Judicial Viewpoints on ASFA

by Ernestine S. Gray

When I took the bench in November 1984, the Adoption Assistance and Child Welfare Act, Public Law 96-272, was the law of the land. And even though the law had been on the books since 1980, child welfare agencies and courts were still struggling with what it meant and how to implement its provisions. Congress had passed the Act to address many problems discovered in the child welfare system that were preventing the best results for children in foster care.

Of particular concern was "foster care drift"—the phenomenon of children being left in limbo for long periods during which they were placed multiple times with no sense of permanence. Also of general concern were the many children coming into the foster care system and the impact upon families. To improve the system, P.L. 96-272 had several goals and objectives, chiefly to protect the autonomy of the family, to focus on placement and reunification, and to encourage adoption when in the child's best interest.

In addition, P.L. 96-272 created an adoption assistance program that outlined major roles for the court system. Courts were required to review child welfare cases on a regular basis (every six months) to determine what was in the child's best interest—whether the child should return home, be adopted, or continue in foster care within 18 months after initial placement. Most importantly, the court was to make a determination as to whether the state agency had made "reasonable efforts" to prevent removal of a child from the home or to return the child as soon as possible after a removal. P.L. 96-272 initiated changes that led to some improvements in foster care trends; however, there were still problems in the child welfare system.

From many perspectives, one central problem involved defining "reasonable efforts." This national legislation left to states the task of developing a definition, which was then to be approved by DHHS. The net result was that DHHS did not provide meaningful guidance to individual social workers, child welfare agencies, or juvenile court judges charged with deciding whether reasonable efforts had been made. A second major failing was a lack of recognition of the important role played by primary prevention and a corresponding lack of commitment to funding it sufficiently.

Against this backdrop, we chose to act somewhat like the town represented in the poem "A Fence or an Ambulance (A Poetic Case for the Value of Prevention)," by Joseph Malins (1895). The poem recounts a community's concern about residents falling off a cliff into the valley below. There arose a debate as to whether they should build a protective fence at the edge of the cliff or place an ambulance in the valley to pick up the fallen bodies.

Two passages remind me of our own situation as it was under P.L. 96-272; the first is when the poem's old sage says: "It's a marvel to me that people give far more attention to repairing results than stopping the cause, when they'd much better aim at prevention… If the cliff we will fence, we might dispense with the ambulance down in the valley."

The second reads: "To rescue the fallen is good, but 'tis best to prevent other people from falling.

Rather than fix the existing law by adequately defining reasonable efforts and promoting primary prevention, and rather than tackle the real causes of child abuse and neglect—namely, poverty, parent mental health needs, alcohol and substance abuse of parents, and domestic violence—another piece of legislation was passed that sought to deal more effectively with children who suffered abuse and neglect. We were still placing "the ambulance down in the valley."

This new legislation, the Adoption and Safe Families Act of 1997 (ASFA), P.L. 105-89. 105th Cong. 1st session (1997), was signed by President Clinton in November 1997. ASFA's purpose was to provide for children's health, safety, and well being, to decrease the time that children spend in foster care, and to increase the use of adoption as a permanency option for children in foster care. ASFA also required a more active role of the court in processing and supervising abuse and neglect cases. Courts must conduct more frequent review hearings and make certain findings at designated times during the life of a case.

Over the course of the last 12 years, I have had the opportunity to discuss with many colleagues the pros and cons of this significant legislation. Generally, says one judge, "I think ASFA has led to a sea-change in the court community, apart from what's done in child welfare. I think judges are far more attuned to their responsibilities and have a far greater understanding and appreciation for urgency and accountability in these cases than ever before."[1] I couldn't agree more. Perhaps this "sea-change" is a result of the Child and Family Service Reviews and the concern that states could lose eligibility for funding

under Titles IV-B and IV-E of the Social Security Act.

Specifically, judges believe the following are positive attributes or outcomes of ASFA:

- more reunifications with parents or quicker placements with relatives;
- greater awareness of all parties (social workers, lawyers, parents, etc.) about the need to engage in the treatment plan quickly;
- more diligence in the system's providing appropriate services and visitation up front, giving parents a better opportunity and a longer timeframe to address issues;
- more concerted efforts to find fathers and family members on both the maternal and the paternal side, as well as kin who may be placement options for the children in the short- or long-term;
- increased recognition of the unique needs of children in foster care, with safety, permanency, and well-being in the forefront;
- mandated concurrent planning (simultaneous efforts toward reunification and adoption or some other permanent arrangement).

On the other hand, judges have concerns about the possible negative impacts of ASFA:

- insufficient time (12 months) for a drug-abusing parent to kick an addiction and lack of available treatment for substance-abusing and mentally ill parents;
- more failed adoptions as a result of insufficient efforts to stabilize or support placements;
- creation of so-called legal orphans (the children continue to be wards of the state until they reach the age of majority);
- lack of clarity about when exceptions can appropriately be made to terminating parental rights (e.g., exceptions for parental mental illness or incarceration);
- overrepresentation of children of color in the child welfare system.

From my perspective, this last concern is perhaps the most troubling aspect of the foster care system. Research has shown that "Nationally, African-American children made up less than fifteen percent of the overall child population in the 2000 census, but that they represented 27 percent of the children who entered foster care during the fiscal year 2004, and they represented 34 percent of the children remaining in foster care at the end of that year."[2] Not only are these children disproportionately overrepresented in foster care, but once in the foster care system, children of color tend to receive fewer services, stay in care longer, and generally have worse outcomes than white children.[3]

Conclusion

While ASFA has led to many positive results in the child welfare field, most judges would recommend the following, as we keep trying to improve the system that deals with vulnerable children and their families:

- continue a sense of urgency, reflected in distinct timelines, through processes of termination and adoption;
- expand the timeframe of "15 out of the last 22 months," which is too stringent;
- do not terminate parental rights if there is no prospective adoptive parent in view;
- permit parents whose rights have been terminated to have those rights reinstated, if deemed appropriate, within a certain time period (if the child has not otherwise achieved permanency);
- consider race as a factor when placing children for adoption (e.g., by applying provisions similar to those in the Indian Child Welfare Act (ICWA) to African American children);
- vigorously recruit families whose background reflects that of children waiting to be adopted and who will adopt older children;
- promote placements with caring relatives through adoption or subsidized guardianship;
- ensure timely provision, by the state, of the services necessary for the safe return of the child to the family;
- renew the commitment to primary prevention through adequate funding;
- develop appropriate permanency options for children for whom neither returning home nor adoption is a viable option;
- consider more carefully the exceptions to filing a termination petition.

I believe that ASFA can have an even greater impact if we determine how to fund prevention, put services up front, and ensure that all stakeholders are adequately trained. Also needed are more social workers and lawyers with smaller case loads, so that agencies and the courts can work together and make every effort to eradicate racial disproportionality.

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Endnotes

[1] Judge Susan B. Carbon, Grafton Court Family Division, New Hampshire.

[2] United States Government Accountability Office Report to the Chairman, Committee on Ways and Means, House of Representative. *African American Children in Foster Care: Additional HHS Assistance Needed to Help States Reduce the Proportion in Care.* Washington, DC: U.S. Government Printing Office, 2007.

[3] Child Welfare League of America, National Data Analysis System. <https://ndas.cwla.org/research_info/specialtopic1a.asp>;