading to large amounts of media attention over child deaths at the hands of their parents.³⁷ Additionally, workers were leaving children in foster care for years while continuing to provide services to the parents to attempt reunification, even in situations where the parents committed chronic or severe acts of abuse or when parents made little or no progress in remedying potentially harmful situations to children.³⁸ Cases of child deaths occurring in foster care also began to receive intense media coverage.³⁹ Pressure increased to enact clear legislation that would result in permanency for children within shorter time frames.

C. *The Adoption and Safe Families Act*

Enactment of the federal Adoption and Safe Families Act of 1997⁴⁰ was widely supported across political party lines and heralded by some commentators as providing hope for a “revolution” in foster care.⁴¹ ASFA attempted to address many of the concerns that arose from prior federal legislation. In order to clear up the vagueness of the “reasonable efforts” requirement of AACWA, ASFA provides that when states offer reasonable efforts to families in order to prevent removal of children or to facilitate family reunification, “the child’s health and

36. See Will L. Crossley, *Defining Reasonable Efforts: Demystifying the State’s Burden Under Federal Child Protection Legislation*, 12 B.U. PUB. INT. L.J. 259, 273 (2003).

37. See *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 193 (1989); Nina Bernstein & Frank Bruni, *She Suffered in Plain Sight But Alarms Were Ignored*, N.Y. TIMES, Dec. 24, 1995, at 1, 22.

38. See U.S. GENERAL ACCOUNTING OFFICE, FOSTER CARE: STATE EFFORTS TO IMPROVE THE PERMANENCY PLANNING PROCESS SHOW SOME PROMISE 15 (1997), available at <http://www.gao.gov/archive/1997/he97073.pdf>; U.S. Dep’t of Health & Human Servs., *Adoption 2002: A Response to the Presidential Executive Memorandum on Adoption Issued December 14, 1996*, available at http://www.profane-justice.org/Su_z_Personal/Forced_Adoption/forced_adoption.html.

39. See Title IV-E Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews, 63 Fed. Reg. 50,061 (proposed Sept. 18, 1998) (blaming misinterpretations of the reasonable efforts requirement as the cause of several foster child deaths).

40. Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified as amended in 42 U.S.C. §§ 603, 613, 622, 629, 645, 653, 671-72, 673(b), 674-75, 677-78, 679(b), 901, 1305, 1320, & 5113 (1998)).

41. R. Bruce Dold, *Giving Kids a Little More Wiggle Room*, CHI. TRIB., Dec. 12, 1997, at 27. Mr. Dold also stated that “the law will no longer let kids languish forever in foster care while social workers treat their misfit parents as victims. This is what those of us who have been complaining about the system have been looking for.” *Id.*

safety shall be the paramount concern.”⁴² Therefore, reasonable efforts to prevent removal or facilitate reunification are not always required, such as in extreme abuse situations or when the custodial parent’s rights to another child have been terminated.⁴³ However, as at least one commentator on ASFA recognized, states must provide proper services to families for reasonable efforts to work.⁴⁴

Other provisions of ASFA focus on reducing the time children spend in foster care by requiring “permanency hearings.”⁴⁵ A permanency hearing must be held within thirty days after a child is taken into state custody and again after the child has been in state custody for twelve months.⁴⁶ ASFA also eliminates temporary foster care as an option during dispositional hearings, which determine where the child will reside; the states are required to determine if the child will be returned to the parent, placed for adoption pending termination of parental rights, or referred for legal guardianship.⁴⁷ ASFA promotes the possibility of foster child adoption by requiring states to recruit qualified adoptive families and by providing monetary incentives to states that are able to increase adoptions above pre-ASFA levels.⁴⁸

An important feature of ASFA is that it requires state child protection agencies to file a court petition for termination of parental rights (“TPR”) in certain situations.⁴⁹ ASFA requires that the juvenile office file a TPR petition in cases where the child has remained in foster care for fifteen of the most recent twenty-two months.⁵⁰ This provision, coupled with the requirement of a

42. 42 U.S.C. § 671(a)(15)(A) (Supp. IV 1998). In Subpart B, however, the exact language of AACWA is retained. *Id.* § 671(a)(15)(B). See Christine H. Kim, *Putting the Reason Back into Reasonable Efforts Requirement in Child Abuse and Neglect Cases*, 1999 U. ILL. L. REV. 287.

43. 42 U.S.C. § 671(a)(15)(D) (Supp. IV 1998). For instance, if parents have committed crimes against their children such as murder, voluntary manslaughter, or felony assault, reasonable efforts to reunify are not required; also, in situations such as “abandonment, torture, chronic abuse, and sexual abuse,” reasonable efforts are not compelled. *Id.* However, it is left up to the states to define such aggravating circumstances that would alleviate workers from the requirement of reasonable efforts.

44. *Foster Care, Child Welfare, and Adoption Reforms: Joint Hearings Before the Subcomm. on Public Assistance and Unemployment Compensation of the Comm. on Ways and Means and Select Comm. on Children, Youth and Families*, 100th Cong. 218-20 (1988) (statement of Mark A. Hardin, Esq., Director, Foster Care Project, American Bar Association).

45. See H.R. REP. NO. 105-77, at 13 (1997), reprinted in 1997 U.S.C.C.A.N. 2739, 2745-46.

46. 42 U.S.C. § 671(a)(15)(E) (2000).

47. *Id.* § 675(5)(C).

48. *Id.* § 673(d)(1)(A)-(B).

49. *Id.* § 675(5).

50. *Id.* Other provisions of this Section require that agencies file a TPR petition

dispositional hearing at twelve months, offers children the hope of timely removal from foster care into a permanent home.⁵¹ It also serves to clarify for the states exactly how long reasonable efforts to reunify families are required and can provide incentive for parents to work toward case plan goals to enable reunification within a timely manner.⁵² ASFA regulations allow states the option of not filing a petition, even when statutorily mandated, if there are certain "compelling reasons" not to file.⁵³ An example of a compelling reason that precludes mandatory filing of a TPR petition is when the state agency has not provided reasonable efforts to attempt family reunification.⁵⁴ ASFA retains the requirement that "reasonable efforts" be made to reunify, while pairing this with the requirement that juvenile courts move efficiently and swiftly in determining the fates of children. ASFA strives to maintain an appropriate balance between the rights of parents to raise their children without interference, and the rights of children to obtain a permanent and stable home without being subjected to the harms of long-term foster care during delicate developmental periods.

III. RECENT DEVELOPMENTS

After the enactment of ASFA, the Missouri legislature made several statutory changes in order to comply with the federal legislation.⁵⁵ The main changes are found within Chapter 210 on Child Protection and Reformation, Chapter 211 on Juvenile Courts, and Chapter 453 on Adoption and Foster Care.⁵⁶ The summer of 2003 marked the five year anniversary of these changes in Missouri law. As such, now is an appropriate time to review developments within this area of the law since the enactment of the post-ASFA state statutory amendments.

when the parent has committed, attempted, or aided and abetted murder or voluntary manslaughter of another child in the home, or when the child has been adjudicated an abandoned infant. *Id.*

51. *Id.*; see *id.* § 675(5)(C).

52. *Id.* § 675(5).

53. 45 C.F.R. § 1356.21 (1999).

54. *Id.* Other reasons can include when the child is being cared for by a relative or when the state documents other compelling reasons to establish that filing a petition is not in the child's best interest. *Id.*

55. See generally Roy A. Hough, *Juvenile Law: A Year in Review*, 63 MO. L. REV. 459 (1998).

56. See MO. REV. STAT. §§ 210.001-.937, 211.011-.500, 453.005-.503 (2000).

A. Missouri Legislation Following ASFA

In response to ASFA, Missouri modified its statute governing termination of parental rights.⁵⁷ Amendments to Section 211.447.2(1) provide that a TPR petition must be filed by the juvenile office when “[i]nformation available to the juvenile officer or the division establishes that the child has been in foster care for at least fifteen of the most recent twenty-two months.”⁵⁸ Missouri courts previously held that this sole allegation is sufficient grounds to file a petition to terminate parental rights.⁵⁹ In January of 2004, the Missouri Supreme Court finally decided that the fact that a child has remained in foster care for fifteen months is not constitutional as a stand-alone ground for termination of parental rights.⁶⁰ However, other states’ courts have been divided on the issue of whether fifteen months of foster care suffices as a constitutional stand-alone ground for termination of parental rights, or if other allegations must also be established.⁶¹

In order to comply with the federal mandate, Missouri retained the “failure to rectify” ground for termination of parental rights, located in Section 211.447.4(3).⁶² This provision of the termination of parental rights statute states that “[t]he juvenile officer or the division may file a petition to terminate the parental rights of the child’s parent when . . . [t]he child has been under the jurisdiction of the juvenile court for a period of one year,” and the office or division finds that potentially harmful conditions still exist and are not likely to be rectified in an ascertainable time.⁶³

When deciding whether to terminate a parent’s rights under Section 211.447.4(3), a court is required to make findings on several factors.⁶⁴ The initial factor asks the court to examine “[t]he terms of a social service plan entered into by the parent and the division and the extent to which the parties have made

57. See MO. REV. STAT. § 211.447 (2000).

58. *Id.* § 211.447.2(1).

59. See *J.J.P. v. Greene County Juvenile Office*, 113 S.W.3d 197, 202 (Mo. Ct. App. 2003), *abrogated by In re M.D.R.*, 124 S.W.3d 469 (Mo. 2004) (en banc); *K.C.M. v. D.M.*, 85 S.W.3d 682, 694 (Mo. Ct. App. 2002), *abrogated by In re M.D.R.*, 124 S.W.3d 469 (Mo. 2004) (en banc).

60. *In re M.D.R.*, 124 S.W.3d 469 (Mo. 2004) (en banc).

61. See Maryann Zavez, *The Adoption and Safe Families Act: Implementation and Case Law with a Focus on 15/22 Month Terminations*, 28 VT. B.J. & L. DIG. 37, 39-40 (Mar. 2002). These cases base their determinations on both state and federal constitutional provisions regarding substantive due process, recognizing that parents’ interests in raising their children without interference are fundamental liberty interests. See *id.*

62. MO. REV. STAT. § 211.447, Historical and Statutory Notes, 1998 Legislation.

63. MO. REV. STAT. § 211.447.4(3) (2000).

64. *Id.*

progress in complying with those terms.”⁶⁵ The next factor asks for a finding on “[t]he success or failure of the efforts of the juvenile officer, the division or other agency to aid the parent on a continuing basis in adjusting his circumstances or conduct to provide a proper home for the child.”⁶⁶ These factors should be relevant in most hearings due to the requirements of reasonable efforts, which include providing services and creating a case plan.⁶⁷

B. Missouri Case Law

In September of 2003, a Greene County circuit court judge declared Missouri’s “mandatory reporter” statute,⁶⁸ which requires certain professionals to report suspicions of child abuse or neglect, to be unconstitutionally vague.⁶⁹ Leslie Ann Brown, a hospital nurse who examined a foster child with suspicious injuries that could have indicated abuse, was prosecuted for her failure to notify the child abuse and neglect hotline of the child’s injuries.⁷⁰ The law in question states that when nurses (and certain other persons responsible for the care of children) have “reasonable cause to suspect that a child has been or may be subjected to abuse or neglect,” they are responsible for immediately reporting their observations.⁷¹ Although the statute has existed since 1975,⁷² it had never faced a constitutional attack as it had not been utilized for prosecution.⁷³ The appeal is set for oral arguments at the Missouri Supreme Court on May 12, 2004.⁷⁴ The decision will hopefully provide new clarity to an old law.⁷⁵

65. *Id.* “Social service plan” is not defined anywhere within this or any other Section of the most current version of the Missouri Revised Statutes. However, a “case plan,” as defined by ASFA, is a document which includes “[a] plan for assuring that the child receives safe and proper care and that services are provided to the parents, child, and foster parents in order to improve the conditions in the parents’ home, facilitate return of the child to his own safe home or the permanent placement of the child” 42 U.S.C. § 675 (2000).

66. MO. REV. STAT. § 211.447.4(3) (2000).

67. The remaining factors may not apply in every circumstance. They include whether the parent has a permanent mental condition, a chemical dependency problem, or has been convicted of certain felony offenses. *Id.*

68. MO. REV. STAT. § 210.115 (Supp. 2003).

69. *Dismissal of Case Will Bring Clarity*, SPRINGFIELD NEWS-LEADER, Sept. 15, 2003, at 5A.

70. *Id.*

71. MO. REV. STAT. § 210.115 (Supp. 2003).

72. *Id.*

73. *Id.*; see *supra* note 69.

74. See <http://www.osca.state.mo.us/sup/index.nsf> (docket schedule for May 12, 2004).

75. See *supra* note 69. Prior to the current legislation the hotline system underwent a state audit, revealing numerous problems with proposals for change that were supposed

Adoption of the circuit court's reasoning could impact ASFA-related legislation because it affects the method by which many children enter into the child protection system. A narrower mandatory reporting law, however, could prevent some children from ever entering the child protection system and preclude some families from receiving services.

In July of 2003, an important decision regarding termination of parental rights was delivered by the Western District of the Missouri Court of Appeals.⁷⁶ *In re C.N.G.* reversed a termination of parental rights judgment, holding that the circuit court's determination that a parent failed to rectify harmful conditions was not supported by adequate evidence.⁷⁷ The manner in which the appellate court explained its decision, however, seems to oppose the policies underlying the TPR statute and federal law.⁷⁸

In *C.N.G.*, the Division of Family Services was notified in April of 2000 that a mother, M.G.S., was allegedly providing inadequate parenting to her children.⁷⁹ The person who reported the neglect to the child abuse registry stated that M.G.S. was abusing prescription medication and leaving her children without proper care for extended periods of time.⁸⁰ Her two-year old child, C.N.G., was taken into protective custody by the Division for placement in foster care.⁸¹ After C.N.G. was in foster care for some time, his mother was allowed some unsupervised visitation with C.N.G.⁸² However, shortly after unsupervised visits increased, C.N.G.'s mother relapsed and began abusing prescription medication once again.⁸³ The juvenile officer subsequently filed a petition to terminate M.G.S.'s parental rights on the grounds that C.N.G. had been within the jurisdiction of the juvenile court for over one year, and the mother had failed to rectify harmful conditions.⁸⁴ The circuit court entered its judgment in favor of termination.⁸⁵

to be implemented in 2003. *State to Verify Abuse Hotline Changes*, SPRINGFIELD NEWS-LEADER, Feb. 5, 2003, at 3B. Also concerning the reporting statutes, 2003 saw recent legislation proposed to eliminate the option for non-mandatory reporters to remain anonymous when calling the hotline. Commission on Children's Justice, *Meeting Minutes* (Feb. 10, 2003) (regarding House Bill 396). The apparent intended effect of disallowing anonymity was to "[e]nd abuse of the child abuse/neglect hotline." *Id.*

76. *In re C.N.G.*, 109 S.W.3d 702 (Mo. Ct. App. 2003).

77. *Id.* at 710.

78. *See infra* notes 96-100 and accompanying text.

79. *C.N.G.*, 109 S.W.3d at 704. In 2003, the Division of Family Services was split into two separate divisions and the agency that deals with child abuse and neglect was renamed the "Children's Division."

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 705.

The court of appeals had an opportunity to examine the “failure to rectify” ground for termination under Missouri Revised Statutes Section 211.447.4(3).⁸⁶ The circuit court’s judgment stated that the conditions in Section 211.447.4(3) existed, and that M.G.S. failed to “substantially comply” with the terms of numerous agreements entered into by her and the Division of Family Services.⁸⁷ The circuit court mentioned several instances in which M.G.S. had been uncooperative in participating in services that the agency offered.⁸⁸ However, the court of appeals stated that the lower court focused on the wrong issue and failed to correctly interpret the statute.⁸⁹ The appellate court explained that “[t]he issue is whether or not progress has been made toward complying with the service agreements—not whether or not the compliance was full or substantial.”⁹⁰ Subsequently, in the final decision, the court of appeals determined that there was clear, cogent and convincing evidence that M.G.S. was making some progress on her goals, even if she had neither complied substantially nor actually completed many of the goals.⁹¹ Based on this evidence, the court of appeals found that there was “neither the persistence of conditions leading to the assumption of jurisdiction, nor conditions of a potentially harmful nature,” and reversed the parental rights termination.⁹²

The appellate court failed to address a potential alternative ground for termination of parental rights—that the child had been in foster care for more than fifteen of the most recent twenty-two months.⁹³ If the TPR petition had alleged the time limit as a ground for termination and if the court followed its own precedent as of the time of decision, the court could have affirmed the

86. *See supra* notes 62-67 and accompanying text.

87. *C.N.G.*, 109 S.W.3d at 706. See Missouri Revised Statutes Section 211.447.4(3), which states:

4. The juvenile officer or the division may file a petition to terminate the parental rights of the child’s parent when it appears that one or more of the following grounds for termination exist:

.....

(3) The child has been under the jurisdiction of the juvenile court for a period of one year, and the court finds that the conditions which led to the assumption of jurisdiction still persist, or conditions of a potentially harmful nature continue to exist, that there is little likelihood that those conditions will be remedied at an early date so that the child can be returned to the parent in the near future, or the continuation of the parent-child relationship greatly diminishes the child’s prospects for early integration into a stable and permanent home.

88. *C.N.G.*, 109 S.W.3d at 706-07.

89. *Id.* at 707.

90. *Id.*

91. *Id.* at 710.

92. *Id.*

93. *Id.*

termination solely based on this ground.⁹⁴ It is not clear from the court's opinion why the fifteen month rule was not addressed, since evidence shows that C.N.G. remained in foster care from April of 2000 until the filing of the TPR petition in January of 2002.⁹⁵ Even if the time limit had been alleged in the petition as a separate ground, however, the court would still be required by statute to determine if termination of the mother's rights was in the child's best interests.⁹⁶ The court of appeals never reached the "best interest" determination, and instead determined that no grounds for termination existed.

IV. DISCUSSION

By enacting the 1998 revisions to the TPR statute to comply with ASFA, the Missouri legislature intended to provide permanency for foster children as quickly as possible.⁹⁷ The law attempts to balance children's rights with parents' rights by giving families an adequate chance at reunification. The "failure to rectify" and "fifteen out of twenty-two months" provisions both focus on the time limitations of services for family reunification, while still mandating that reasonable efforts should be made when appropriate.⁹⁸ Both of these provisions of the TPR statute recognize that, even when there have been no severe acts of abuse or neglect towards a child, the parent may nonetheless lack the necessary skills to raise a child.⁹⁹ The time-limited sections of the TPR statute give child protection agencies the discretion to determine when such a situation exists in order to minimize the time a child remains in foster care.¹⁰⁰ The TPR statute, as well as other Missouri laws governing adoption, points to a legislative preference

94. See *In re K.C.M.*, 85 S.W.3d 682, 694 (Mo. Ct. App. 2002).

95. *C.N.G.*, 109 S.W.3d at 704, 705. Again, it is possible that this ground was never alleged in the TPR petition; despite prior appellate court decisions that the 15/22 month provision could be a stand-alone ground to terminate a parent's rights, many juvenile offices and agencies may have felt that this was merely a statutory trigger requiring a petition to be filed. The lack of clarity in this area of the statute was recently cleared up by the Missouri Supreme Court, which declared that the 15/22 month provision is not a stand-alone ground for TPR, but is merely a statutory trigger requiring filing of a TPR petition after a child has remained in foster care for fifteen months. See *In re M.D.R.*, 124 S.W.3d 469 (Mo. 2004) (en banc) (discussing MO. REV. STAT. § 211.447.2(1) (2000)).

96. See MO. REV. STAT. § 211.447.6 (2000); *K.C.M.*, 85 S.W.3d at 694 (remanding a termination of parental rights judgment, although sufficient grounds were alleged to prove TPR, due to insufficient findings of whether termination was in the child's best interests).

97. MO. REV. STAT. § 211.447 (2000).

98. See MO. REV. STAT. § 211.447.2(1), 211.447.4(3) (2000).

99. *Id.*

100. See Hough, *supra* note 55, at 465.

towards state policies that will “promote the best interests and welfare of the child in recognition of the entitlement of the child to a permanent and stable home.”¹⁰¹

Despite laudable legislative intent, the decision and reasoning of *In re C.N.G.* has set a precedent which is detrimental to the legislature’s goal of permanency.¹⁰² It is important to recognize that the termination timelines contain a major loophole—the petition does not have to be filed until the child protection agency determines that “reasonable efforts” toward reunification have occurred.¹⁰³ This exception is easy to invoke on appeal, and reversal could occur in any situation where the services that were offered to the family are found to fall short of reasonable efforts.¹⁰⁴ Another loophole arguably exists under *C.N.G.* when a parent is not likely to complete goals in the ascertainable future, but is nonetheless making some progress toward case goals. Given the lengthy process of appeals, child protection workers may have to wait until they have other grounds, lest the child remain in foster care for several years pending a judicial determination.¹⁰⁵ In Missouri, the court’s decision in *C.N.G.* may deter the filing of a TPR petition at least until fifteen months have gone by, and until still undefined “reasonable efforts” have been given to a family.¹⁰⁶

The juvenile court’s reasoning is not without merit—in determining whether potential harm to the child exists in the parental home, it makes sense to look at whether the goals deemed necessary for reunification have been substantially completed. However, the court of appeals’ final decision in *C.N.G.*, by holding that termination may not be sought even though the child protection agency has determined that the likelihood of harm exists, could preclude the filing of a petition based on Section 211.447.4(3), taking all the bite out of this portion of the statute.¹⁰⁷ Even in situations where diligent efforts toward reunification have

101. MO. REV. STAT. § 453.005 (2000); Hough, *supra* note 55, at 465.

102. *In re C.N.G.*, 109 S.W.3d 702 (Mo. Ct. App. 2003).

103. Missouri Revised Statutes Section 211.447.3 states that even if grounds exist that would normally mandate the filing of a TPR petition, the child protection agency does not have to file if:

- (1) The child is being cared for by a relative; or
- (2) There exists a compelling reason for determining that filing such a petition would not be in the best interest of the child, as documented in the permanency plan which shall be made available for court review; or
- (3) The family of the child has not been provided such services as provided for in section 211.183.

104. See Celeste Pagano, *Adoption and Foster Care*, 36 HARV. J. ON LEGIS. 242, 247 (1999).

105. For instance, after two appeals of the lower court’s judgment terminating parental rights, *C.N.G.* had been in foster care for over three years. See *C.N.G.*, 109 S.W.3d 702; *In re C.N.G.*, 89 S.W.3d 564 (Mo. Ct. App. 2002).

106. MO. REV. STAT. § 211.447.2 (2000).

107. *Id.* § 211.447.4(3)(a).

been made by the agency, there is still danger of appellate reversal based on "failure to rectify" grounds.¹⁰⁸ This could cause children to remain in foster care longer, subjecting children to psychological harms and other risks.¹⁰⁹

Despite various efforts to monitor and improve Missouri's foster care and child protection scheme, recent years have proven difficult for the system. Jackson County continues to try to improve its system after facing lawsuits based on the conditions of foster homes.¹¹⁰ In 1999, Jackson County received additional negative press due to the tragic deaths of two siblings that remained in their parent's care; Division of Family Services employees were blamed for the deaths due to workers' alleged failure to respond to hotline calls or to investigate adequately.¹¹¹ In 2001, a child was shaken to death by his foster father in Greene County, once again focusing media attention on the poor conditions of foster care in Missouri.¹¹²

Following such tragic incidents, the news media tend to jump on the failures of allegedly negligent child protection workers, holding them up as effigies for critics of the child protection system.¹¹³ Additionally, caseworkers face the increasing possibility of civil liability, based on the increasing number of lawsuits alleging negligence for both failure to remove children from abusive parents and failure to supervise children in foster care.¹¹⁴ Risk of lawsuit is another factor causing extremely poor morale among child protection workers. This risk only increases the already high rate of worker turnover, which further reduces chances for stability for foster children.¹¹⁵

108. *See id.* § 211.447.4(3).

109. *See supra* notes 26, 39 and accompanying text.

110. *See* Angela Wilson, *New Children's Services Director Named for State*, SPRINGFIELD NEWS-LEADER, Aug. 27, 2003, at 1A.

111. *See* Sheila Thiele, *Letter Not Sufficient Grounds for Suspension*, KANSAS CITY DAILY RECORD, May 6, 2002. In 2003 the Division of Family Services was split into two agencies and renamed; the agency that deals with abused and neglected children is now called the "Children's Division."

112. RICHARD C. DUNN & FRANK CONLEY, REPORT OF THE INVESTIGATION OF THE CHILD WELFARE SYSTEM IN GREENE COUNTY, MISSOURI 1 (Dunn and Judge Conley wrote this report in response to the request of Governor Bob Holden), available at http://go.missouri.gov/REPORT_OF_INVESTIGATION.pdf (last visited Apr. 20, 2004).

113. *See* Matthew Frank, *Most Kids Dying from Abuse Are Known to State System; Caseworkers Visited Some Families up to 15 Times*, ST. LOUIS POST DISPATCH, Feb. 3, 2003, at A1.

114. *See* *Don't Make DFS Mistakes a Crime, Accountability Possible Through Other Means*, SPRINGFIELD NEWS-LEADER, Feb. 27, 2003, at 8A.

115. Jim Moye & Roberta Rinker, *It's a Hard Knock Life: Does the Adoption and Safe Families Act of 1997 Adequately Address Problems in the Child Welfare System?*, 39 HARV. J. ON LEGIS. 375, 382-83 (2002).

A 2003 audit of Missouri's foster care system revealed several disturbing facts.¹¹⁶ The report showed that caseworkers were too overwhelmed to visit foster homes regularly, did not comply with federal law in seeking termination of parental rights in a timely manner, and failed to regularly check almost half of the foster parents for recent criminal offenses.¹¹⁷ Therefore, in addition to psychological damage caused to children who lack permanent homes, the inability to properly implement the statutes in order to swiftly find permanent homes for children may actually subject children to risks from within the system.

Missouri needs the funding necessary to hire adequately trained child protection employees and to provide salaries that will keep these employees from leaving their positions after a short time. With sufficient training, staff, and funding, child protection agencies would be capable of providing necessary services to families. Without additional resources, the child protection and foster care statutory schemes, regardless of how well planned and potentially useful, will never be implemented in a manner that brings the spirit of the federal laws into actual practice.

V. CONCLUSION

Historically, the pendulum of child protection swung too far in the direction of family preservation, which gave extreme deference to the constitutional liberties of parents but did little to protect the rights of children. Although the pendulum has fortunately begun to swing toward child protection and permanency, the ideal and proposed effects of the current legislation have yet to come to fruition. Recent budget cuts to Missouri's social service departments are likely to have serious negative impacts on Missouri's child protection system, which already struggles to provide sufficient services with the resources currently allotted.¹¹⁸

Despite the problems, the positive aspects of the child protection system are only further reduced by judicial interpretations that impede permanency even in situations where caseworkers were able to provide reasonable efforts towards reunification. It is difficult to tell if judges are distrustful that services were adequate, or if they are merely adhering to prior legislation that focused more on family reunification than permanency for foster children. Lessons learned from

116. The 2003 foster care audit was completed by State Auditor Claire McCaskill. OFFICE OF STATE AUDITOR CLAIRE MCCASKILL, PERFORMANCE AUDIT, DEPARTMENT OF SOCIAL SERVICES FOSTER CARE PROGRAM (Mar. 18, 2003), available at <http://www.auditor.state.mo.us/press/2003-25.pdf>; Matthew Franck, *Foster Care Visits Fall Short, Audit Finds*, ST. LOUIS POST-DISPATCH, Mar. 19, 2003, at B1.

117. PERFORMANCE AUDIT, *supra* note 116.

118. Editorial, *Resignations and Reform*, ST. LOUIS POST-DISPATCH, Dec. 30, 2002, at B6 (explaining that in 2002, funding for Social Services was subjected to a two percent budget cut although caseloads had increased by eight percent).

the not-too-distant past should remind Missourians how erroneous interpretations of well-meaning laws can diminish children's chances at a permanent and stable home.¹¹⁹ In addition to questionable judicial interpretations, the legislature has provided no additional funding, which is necessary to effect actual systemic change.

Without additional funding and clear court interpretations that support child protection policies, Missouri's child protection advocates and workers will have to continue their struggle to support a system in which services needed surpass services available. It remains to be seen if the state will be able to do what the federal legislature intended—to "giv[e] our nation's most vulnerable children what every child deserves—a safe and permanent home."¹²⁰

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119. *Hearing on Child Welfare Reform Before the Subcomm. on Social Security and Family Policy of the Senate Comm. on Finance, 105th Cong. (1997), available at 1997 WL 274386.*

120. Press Release, White House Office of the Press Secretary, Statement on the Adoption Bill 11/13/97 (Nov. 19, 1997), *available at 1997 WL 718518.*

