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Editor's Note—Spring 2013

This first electronic issue of the Michigan Child Welfare Law Journal covers a variety of topics. In "After *Mason*: Assessing the Rights of Incarcerated Parents in Michigan" the author examines how the Michigan Court of Appeals has grappled with the *Mason* decision in order to discern how the rights of incarcerated parents have expanded—and what remains unchanged. The author surveys the decisions that have drawn upon the *Mason* ruling over the past two years in order to identify differences between cases where TPRs are affirmed and reversed.

The author of "Engaging Families in Case Planning" suggests that successfully involving family members in case planning may be the most critical component for achieving positive outcomes in child welfare practice. Research suggests that when families are engaged and supported to have a significant role in case planning, they are more motivated to actively commit to achieving the case plan. Additionally, families are more likely to recognize and agree with the identified course of action in any given case.

"Determining the Best Interests of the Child" presents an overview of how other states define the "best interests" when making e a variety of decisions that affect children, including placement and custody determinations, safety and permanency planning, and proceedings for termination of parental rights.

Finally, this issue includes Michigan Attorney General Bill Schuette's recent opinion regarding the application of the Medical Marijuana Act to child-protective proceedings.

As always, the editors welcome your feedback on this and future issues to ensure that the *Child Welfare Journal* is of value to you

—Joseph Kozakiewicz

Editorial and Review Board

Message from the Chair

"It is easier to build strong children than to repair broken men." —Frederick Douglass

We had an extraordinary event at the 11th Annual Conference: Transforming Child Welfare Through Legal Representation on Thursday, May 16, 2013 at the beautiful Shanty Creek Resort! This spectacular event was co-sponsored by the State Bar of Michigan-Children's Law Section, the State Court Administrative Office-Child Welfare Division, the Governor's Task Force on Child Abuse and Neglect, and the Referees Association of Michigan. This conference focused on Trauma Informed Practice for Advocates and Decision-Makers, Child Welfare Legal Updates, and a Comprehensive Perspective on the Use of Motion Practice in Child Welfare cases. This conference really focused on bringing more attention to how crucial the roles of attorneys are in the child welfare system. It also showed how involved and how difficult our field really is.

Recently I was speaking with an esteemed colleague who described a conversation he had with a person who does not work in the field of child welfare. After some comparisons on each of their fields they worked in, my esteemed colleague was taken aback when the other person stated "how hard can working in child welfare be; it is not rocket science". My esteemed colleague responded that he was "correct that child welfare was not rocket science but actually harder". As he told me this story, I decided to do some research and found that he was absolutely correct in his response. Rocket science is aerospace engineering and it concerns itself with rockets which launch spacecraft into or operate in outer space. That is their main focus.

However, practicing in child welfare requires knowledge in all areas of life. We must have knowledge in substance abuse, child development, domestic violence, all types and forms of abuse and neglect, trauma and its effects on every member of the family, knowing every protocol developed by the medical field, legal field, and by a variety of agencies. We are required to know all facets of the law as they pertain to our cases such as criminal law, family law, probate guardianships, estate law, etc. We also need to know state and federal laws along with new case laws that come around every day changing the way we practice. So, yes I agree with my esteemed colleague, child welfare is not rocket science; it is much harder!

Unfortunately, child welfare is known as the kiddy court or the touchy-feely court but that does not even come close to what we do; we are so much more. We carry a heavy load on our shoulders. We handle the thing that is most important and precious to every person; family. While criminal courts deal with a person's freedom, we deal with the family unit, the most critical part of our society. Sometimes it ends well and everyone is reunited and sometimes it ends in termination of parental rights or the need for other permanency options.

The goal at the beginning of the majority of our cases is how can we put this family back together; how can we reunite them? That is why our roles as attorneys are so important. We advocate for our families to get what they need to be reunited. Our job is to ensure that our clients are effectively represented using every tool we were trained to use. Throughout child welfare cases, the one common theme throughout every stage is what is in the best interests of the children. We may differ in our opinion as to what that is but we can all agree that once that family is reunited, we never want to see them apart again.

To do this, we need to be great advocates and push for the services that our families require and

not the cookie-cutter list of services that we often see. We need to have individualized plans for each one of our families; each family is different. We need to focus on helping the family heal from the trauma they have all endured in addition to all the issues that brought the family to our attention in the first place. We need to expect more from everyone involved in these cases. We need to build strong families and strong children so they are able to achieve so much once they leave us. The only way to do this is to expect more.

The State Bar of Michigan-Children's Law Section is working to expect more out of all individuals working within the child welfare arena. This is an ever-changing field that requires the utmost of attention. We are the only voices these families have and must continue to advocate loudly for them and demand that their most vital needs are met. We need to bring child welfare to the forefront and to show the world that our families will not suffer in silence and we will do everything in our power to make our families stronger.

—Robin Eagleson

The Michigan Child Welfare Law Journal Call for Papers

The editorial board of *The Michigan Child Welfare Law Journal* invites manuscripts regarding current issues in the field of child welfare. The *Journal* takes an interdisciplinary approach to child welfare, as broadly defined to encompass those areas of law that directly affect the interests of children. The editorial board's goal is to ensure that the *Journal* is of interest and value to all professionals working in the field of child welfare, including social workers, attorneys, psychologists, and medical professionals. The *Journal's* content focuses on practice issues and the editorial board especially encourages contributions from active practitioners in the field of child welfare. All submissions must include a discussion of practice implications for legal practitioners.

The main text of the manuscripts must not exceed 20 double-spaced pages (approximately 5,000 words). The deadline for submission is September 30, 2013. Manuscripts should be submitted electronically to kozakiew@msu.edu. Inquiries should be directed to:

Joseph Kozakiewicz, Editor
The Michigan Child Welfare Journal
School of Social Work
238 Baker Hall
Michigan State University
East Lansing, MI 48823
kozakiew@msu.edu
(517) 336-8088

The Referees' Association of Michigan

by Shelley R. Spivack, JD, MA, Genesee County Family Court Referee

What is a Referee? What role do they play in the evolution of the Family Court in Michigan? How can Referees influence legislation and court rules affecting families and children?

For the past twenty eight years, Referees from around the state of Michigan have been addressing questions such as these through the Referees' Association of Michigan, a Special Purpose Bar Organization known informally as "RAM." Founded in 1984 by Referees from Oakland and Kent County, RAM is now a state wide organization of Family Division Referees and includes amongst its members both Friend of the Court and Juvenile Referees as well as those who serve in both capacities. Initially conceived of as an organization whose primary purpose was to create a sense of community amongst Referees performing varying roles throughout the state, RAM soon grew into an organization with a greater and more encompassing role. Today RAM is an organization providing vital continuing education to its members as well as an organization that plays a prominent role in the development of family law and policy throughout the state.

As part of its mission to "promote education for referees" RAM holds a yearly conference, as well as publishing a quarterly newsletter, a web site and sponsoring a list serve for its members. At its yearly conference in May, RAM features nationally recognized speakers from a variety of disciplines (such as medical, psychological and legal) as well as hosting justices and judges from Michigan's appellate, circuit and probate courts.

RAM'S newsletter, the "Referee's Quarterly" is available not only to Referees, but to the public at large on its website. Included within the "Referees' Quarterly" is an invaluable update and summary of family and juvenile law cases, legislation and court rules. Also featured are timely feature articles on issues such as Same-Sex Marriage, Arts Programming in Juvenile Detention Centers and the Indian Child Welfare Act. RAM's list serve is used daily by Referees throughout the state seeking advice and input on cases that come before them.

RAM's role in the creation and implementation of family and juvenile law and policy has grown substantially during the last twenty eight years. Members of RAM are active members of the State Bar's Family Law and Children's Law Committees as well as SCAO Forms Committees. RAM members have served on numerous state policy task forces and as an organization RAM has offered position statements on numerous proposed court rule and statutory revisions.

As the issues facing both the Family Court and Referees continue to grow and become more complex, the Referees' Association of Michigan will continue work with the courts, the bar and the community to ensure justice for all Michigan children and families.

For more information contact:
Shelley R. Spivack
sspivack@co.genesee.mi.us

Paul Jacokes
pjacokessr@yahoo.com

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Duncan Beagle
Chief Judge Pro Tem
Genesee County Circuit Court
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After *Mason*: Assessing the Rights of Incarcerated Parents in Michigan

by Amanda Alexander[1]

Introduction

In May 2010 the Michigan Supreme Court took the rare step of reversing a termination of parental rights, finding that Richard Mason, an incarcerated father of two young boys, had not been afforded an adequate opportunity to participate in the proceedings against him.[2] With *In Re Mason*, the court expanded the rights of incarcerated parents in holding that "mere present inability to personally care for one's children as a result of incarceration does not constitute grounds for termination of parental rights."[3] Before the decision, Michigan was one of a handful of states where a parent's rights could be terminated if they were incarcerated for two years.[4] While foster care workers in many states routinely developed case plans for parents in prison, Michigan's Children's Protective Services (CPS) caseworkers had automatically ruled out working with parents who had a sentence longer than two years.[5] After *Mason*, CPS was forced to overhaul its practices regarding parents in prison,[6] and at least two dozen terminations of parental rights have since been reversed on appeal.[7] As reversals of TPRs are extraordinarily rare—some family advocacy attorneys refer to TPRs as the "death penalty of family law," underscoring their irrevocable nature[8]—the sheer number of reversals in the wake of *Mason* indicates the decision's significance.

In this article, I will examine how the Michigan Court of Appeals has grappled with the *Mason* decision in order to discern how the rights of incarcerated parents have expanded—and what remains unchanged. I will survey the decisions that have drawn upon the *Mason* ruling over the past two years in order to identify differences between cases where TPRs are affirmed and reversed. Although the Michigan Supreme Court was very specific in some aspects of its ruling—for example, it held that incarcerated parents must have the opportunity to participate via telephone in every court hearing in a child protective proceeding, an opportunity denied to Richard Mason—other portions of its ruling were vague. The court has held that incarceration can no longer be the sole ground for terminating parental rights, but it was left to lower courts to determine what that means in practice. Further, it remained for courts to delineate what constitute reasonable efforts on the part of CPS to reunify a family, and what falls short. Based upon an assessment of *Mason*'s procedural and substantive rulings and subsequent lower court decisions in *Mason*'s wake, I argue that the decision is an important tool for parents and families cross-involved in the prison and child welfare systems, but that existing statutes and court rules still contain troubling oversights.

The *Mason* decision

I will begin by discussing the *Mason* case in depth. Richard Mason was jailed for drunk driving in October 2006 when his eldest son was two years old and his partner, Clarissa Smith, was due to give birth shortly to their second son. After Mason was incarcerated Smith brought the boys to visit with their father every week.[9] In June 2007, CPS temporarily removed the boys from Smith's care after police found the oldest son, then three years old, wandering outside the home unsupervised.[10] The removal petition also accused Mason of neglect, citing his criminal history and claiming that he had failed to provide for the children. A CPS worker, Steven Haag, created a service plan for both parents, but the Michigan Supreme Court later determined that it was likely Mason had not ever seen the plan.[11] Indeed, Haag admitted that he never spoke with Mason.[12] The family court removed the boys from Smith and placed them with their paternal aunt and uncle.

The court did not include Mason in five hearings between November 2007 and October 2008, and failed to inform him of his right under MCR 2.004 to participate in hearings by telephone. At a July 2008 hearing Mason expressed through his attorney that he was "extremely concerned with what is going

on with this case," that he wanted what was best for his children and to be part of their lives, and that he did "very much want to be part of any and all court proceedings."[13] The request was apparently overlooked until December 2008, when the court arranged for Mason to participate in a permanency planning hearing by phone, more than 16 months after he last participated.

At the hearing Mason testified about the classes and paid work he completed in prison, and expressed his desire and plan to care for his sons. The court proceeded to terminate his parental rights, faulting Mason because he had not personally cared for the children for at least the past two years and finding that his incarceration precluded him from taking advantage of services offered by DHS.[14] Mason appealed to the Michigan Court of Appeals, which affirmed the termination of rights on the basis that the lower court had not clearly erred in its findings.[15] Mason then appealed to the Michigan Supreme Court.

The Michigan Supreme Court found that DHS's efforts had focused exclusively on the children's mother and had basically ignored Mason, even though the state is not relieved of its duties to engage an absent parent solely because that parent is incarcerated.[16] The court reversed the termination of Mason's parental rights and made four key holdings: 1) that Mason had not been afforded a meaningful and adequate opportunity while incarcerated to participate in child protective proceedings and, therefore, the termination of his rights was premature;[17] 2) that mere present inability to personally care for one's children as a result of incarceration does not constitute grounds for termination of parental rights;[18] 3) that the trial court erred in concluding, on the basis of the foster care worker's largely unsupported opinion, that it would take at least six months for Mason to be ready to care for his sons after his release from prison;[19] and 4) that there was no evidence that his sons would be harmed if they lived with their father upon his release.[20]

The court ruled on the basis that DHS and the appellate court had violated statutes and court rules, but did not reach the question of whether the lower court's decision could have been reversed on due process grounds.[21] It is unsurprising that the court did not rule on constitutional grounds, given the doctrine of constitutional avoidance; courts generally must avoid constitutional arguments if the case can be resolved on a non-constitutional basis. Furthermore, the Court had ruled on constitutional grounds the previous year, creating strong precedent regarding the due process rights of (incarcerated and non-incarcerated) parents in child protective proceedings. In 2009, the court held in *In re Rood* that the state had deprived a father of even minimal procedural due process by failing to adequately notify him of relevant proceedings and then terminating his rights on the basis of his lack of participation.[22] The Michigan Court of Appeals has cited *Rood* nearly 200 times in cases involving incarcerated and non-incarcerated parents, most often distinguishing the case before it and finding that the parent had had adequate notice.[23] Given the constitutional avoidance doctrine and the *Rood* decision, it is unsurprising that the Michigan Supreme Court declined to rule on due process grounds.

Instead, the court determined that DHS had failed in its statutory duty to draw up a service plan, facilitate access to services, and discuss updates to the plan.[24] The court also noted that Michigan Court Rule 2.004 requires the court and DHS to arrange the opportunity for an incarcerated parent to participate by telephone in child protective hearings.[25] The court thus held that the lower court had based its factual findings on a record that was incomplete because of failures by DHS and the court to involve Mason.[26]

The *Mason* court also held that the lower courts had failed to apply correctly the text of the relevant statute (MCL 712A). Under MCL 712A.19b(3)(h), termination is authorized only if *each* of three conditions is met:

> The parent is imprisoned for such a period that [1] the child will be deprived of a normal home for a period exceeding 2 years, *and* [2] the parent has not provided for the child's proper care and custody, *and* [3] there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.[27]

The *Mason* court found that the family court had failed to consider each of the three provisions separately and, as a result, had essentially terminated Mason's rights "solely because of his incarceration."[28] In effect, *Mason* did not expand constitutional due process rights for incarcerated parents, but it did provide a basis for ensuring the enforcement of existing statutes and court rules. Subsequent courts have faced the challenge of determining the extent of its protections. I will discuss these interpretation challenges and refinements in the next section.

The rights of incarcerated parents after *Mason*[29]

procedural rulings

Several of the rulings that have sought to apply or refine *Mason* have been concerned with its first holding, the question of what constitutes a meaningful and adequate opportunity to participate in child protective hearings.[30] Courts have sought to discern whether *Mason* requires that parents be given the opportunity to participate in *each* hearing or whether, as DHS has asserted in subsequent cases,[31] it is enough for an absent parent to be represented by counsel or to be present by telephone at crucial hearings, but not all hearings. The Court of Appeals has tended to reject such arguments by DHS, holding that *Mason* requires that parents be given the opportunity to participate in *each* hearing.[32] The Court of Appeals in *D.M.K.* forcefully rejected DHS's arguments and expanded upon the importance of participation in all proceedings:

> In this case, respondent did not appear by telephone at the adjudication, the dispositional hearing, or the first three dispositional review hearings. These initial hearings allow the parties to become familiar with the parents' abilities and deficits, the child's needs, and the efforts necessary for reunification. In a sense, the initial dispositional hearings form the cornerstones of the succeeding review hearings, the permanency planning phase, and the ultimate decision to terminate parental rights. Respondent's incarceration does not alter that; had he participated, he could have supplied the court with highly relevant information about his son's needs, the child's paternal family history, familial placement options, and the nature of the services necessary to achieve a permanency goal that would serve the child's best interests. The adjudicative and dispositional processes embodied in Michigan law and our court rules envision that early and meaningful parental participation facilitates the determination of the most beneficial permanency goal. In summary, we reject the DHS's suggestion that excluding a parent for a prolonged period of the proceedings can be considered harmless error.[33]

The court's description underscores the fact that preliminary and review hearings are not intended to be box-checking exercises along the way to the all-important permanency planning or termination hearings. Instead, a parent's participation (or non-participation) from the earliest point in the process is likely to profoundly shape the course of the proceedings and its outcome.

However, the Court of Appeals has also rejected certain interpretations of *Mason*. In some cases where DHS has made reasonable efforts at reunification and an incarcerated parent has attended the vast majority of hearings, the parent's absence from one hearing is not automatically viewed as a denial of participation on the magnitude of *Mason.* In *In re Wood,* the Court of Appeals stated, "We do not read *Mason* to require reversal when a respondent does not attend a couple of hearings, but otherwise attends and the DHS involves respondent to the extent possible while he is in prison."[34] In *Wood,* the Court of Appeals found that the father's reliance on *Mason* was incorrect because the DHS worker had made attempts to actively engage him in services, he was presented with a service plan detailing what he needed to do to achieve reunification, and he participated in the termination hearing (testifying on his own behalf) and at least one other hearing.[35] Although the Court of Appeals has generally been quite strict in requiring that incarcerated parents be given the opportunity to participate in *each* hearing since *Mason*, the decision generally protects parents from being completely shut out of proceedings, but does not seem to offer a last-ditch strategy for parents who have, on the whole, engaged with DHS and with the hearing process.

Other post-*Mason* decisions have held that mere provision of services to an incarcerated parent is not enough if none of the services were aimed at reunification and at helping the parent overcome his or her parenting limitations.[36] In *Stauffer*, for instance, DHS was found to have failed in its statutory duties when it provided a range of services to an incarcerated father, but none which addressed or provided him assistance in overcoming his drug and alcohol dependency, housing and employment problems, criminal sexual propensities, or parenting limitations—all factors which the trial court later cited in support of termination.[37] The Court of Appeals stated, "[C]onsistent with *Mason* and MCL 712A.19a(2), respondent was entitled to reasonable reunification efforts and services to tackle these issues prior to termination."[38] A termination of parental rights was also reversed when the Court of Appeals determined that a parent was

penalized for failure to participate in services not available to him because of his incarceration.[39] Drawing on *Mason*'s holding that a parent is denied reasonable services when the caseworker and the lower court do not facilitate his access to services, the Court of Appeals held that DHS had not gone far enough by ordering a father to participate in services which appeared to be available at his facility based on the DOC website.[40] There was no evidence that any services were actually available to the father, other than a substance abuse treatment program for which he was on the waiting list.[41] Citing *Mason*, the court held this to be a denial of reasonable services.[42]

The Court of Appeals has also relied upon *Mason* to rule that criminal history was erroneously used as a basis for refusing reunification services, highlighting instances when DHS's policies failed to comply with statutes.[43] In *Manciel,* for example, an incarcerated father's "extensive criminal record" was cited as one of several factors in DHS's petition to terminate his parental rights.[44] In deciding that case, the Court of Appeals drew on *Mason*'s observation that "a criminal history alone does not justify termination" in finding that DHS had failed its statutory duty to engage the father since his conviction was not among the statutory exceptions to engagement.[45] In *Stauffer*, DHS's policy of not offering reunification services to parents who had a criminal sexual conduct conviction, absent a court order, was found to violate DHS's statutory duty to make reunification efforts in *all* cases except those involving aggravated circumstances enumerated in MCL 712A.19a(2).[46] A conviction of criminal sexual conduct against a person who is not the minor child or a sibling of the minor child is not one of the statutory exceptions. DHS had failed to create a service plan or to make reasonable efforts toward reunification solely because of the parent's conviction, and the Court of Appeals drew on *Mason* to give additional common law force to its finding that the statute had been violated.

Substantive rulings

The substantive standard for how DHS and courts determine whether a termination is warranted due to a parent's inability to provide proper care and custody has also shifted post-*Mason*. Before examining specific shifts, it is worth contextualizing this discussion within broader debates over the interests of parents and children. Such debates ran beneath the majority and dissenting opinions in *Mason* and, in some passages, fundamental differences of opinion were made explicit. On the one side, arguments in favor of strong protections for the rights of incarcerated parents and robust standards for "reasonable efforts" on the part of DHS include:

- the time-driven approach of ASFA and state statutes are overly rigid;[47]
- more procedural checks allow for individual, qualitative analysis over time;[48]
- terminations of parental rights might result in children becoming "legal orphans" and do not necessarily lead to more permanence or an exit from foster care;[49]
- parents should not be subjected to the additional punishment of losing their parental rights as a de facto consequence of their sentence;
- families should not face permanent separation because of a parent's incarceration;[50]
- family integrity (fostered by "reasonable efforts" that help promote communication and visitation) promotes successful reentry;[51]
- safe permanency options should exist that do not sever family bonds forever;[52] and
- zealous representation for parents improves the adversarial system and leads to better outcomes for children.[53]

On the other side, arguments in favor of fewer protections and less robust "reasonable efforts" requirements, several of which were raised by Justice Markman in his dissent in *Mason*, include:

- the time-driven approach of ASFA and state statutes allows children to be adopted into permanent homes;[54]
- ASFA's time-driven approach aims to ensure the health and safety of children;[55]
- "reasonable efforts" to reunify families might go to unreasonable lengths in terms of effort and time;[56]
- the need for clarity and permanence outweigh due process considerations;[57]
- terminating parental rights may allow for adoption by a step-parent or relative;
- a parent's criminal conviction and incarcera-

tion are problems of their own making and the state should not bear the responsibility of safeguarding the parent's rights;[58]

- even after release, it might take a formerly incarcerated parent a significant amount of time to demonstrate that they are capable of caring for their child;[59] and
- judicial efficiency.

Justice Markman summed up several of these concerns in his dissent when he argued that it was "potentially catastrophic for these children that their interest in a safe, secure, and stable home must again be placed in abeyance while respondent is afforded yet another opportunity to become a minimally acceptable parent.[60]

The majority devoted a section of the decision to addressing Justice Markman's concerns directly. The court pointed out that reversing and remanding the lower court's decision for further proceedings would not cause a "potentially catastrophic" delay in realizing the children's interest in a safe and stable home; the children would continue to live with their aunt and uncle while Mason worked with the court and DHS to establish his ability to safely parent them.[61] The court identified two other main errors in Markman's dissent and the lower court's reasoning, one procedural and one substantive. The court stated that the overriding error was a failure to honor Mason's right to participate, which led to the lower court's termination of his rights based on a largely uninformed presumption of unfitness.[62] The court pointed out that the lower court may again conclude on remand that termination is appropriate—with the "best interests of the child" standard always serving as the ultimate metric—but it must do so by making proper findings of fact based on Mason's participation in the hearings.[63] As a substantive matter, the court faulted the lower court for not considering MCL 712A.19a(6)(a), which establishes that the state is not required to initiate termination proceedings when children are being cared for by relatives.[64]

The court's sharply divided opinions indicate broader cleavages among constituencies that are adamantly in favor of parent or child interests. Unfortunately, child welfare law often frames parents and children in direct opposition; more procedural protections for parents' rights are assumed to necessarily entail deprivation of security and stability for children. However, this zero-sum equation is largely a problem of the law's own making. More and more states, Michigan included, are realizing that benefits for children need not be conditioned on permanently severing their relationships with their parents. For example, 42 states and the District of Columbia now provide subsidized guardianship programs to expand permanency options for children who cannot be reunified with their parents, including children whose parents are serving long prison sentences.[65] Michigan adopted such a program in 2009.[66] Others have argued that states should allow children to have more than two legal parents; California passed a bill along these lines in 2012 but Governor Brown later vetoed it, urging the legislature to redraft the bill to avoid unintended consequences.[67] At the very least subsidized guardianship programs and measures that would allow for additional legal parents succeed in expanding the child welfare debate beyond 'TPR or not' by broadening existing legal options to provide for children's needs. These are welcome developments that have the potential to help ensure safety and stability for children with incarcerated parents, and reduce the number of families permanently separated by a parent's incarceration.

With these broader debates in mind, we now have a basis for evaluating *Mason*'s substantive rulings. Following *Mason* the Court of Appeals more closely scrutinizes DHS and lower court claims that a termination is warranted due to a parent's inability to provide proper care and custody within a reasonable time. By statute, a court may terminate parental rights if it finds by clear and convincing evidence that:

- The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age;[68] or
- The parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years, and the parent has not provided for the child's proper care and custody, and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.[69]

Mason held that mere present inability to personally care for one's children did not constitute grounds for termination and that a parent "could fulfill his duty to provide proper care and custody in the future by voluntarily granting legal custody to his relatives during his remaining term of incarceration."[70] The *Mason* court reiterated that a child's placement with relatives weighs against termination under MCL 712A.19a(6)(a), which establishes that termination proceedings need not be initiated when a child is being cared for by relatives.[71] If termination proceedings have begun and a child is living with relatives, the court must explicitly consider this fact in determining whether termination is in the child's best interests.[72] The Court of Appeals, drawing on *Mason*, has stated this requirement bluntly: "A trial court's failure to explicitly address whether termination is appropriate in light of the children's placement with relatives renders the factual record inadequate to make a best-interest determination and requires reversal."[73] For instance, in *In re Cassidy* the Court of Appeals reversed a lower court's decision that had terminated the parental rights of a father who was incarcerated for two to five years. The lower court noted that the father's twin toddlers had bonded with their foster parents and were in need of "permanency and certainty;" the court stated that they should not remain in "legal limbo" while their father awaited release from prison and re-established a home.[74] However, the lower court had failed to recognize that the twins were placed with relatives; their foster mother was their mother's cousin. The Court of Appeals reversed the termination, noting that the father had a good relationship with the relative foster mother and that he believed the twins were being well cared for.[75] In this case, the father had fulfilled his duty to provide proper care and custody to his children through their placement with relatives.

Given that DHS routinely neglected to engage parents who would be incarcerated for longer than two years prior to *Mason*, the court's emphasis post-*Mason* on a parent's ability to fulfill his or her duty to provide care by arranging for other caretakers may significantly impact parents with longer sentences. This is an important clarification of the law, since there appears to be an incentive for incarcerated people to voluntarily terminate their rights in order to allow relative caregivers to obtain state support more readily. Under DHS policy, relative caregivers are eligible for foster care payments if their home is licensed *or* if parental rights have been terminated.[76] Given that some conditions for licensure present greater barriers for families with more contacts with the criminal legal and prison systems—as everyone over 18 in the home must undergo a criminal record check before the home can be licensed—there may exist an incentive for voluntary termination within these families. However, under D.O.C. policy, a minor may not visit an incarcerated parent if the parent's rights have been terminated.[77] Thus, although parents and families may still decide that voluntary termination makes sense particularly if they could not provide for the child without foster care payments, *Mason* expands their options by establishing that arranging for limited guardianship may be sufficient to avoid termination of parental rights.

Conclusion: After Mason: Two-tiered protections for parents in prisons and jails

The *Mason* decision has gone a long way toward ensuring that incarcerated parents are afforded an opportunity to participate in child welfare hearings, and toward requiring DHS workers to make reasonable efforts to engage them in reunification services. It is evident from an assessment of *Mason*'s rulings and subsequent lower court decisions in *Mason*'s wake that the decision is an important tool for parents and families cross-involved in the prison and child welfare systems. However, existing statutes and court rules still contain troubling oversights, including differential protections for parents in prisons and jails.

In multiple subsequent cases, the Court of Appeals has clarified that *Mason* only applies to parents held in Michigan prisons—not those held in county jails or in prison out of state.[78] When parents in jail or in out-of-state prisons have attempted to draw upon *Mason* to argue that they were not afforded an adequate opportunity to participate in hearings, appellate judges point out that *Mason* relied upon Michigan Court Rule 2.004. MCR 2.004, which requires the trial court and DHS to arrange for an incarcerated parent's telephonic participation in hearings, applies only to persons incarcerated under the jurisdiction of the Michigan Department of Corrections, not those held in jails (which are operated by counties) or serving a prison term elsewhere.[79] For example, for a father who was in jail during two hearings, the Court of Appeals held that it was adequate that he was represented by counsel at all hearings.[80]

Although most of the *Mason* ruling pertained to "incarcerated parents" broadly, the significant procedural safeguards of this specific holding only apply to parents in prison. This has resulted in bifurcated reforms to CPS policy.[81] The updated Protective Services Manual states that when a CPS caseworker files a petition in a case involving a parent incarcerated by the MDOC, the petition must include a clause stating that a telephone hearing is required.[82] If a parent is incarcerated in a jail or an out-of-state prison or jail, the court may determine how the parent will participate in the hearing, but DHS is not required to raise the issue in the petition.[83]

Mason's other holdings do apply to parents in Michigan jails, however, and the Protective Services Manual now requires caseworkers to make reasonable efforts to identify and locate an incarcerated parent and provide them prior notice of a scheduled permanency planning conference in the case of a considered removal.[84] Although this location and notification requirement is an improvement over past practices, mandating that DHS and the court give parents in jail an opportunity to participate in hearings by telephone would be better still. Equalizing the rights of parents in prisons and jails would no doubt create more work for DHS and jail staff, but it would end the two-tiered system of procedural rights afforded to incarcerated parents based upon whether they are pre- or post-trial or sentenced to a jail or a prison.

The *Mason* decision is an important tool for ensuring that decisions that have the potential to permanently sever family relationships are based upon a full agency assessment and judicial record. Still, broader reforms are needed to ensure that parents and families stand a better chance of successful reunification following incarceration. Beyond the scope of participation in child protective proceedings, families could benefit from a reduction in the cost of prison phone calls and a lifting of the ban on prison visits by minor nieces and nephews and by children as to whom parental rights had been terminated.[85] However, such changes are more likely to come about through legislative advocacy aimed at shifting DOC and DHS policies, given the failures of previous constitutional litigation and courts' permissive stance toward penological interests.[86] In the meantime, the *Mason* decision represents an important tool for enforcing existing statutes and court rules, and is of great potential benefit to parents and families situated at the intersection of the prison and child welfare systems.

Endnotes

1 Amanda Alexander is an incoming Soros Fellow at the University of Michigan Law School's Child Advocacy Clinic and the Detroit Center for Family Advocacy. She is a J.D. candidate at Yale Law School, where she co-founded the Women, Incarceration, and Family Law Project. During law school, she interned with The Bronx Defenders' Family Defense Practice and the Center for Constitutional Rights. Acknowledgements: Thanks to Hope Metcalf, Sofia Nelson, Vivek Sankaran, and Sia Sanneh for their helpful suggestions and comments. Any remaining errors are my own.

2 *In re Mason*, 486 Mich. 142, 146, 782 N.W.2d 747 (2010). In Michigan a parent may appeal a termination of parental rights within 21 days, but reversals are exceedingly rare. In order to reverse, a court must find that the lower court's ruling was clearly erroneous. MCR 3.977. *See In re Trejo,* 462 Mich. 341, 356 (2000) (affirming termination of parental rights; "We review decisions terminating parental rights for clear error: a decision must strike us as more than just maybe or probably wrong") (citation omitted).

3 *Id.* at 160.

4 Michigan was one of eight states with TPR statutes that included parental incarceration of two years (in some states as low as one year) as a ground for termination. The other states were: Colorado, Illinois, Kentucky, Montana, Ohio, Texas, and Utah. Arlene F. Lee, Philip M. Genty, an Mimi Laver, *The Impact of the Adoption and Safe Families Act on Children of Incarcerated Parents*, at 11-13 (Child Welfare League of America 2005). On the other end of the spectrum, New York amended its Social Services Law in 1983 to remove incarceration as sole grounds for termination of parental rights. 1983 N.Y. Laws 911. *See*, Philip M. Genty, *Protecting the Parental Rights of Incarcerated Mothers Whose Children are in Foster Care: Proposed Changes to New York's Termination of Parental Rights Law*, 17 Fordham Urb. L.J. 1 (1986).

5 Before *Mason,* instructions in the DHS-65 Initial Service Plan (ISP) and DHS-66 Updated Service Plan (USP) forms allowed a case worker to disregard a parent who would be incarcerated for a period of two years or more. Michigan Department of Human Services, "Involving Incarcerated Parents: Required Practice Changes," DHS Memorandum L-10-117-CW, 2-3 (Sep. 17, 2010).

6 *Id*; The Department of Human Services updated its Protective Services Manual in June 2011. The updated sections regarding incarcerated parents are PSM 713-8, 713-10, and 715-2, available at http://www.mfia.state.mi.us/olmweb/ex/PS-2011-001.pdf.

7 The Court of Appeals has cited *Mason* in reversing

termination decisions in cases involving both incarcerated and non-incarcerated parents. These cases include *In re Loughner*, 2013 WL 163612 (Mich. Ct. App. Jan. 14, 2013); *In re LeBeau*, 2012 WL 6177101 (Mich. Ct. App. Dec. 11, 2012); *In re Smith*, 2012 WL 6097299 (Mich. Ct. App. Dec. 6 2012); *In re Williams*, 2012 WL 4373154 (Mich. Ct. App. Sept. 25, 2012); *In re Weaver/Mullen*, 2012 WL 3537066 (Mich. Ct. App. Aug. 16, 2012); *In re Pope*, 306605, 2012 WL 2402589 (Mich. Ct. App. June 26, 2012); *In re Dobson*, 307478, 2012 WL 2345139 (Mich. Ct. App. June 19, 2012); *In re Dembny-Reinke*, 306321, 2012 WL 2126105 (Mich. Ct. App. June 12, 2012); *In re Olive/Metts Minors*, 823 N.W.2d 144 (Mich. Ct. App. June 5, 2012); *In re Pociask*, 307632, 2012 WL 1698361 (Mich. Ct. App. May 15, 2012); *In re Vincent*, 307202, 2012 WL 1449114 (Mich. Ct. App. Apr. 26, 2012); *In re Mays*, 490 Mich. 997, 997, 807 N.W.2d 304 (2012); *In re Carter*, 304476, 2012 WL 716287 (Mich. Ct. App. Mar. 6, 2012); *In re Baker*, 304519, 2011 WL 6464232 (Mich. Ct. App. Dec. 22, 2011); *In re Halasi*, 303291, 2011 WL 5375090 (Mich. Ct. App. Nov. 8, 2011); In *re Cassidy*, 300894, 2011 WL 2119629 (Mich. Ct. App. May 26, 2011); *In re Hinson*, 299908, 2011 WL 1600492 (Mich. Ct. App. Apr. 28, 2011); *In re Stauffer*, 298405, 2011 WL 521342 (Mich. Ct. App. Feb. 15, 2011); *In re Bordeaux*, 297751, 2011 WL 254522 (Mich. Ct. App. Jan. 27, 2011); *In re Polley*, 298823, 2011 WL 149968 (Mich. Ct. App. Jan. 18, 2011); *In re Schooler* 297747, 2010 WL 4630871 (Mich. Ct. App. Nov. 16, 2010); *In re Hollins*, 296968, 2010 WL 4628935 (Mich. Ct. App. Nov. 16, 2010); *In re Manciel*, 296359, 2010 WL 3187931 (Mich. Ct. App. Aug. 12, 2010); *In re Rose*, 295948, 2010 WL 2870772 (Mich. Ct. App. July 22, 2010); *In re D.M.K.*, 289 Mich. App. 246, 796 N.W.2d 129 (Jul. 15, 2010); *In re Jones/Jenkins*, 295827, 2010 WL 2794274 (Mich. Ct. App. July 15, 2010); *In re Hansen*, 486 Mich. 1037, 1037, 783 N.W.2d 124 (Jun. 25, 2010).

8 Courts have used this language as well. The Court of Appeals of Ohio has called termination of parental rights "the family law equivalent of the death penalty in a criminal case." *In re Smith*, 77 Ohio App. 3d 1, 16 (1991). The Nevada Supreme Court has declared that termination of a parent's rights is "tantamount to imposition of a civil death penalty." *Drury v. Lang*, 105 Nev. 430, 433 (1989).

9 *Mason*, 486 Mich. at 147.

10 *Id.* at 147.

11 Note that the Court of Appeals will not always or automatically consider a lack of signature as proof that the parent has not seen the service plan. *See, e.g, In re Micoff*, 296890, 2010 WL 4140466 (Unpublished, Mich. Ct. App. Oct. 21, 2010) (stating that "the fact that the PAA was unsigned is of no consequence where both respondent and his attorney acknowledged early on that they were fully aware of its contents and had no objections."). The Michigan Supreme Court found the lack of signature in *Mason* to be consequential alongside other evidence that the DHS worker had failed to engage Mason.

12 *Mason*, 486 Mich. at 150.

13 *Id.* at 148.

14 *Id.* at 151.

15 *In re Mason*, unpublished memorandum opinion of the Court of Appeals, issued September 15, 2009 (Docket No. 290637), 2009 WL 2952685.

16 *Mason*, 486 Mich. at 152. The court relied on MCL 712A.19(a)2, which states that "reasonable efforts to reunify the child and family must be made in *all* cases" except those involving aggravated circumstances, none of which were present in Mason's case.

17 *Id*. at 152.

18 *Id*. at 160.

19 *Id*. at 162.

20 *Id*. at 165.

21 *Id*. at 166.

22 *In re Rood*, 483 Mich. 73 (2009). *Rood* did not involve an incarcerated parent (he was released from jail before hearings took place), and so the statutes and court rules at issue in *Mason* were not implicated in that case.

23 *See e.g. In re J.S.C.* 2010 WL 1461597 (Unpublished, Mich. Ct. App. Apr. 30, 2010); *But see In re Stauffer*, 2011 WL 521342 (Unpublished, Mich. Ct. App. Feb. 15, 2011) (reversing termination of parental rights, citing *Mason* and *Rood*); *In re Morrow*, 2011 WL 182166 (Unpublished, Mich. Ct. App. Jan. 20, 2011) (reversing termination of parental rights, citing *Mason* and *Rood*).

24 *Mason*, 486 Mich. at 156-7.

25 Mich. Ct. R. 2.004 (2003).

26 *Mason*, 486 Mich. at 166.

27 MCL 712A.19b(3)(h). Emphasis added by the *Mason* court. *See, Mason*, 486 Mich. at 160-1.

28 *Mason* at 160.

29 Many cases that cite *Mason* are unpublished opinions. This is not surprising given that the cases concern the sensitive matter of terminating parental rights, and judges may consider their determinations to be so individualized and fact-specific as to not hold broader relevance or precedential value. Under Michigan Court Rule 7.215 an unpublished opinion is not precedentially binding under the rule of stare decisis, but parties may cite such opinions. Mich. Ct. R. 7.215 (1985). Still, trial courts consider unpublished opinions and such opinions provide insight into how the Court of Appeals reasons about particular issues. In the following sections I will discuss both published and unpublished Court of Appeals cases that refine *Mason* since both are

useful for understanding how courts are grappling with the decision (and are likely to do so in the future). I will mark unpublished cases as such in the footnotes, however, so that they are not read as binding precedent.

30 *See, In re D.M.K.,* 289 Mich. App. 246 (2010); *In re Dembny-Reinke*, 306321, 2012 WL 2126105 (Unpublished, Mich. Ct. App. June 12, 2012); *In re Jones/Metheny*, 304348, 2011 WL 5108501 (Unpublished, Mich. Ct. App. Oct. 27, 2011) (noting that *Mason* did *not* mandate a year-long review period, but instead merely noted that Mason had missed the "year-long review period" that existed between adjudication and the permanency planning hearing in his case and mandated that respondent parents have a meaningful opportunity to comply with a case service plan.)

31 *See, e.g. D.M.K.* at 253-5.

32 *In re Bordeaux*, 297751, 2011 WL 254522 (Unpublished, Mich. Ct. App. Jan. 27, 2011) ("The *Mason* Court made it clear that participation in some hearings is not sufficient to satisfy the requirements of MCR 2.004, which provides that the incarcerated parent must be given the opportunity to participate in "each proceeding.")

33 *D.M.K.* at 255.

34 *In re Wood*, 298794, 2011 WL 744908 (Unpublished, Mich. Ct. App. Mar. 3, 2011).

35 *See also, In re Lee*, 303124, 2011 WL 6016127 (Unpublished, Mich. Ct. App. Dec. 1, 2011) ("respondent's absence at one hearing which did not affect the outcome of his proceeding differs markedly from respondent Mason's complete exclusion from his child protective proceeding for 16 months, in particular from the year-long review period during which the trial court would have evaluated his efforts at reunification.")

36 *In re Stauffer*, 298405, 2011 WL 521342 (Unpublished, Mich. Ct. App. Feb. 15, 2011); *In re Manciel*, 296359, 2010 WL 3187931 (Unpublished, Mich. Ct. App. Aug. 12, 2010) (reversing termination after DHS failed to offer incarcerated father any services designed to facilitate parent-child reunification, and therefore failed to make reasonable efforts to reunify the father with his child); *D.M.K., supra* note 24 (reversing termination after father was denied his statutory right to reunification services); *In re Rose,* 295948, 2010 WL 2870772 (Unpublished, Mich. Ct. App. July 22, 2010) (reversing termination; "respondent was offered no opportunity to work toward reunification with his child and, accordingly, the court clearly erred when it found that, due almost entirely to his incarceration, there were grounds for termination").

37 *Stauffer,* at 2.

38 *Id.* at 2.

39 *In re Schooler*, 297747, 2010 WL 4630871 (Unpublished, Mich. Ct. App. Nov. 16, 2010).

40 *Id.* at 1-2.

41 *Id.* at 2.

42 *Id.* at 1.

43 *Stauffer, supra* note 31; *Manciel, supra* note 31; *In re Hollins*, 296968, 2010 WL 4628935 (Unpublished, Mich. Ct. App. Nov. 16, 2010) (reversing termination after DHS failed to make reasonable efforts at reunification, failed to provide respondent with a case treatment plan, and failed to provide services to incarcerated father. The lower court had improperly used criminal history as a basis for termination, ruling based on the fact that the father had spent most of his time in jail since the birth of his children, that he had a lengthy, extensive criminal record, much of it as a juvenile, and that he was a long-time marijuana user.)

44 *Manciel* at 1.

45 *Id.* at 3 (citing *Mason* at 165).

46 *Id.* at 1.

47 *See e.g.* Philip Genty, "Moving Beyond Generalizations and Stereotypes to Develop Individualized Approaches for Working With Families Affected by Parental Incarceration," 50 Family Court Review 36 (2012).

48 *Id.* at 37.

49 Vivek Sankaran, "A Hidden Crisis: The Need to Strengthen Representation of Parents in Child Protective Proceedings," Michigan Bar Journal 36 (2010). Michigan has the second highest number of legal orphans in the country.

50 Correctional Association of New York, "A Fair Chance for Families Separated by Prison" (2010).

51 Center for Effective Public Policy, *Engaging Offenders' Families in Reentry* (2010); N.G. LaVigne, C. Visher, & J. Castro (2004). *Chicago Prisoners' Experiences Returning Home* (2004).Available at: http://www.urban.org/UploadedPDF/311115_ChicagoPrisoners.pdf.

52 Women in Prison Project of the Correctional Association of New York, "When 'Free' Means Losing Your Mother: The Collision of Child Welfare and the Incarceration of Women in New York State" (2006).

53 Sankaran, *supra* note 49 at 37-8. Evaluators of a pilot project for parents' representation in Washington state found that after three years of the program hearings took place more quickly, the rate of reunification increased by more than 50 percent, the rate of terminations of parental rights decreased by nearly 45 percent, and the rate of children leaving the foster care system without a permanent home declined by 50 percent (citing National Council of Juvenile and Family Court Judges, "Improving Parents' Representation in Dependency Cases: A Washington State Pilot Program Evaluation" [2003]).

54 Katharine Seelye, "Clinton to Approve Sweeping Shift in Adoption," N.Y. Times (1997).

55 Oregon Department of Human Services, "What Is ASFA?," DHS 9120 (2007). Available at https://apps.state.or.us/Forms/Served/de9120.pdf.; Seelye, *supra* note 55.

56 Richard J. Gelles, "Family Preservation and Child Maltreatment," in Rethinking Orphanages for the 21st Century 47 (Richard B. McKenzie ed., 1999) (cited in Madelyn Freundlich, *Expediting Termination of Parental Rights: Solving A Problem or Sowing the Seeds of A New Predicament?*, 28 Cap. U. L. Rev. 97 [1999]).

57 *Mason*, 486 Mich. at 175, 177 (Markman, J., dissenting) ("These children need stability in their lives and they need it now; they cannot sit around indefinitely and wait to see if respondent, after interminable grants of supposed 'due process' nowhere required in the law, can somehow become a responsible parent;" "One can always identify more process that a person can receive under these circumstances or in the criminal justice context.").

58 *Id.* at 170 (Markman, J., dissenting) ("to the extent that respondent was "hamstrung," this was of his own making—nobody but respondent can be blamed for the fact that he was in prison during the pendency of these proceedings.")

59 *Id.* at fn. 3 (Markman, J., dissenting) ("I think that it is a matter of common sense that it would take significant time for an imprisoned father, with respondent's background, who has *never* had the sole responsibility of taking care of young children to demonstrate that he is capable of doing so.")

60 *Id.* at 171. (Markman, J., dissenting).

61 *Mason*, 486 Mich. at 168 (majority opinion).

62 *Id.*

63 *Id.*

64 *Id.* at 169.

65 Center for Law and Social Policy and Children's Defense Fund, "Child Welfare in the United States" (2010). Available at http://www.clasp.org/admin/site/publications/files/child-welfare-financing-united-states-2010.pdf. Subsidized guardianship programs vary widely and some have significant limitations; many are funded by Temporary Assistance for Needy Families (TANF) dollars that are not secure from year to year. North American Council on Adoptable Children, "Child Welfare Financing." Available at http://www.nacac.org/policy/financing.html.

66 Mich. Comp. Laws Ann. § 722.873 (West 2012).

67 Myra Fleischer, "California Bill Allowing More than Two Parents Vetoed," Washington Times, Sep. 30, 2012.

68 Mich. Comp. Laws Ann. § 712A.19b(3)(g).

69 Mich. Comp. Laws Ann. § 712A.19b(3)(h).

70 *Mason* at 160, 163.

71 *Id.* at 164.

72 *Id.* at 164.

73 *In re Olive/Metts Minors*, 823 N.W.2d 144 (Mich. Ct. App. June 5, 2012). *See also In re Loughner*, 2013 WL 163612 (Unpublished, Mich. Ct. App. Jan. 14, 2013); *In re LeBeau*, 2012 WL 6177101 (Unpublished, Mich. Ct. App. Dec. 11, 2012) ("[W]henever M has been out of respondent's care, petitioner placed the child with relatives at his parents' request. When Port Huron police officers arrested respondent at his home on January 30, 2012, respondent immediately secured M's placements with the child's paternal grandparents. The circuit court was required to consider M's relative placement in determining whether termination was in the child's best interests); *In re Smith*, 2012 WL 6097299 (Unpublished, Mich. Ct. App. Dec. 6 2012) ("We note that our statutes do not require a parent to personally care for a child. For instance, a parent may, because of reasons of illness, entrust the care of her children to others."), *In re Williams*, 2012 WL 4373154 (Unpublished, Mich. Ct. App. Sept. 25, 2012); *In re Weaver/Mullen*, 2012 WL 3537066 (Unpublished, Mich. Ct. App. Aug. 16, 2012); *In re Cassidy*, 2011 WL 2119629 (Unpublished, Mich. Ct. App. May 26, 2011).

74 *In re Cassidy*, 300894, 2011 WL 2119629 (Unpublished, Mich. Ct. App. May 26, 2011), at 2.

75 *Id.* at 4.

76 Michigan Department of Human Services, *Foster Care Payment Eligibility and Rates,* http://www.michigan.gov/dhs/0,4562,7-124-60126_7117_7658-14898--,00.html

77 Mich. Admin. Code r. 791.6609(6)(a). A group of incarcerated people challenged these restrictions—as well as bans on visits from minor nieces and nephews—all the way up to the U.S. Supreme Court. The Court upheld the restrictions in a 9-0 ruling in 2003. *Overton v. Bazzetta*, 539 U.S. 126 (2003).

78 *In re Brinker*, 302305, 2011 WL 4375253 (Unpublished, Mich. Ct. App. Sept. 20, 2011); *In re Plowman*, 297331, 2010 WL 4679495 (Unpublished, Mich. Ct. App. Nov. 18, 2010); *In re M.P.*, 298705, 2011 WL 683013 (Unpublished, Mich. Ct. App. Feb. 24, 2011) (finding that mother was incarcerated in Mississippi and thus was not entitled to the benefit of MCR 2.004).

79 *Brinker* at 1; *Plowman* at 2. *See also, In re BAD*, 264 Mich.App. 66, 71-76 (2004) (specifically holding that MCR 2.004 addresses only parties incarcerated under the jurisdiction of the Michigan Department of Corrections, and therefore, it does not apply to parents incarcerated outside the State of Michigan).

80 *Brinker* at 1.

81 See updates to the Protective Services Manual at 713-8, 713-10, and 715-2. Available at http://www.mfia.state.mi.us/olmweb/ex/PS-2011-001.pdf.

82 PSM 715-2.

83 *Id.*

84 PSM 713-8, 713-10, 715-2.

85 Last year, Michigan nearly doubled the cost of prison phone calls under a new contract. Editorial, *No need to raise inmate phone rates*, Detroit Free Press, Aug. 24, 2011. Available at http://www.freep.com/article/20110713/OPINION01/108240001/Editorial-No-need-raise-inmate-phone-rates.

86 *Overton v. Bazzetta*, *supra* note 73 (holding that prison regulations that barred visits by nieces and nephews and by children as to whom parental rights had been terminated, among others, were rationally related to legitimate penological objectives and did not violate substantive due process or free association guarantee of the First Amendment); *Turner v. Safley*, 482 U.S. 78, 89 (1987) ("[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.").

Engaging Families in Case Planning

by Child Welfare Information Gateway, September 2012

Successfully involving family members in case planning may be the most critical component for achieving positive outcomes in child welfare practice. Research suggests that when families are engaged and supported to have a significant role in case planning, they are more motivated to actively commit to achieving the case plan. Additionally, families are more likely to recognize and agree with the identified problems to be resolved, perceive goals as relevant and attainable, and be satisfied with the planning and decision-making process (Antle, Christensen, van Zyl, & Barbee, 2012; Healy, Darlington, & Yellowlees, 2011; Dawson & Berry, 2001; Jones, McGura, & Shyne, 1981).

Child welfare professionals at the State, Tribal, and local levels— including administrators, supervisors, and frontline workers—can use this information to establish policies and encourage practices that support family engagement in case planning.

Basics of Engaging Families in Case Planning

Collaborative case planning occurs when the caseworker's efforts effectively and continuously engage family members and others as appropriate in case planning activities, including the following:

- Gathering and assessing information in order to visualize the family system
- Matching strengths and needs with solutions and services
- Identifying behaviors and conditions that need to change
- Reviewing, tracking, and acknowledging progress regularly
- Determining readiness for key case transition points, such as reunification
- Preparing for case closure
- Marshaling supports for relapse prevention, as needed

The case plan is a living document that should reflect ongoing input from the family and be reviewed and updated throughout the life of the case. Caseworkers should expect to engage the family for the initial drafting of the plan as well as throughout the planning and implementation process. Family participation helps ensure buy-in from the family and also adds a higher degree of accountability for the family.

The following are tips that can help caseworkers coordinate a case plan meeting in a way that enhances family participation:

- Assist family members with practical issues that may prevent them from attending, such as child care and transportation.
- Take into account family members' other obligations, such as employment, when scheduling meetings.
- Ensure that the physical environment for the meeting is welcoming (e.g., enough space for all members, accessibility for individuals with disabilities).
- Invite people identified by the family as being part of its support system, which may include other family members or individuals external to the family, such as friends, teachers, and clergy.
- Minimize the possibility of family members receiving unanticipated information during the meeting (e.g., communicate information regularly to family members).
- Help the family meet concrete needs (e.g., housing, food).
- Resolve acute behavioral or health-related issues that may impede family participation (e.g., provide housing assistance, if needed).
- Prepare the family for the meeting by reviewing items such as expectations, roles and responsibilities, and goals.

- If the child is unable to participate or will otherwise not be present, incorporate him/her through other means, such as a photograph or artwork (Healy, Darlington, & Yellowlees, 2011; Dawson & Berry, 2001).

Caseworker Strategies That Support Family Engagement in Case Planning

The following are several examples of approaches caseworkers can use to enhance family engagement in case planning.

Using Supportive Behaviors

A number of studies have suggested that the following caseworker behaviors may support a collaborative relationship, including better engaging families in case planning:

- Listening to and addressing issues that concern the family
- Having honest discussions about the nature of the caseworker's authority and how it may be used (this is required by CAPTA)
- Sharing openly with family members what to expect, particularly regarding court issues and timelines
- Balancing discussions of problems with the identification of strengths and resources
- Working with the family's definitions of the problems (rather than the caseworker's definition)
- Setting goals that are mutually agreed upon and may be generated primarily by the family and stated in their language
- Focusing on improving family members' skills rather than providing insights
- Providing family members with choices whenever possible
- Getting a commitment from family members that they will engage in mutually identified tasks
- Regularly spending time with the family discussing goals and progress
- Recognizing and praising progress (Dawson & Berry, 2001; Trotter, 2002; Dawson & Berry, 2002)

> *"This was the first time someone asked me what I thought."*
>
> — Mother, responding to a satisfaction survey designed to elicit family members' reactions to being involved in the child welfare system

Visualizing and Describing the Family System

Developing a visualization or description of the family system can help caseworkers gain insight about how a family views itself and help establish the family as an expert. In this approach, the caseworker asks the family to share information about family relationships, patterns of family interactions, and active community supports and stressors. The family may also want to reflect on family events, some of which may have a lasting significance on family and individual dynamics. This information can help the family and caseworker develop a more thorough case plan. The following are three examples of this approach:

- Genograms, which outline family relationships, multigenerational patterns, and the roles played by individual family members
- Ecomaps, which describe the family's perspective of itself in relationship to the wider community and can help the caseworker and family explore important spiritual and cultural connections
- Family timelines, which highlight life events that are noteworthy to family members

For additional details about creating and using these tools, the Missouri Department of Social Services' *Child Welfare Manual* (2011) offers brief descriptions: http://www.dss.mo.gov/cd/ info/cwmanual/section7/ch1_33/sec7ch25.htm

Instituting Family Teaming Models

Family teaming models may include a variety of family group conferencing, decision-making, and teaming approaches. Although the specific tenets of each approach vary, the basis of each is a belief that families should be involved in a strengths-based, solution-focused team that values the families' voice and focuses on the child's safety, permanency, and well-being (Annie. E. Casey Foundation & Casey Family Services, 2009). These approaches bring together a team of family mem-

bers, fictive kin, and other individuals who are significant to the family in order to discuss the issues, consider alternative solutions, make decisions, and develop a plan. Using family teaming approaches can strengthen family relationships, prevent unnecessary placement and placement disruption, and help caseworkers identify and nurture a system of family supports (Crea & Berzin, 2009; American Humane, n.d.).

For more information about family teaming models, visit the Child Welfare Information Gateway website: http://www.childwelfare.gov/ famcentered/ overview/approaches/family_ group.cfm

> *"The family group conferencing process provides a venue of effective communication, in a neutral place, where private family time is respected. I felt this process helped to bring our family together."*
>
> — Family member commenting on the experience of participating in a family group conference organized around a child welfare case

Incorporating Family Finding

Family finding includes identifying and searching for family members and other important people in the lives of children in foster care and then engaging them in the case decision-making process, including the development and fulfillment of case plans. Family finding can increase the number of individuals who may be able to provide legal and emotional permanency for the child, are aware of the case plan, and can assist the child and family in achieving case goals. Family finding initially was viewed as a tool to enhance permanency for youth aging out of foster care, but many agencies are now using it for all children in care (Malm & Allen, 2011).

For more information about family finding, visit the National Resource Center for Permanency and Family Connections' web section on Family Search and Engagement: http://www.hunter.cuny.edu/socwork/nrcfcpp/ info_services/family-search.html

Employing the Solution-Based Casework Approach

Solution-Based Casework (SBC) is a child welfare practice model built on three theoretical foundations: family life cycle theory, relapse prevention/cognitive behavioral therapy theory, and solution-focused family therapy (Antle et al., 2012). The theoretical foundations of SBC establish a framework of case practice with families based on full partnership with every family as an essential goal, partnerships for protection that focus on the patterns of everyday life of the family, and solutions that target prevention skills needed to reduce the risk in typical life events.

Fundamentally, SBC is a model of empowerment that drives case planning and focuses on:

- Capitalizing on family strengths
- Finding exceptions to problems by searching with the family for ways in which they have successfully solved problems previously
- Writing goals and objectives using the families' own language, acknowledging their culture, and supporting their "ownership"
- Creating concrete, behaviorally specific goals and objectives tailored to the individual and family needs
- Tracking progress with the family and celebrating successes along the way

SBC encourages workers to "walk alongside the families to make sure they have the supportive team they need to navigate the system successfully" (B. F Antle, personal communication, June 7, 2012). Research on SBC has shown that this partnership between the caseworker and family generates better family outcomes. Specifically, in regard to case planning activities (i.e., referrals to services, participating in case plan development), several studies conducted to evaluate the effectiveness of SBC have shown the following results (Antle, Barbee, Christensen, & Martin, 2008):

- Most families involved with SBC followed through with referrals to services.
- A substantial proportion of families who co-created their case plan within an SBC framework also signed their case plan—an important indicator of their involvement.
- Families assigned tasks through an SBC case plan process were more likely to complete those tasks, compared to families not involved in SBC case plans.

- Families in an SBC group achieved significantly more goals/objectives from the case plan compared to those in a non-SBC group.
- Families with a history of involvement with CPS achieved even more goals from their case plan when SBC was used than those without such histories and those for whom SBC was not used.
- Families experienced significantly fewer recidivism referral reports for repeat maltreatment when SBC was used in case planning.

Research suggests that SBC is associated with significantly greater family engagement in case planning activities, which may lead to better safety, permanency, and well-being outcomes for children and families (Antle et al., 2008).

For more information on SBC, visit http://www.solutionbasedcasework.com, or contact Becky Antle: Becky.Antle@louisville.edu

Integrating Structured Decision- Making and Signs of Safety

Structured decision-making (SDM) offers caseworkers an approach that relies on the use of objective, research-based criteria to assess a family's situation (e.g., risk of harm to the child), screen the case for investigation, and make case decisions. These factors are incorporated into the case plan. Although SDM provides a systematic and analytic method of assessing family situations, it is not intended to be an interview tool with families.

Signs of Safety (SoS) is a strengths-based, solution-focused approach that promotes building relationships with families and using a safety mapping process to assess next steps. Safety mapping, in brief, focuses on caseworkers and families determining the answers to three questions:

- What are the worries (e.g., previous abuse)?
- What's working well (e.g., family protective factors)?
- What needs to happen (e.g., safety planning)? (Turnell, 2010)

Both SDM and SoS are approaches that can be used alone or combined. By combining these two models, caseworkers can add the defined assessment criteria of SDM to the safety mapping approach of SoS and use the family engagement and inquiry techniques of SoS to gather information needed for a comprehensive SDM assessment, all of which can inform the case plan (Park, 2010). Recently, States have also begun to integrate SDM and SBC, further strengthening the practice of engaging families throughout the entire life of a case.

For additional information about SDM, visit:

- The Children's Research Center at http://www.nccd-crc.org/crc/crc/c_sdm_about.html
- Child Welfare Information Gateway at http://www.childwelfare.gov/systemwide/ assessment/approaches/decision.cfm

For more information about Signs of Safety, visit: http://www.signsofsafety.net

Agency Strategies That Support Family Engagement in Case Planning

Child welfare administrators and supervisors can use policies and practices already shown to improve general casework practice to support family engagement in case planning within their agencies, including:

- Using family-centered language in policies and other agency documents
- Creating a family-friendly environment in agency offices
- Reducing caseloads in order to give caseworkers more time to engage families
- Providing supervision, coaching, and training that encourage family engagement
- Including family-friendly practice in position descriptions
- Engaging families in decision-making processes and in designing policies and practices
- Assessing whether child welfare information systems support a family- centered approach
- Including family engagement measures in agency evaluation and performance measurement
- Ensuring that caseworkers have the necessary research tools and other resources to aid in finding and engaging family members

Findings in the Child and Family Services Reviews

The results of the Child and Family Services Reviews (CFSRs), which are Federal monitoring evaluations of each State's child welfare services, show that States are having difficulty involving parents and children in case planning. This is assessed specifically in the CFSR Item 18. In both rounds of the CFSRs, all States received a rating of "Area Needing Improvement" on this item. Across the States, CFSR case reviewers found that all parents and children were involved in case planning in 21 to 75 percent of cases, with an average of 50 percent. The involvement of fathers in case planning, however, was consistently lower than the involvement of mothers and children. Additionally, families were more often included in case planning in cases where the child was in foster care rather than receiving in-home services (U.S. Department of Health and Human Services, 2011; U.S. Department of Health and Human Services, n.d.).

Challenges

A review of Statewide Assessments prepared for the second round of the CFSRs found that States identified the following challenges to engaging families in case planning:

- Staff lacking the skills needed for family engagement in case planning (42 States)
- Staff attitudes and behaviors (25 States)
- Organizational issues (e.g., high workloads) (21 States)
- Parent attitudes, behaviors, or conditions that impede active involvement in case planning (17 States)
- Difficulties created by court-related requirements (14 States)
- System issues and documentation requirements precluding the production of a written case plan in a family-friendly format (17 States)

Strategies to Enhance Family Involvement

The CFSR Final Reports indicate that most States (including the District of Columbia and Puerto Rico) have policies regarding family engagement in case planning, with 28 States having policies requiring family engagement and an additional 12 having policies that suggest or encourage it. Additionally, 46 of the 51 States (including the District of Columbia) addressed family engagement in case planning in their Program Improvement Plans (PIPs), which were created to address any deficiencies noted in a State's CFSR. Some States' PIPs included very specific plans for improvement in family engagement, while others tangentially mentioned it. The following are strategies listed in the CFSR Final Reports as facilitating family engagement in case planning:

- Family group decision-making (29 States)
- Diligent searches (9 States)
- Video or teleconferences to allow the participation of family members who otherwise could not attend due to travel issues or incarceration (6 States)
- Training for caseworkers (3 States)
- Mediation (3 States)

The strategies most frequently mentioned in the PIPs to address deficiencies in family engagement in case planning were enhanced family group decision-making meetings (9 States) and training (6 States). Examples of other strategies include equipping caseworkers with smartphones and laptops that would enable them to complete assessments and case plans with clients outside of the agency (Vermont), developing and disseminating a checklist to caseworkers about engaging families in case planning (North Dakota), and adding or modifying questions in its case review instrument to monitor compliance (Kansas).

State and Local Examples

The following are three examples of how jurisdictions are implementing strategies to engage families in case planning.

Texas Department of Family and Protective Services: Family Group Decision-Making

The El Paso Regional Office of the Texas Department of Family and Protective Services (DFPS) uses family group decision- making (FGDM) as a way of involving parents and children in case planning and decision-making. Texas DFPS implemented family group decision-making throughout the State in response to issues raised in its 2002 CFSR.

El Paso DFPS has a team of coordinators that plan and facilitate the meetings. The purpose of the FGDM meetings is to reach consensus on how they will safely prevent removal or on the best placement resource that will protect the child. After consensus is achieved, the participants determine the next steps for the case, with each family member commenting on the tasks (e.g., whether they are achievable). The resulting case plan then is put into writing and signed by the participants.

El Paso's diverse population poses some challenges for implementing FGDM. El Paso is a border community with a large Mexican population, and it can be difficult to locate and engage family members and support individuals who may reside in Mexico or are undocumented. Having staff from diverse backgrounds and who are bilingual helps with the FGDM process, including being able to conduct the meeting and write the case plan in the family's preferred language. Additionally, Federal partners sometimes are able to help parents in Mexico obtain a day pass so they can attend court in El Paso.

El Paso also is home to a large military base. Bringing family members and other support individuals together for military families often is a challenge because the parents and child may have no family in the area and may have not developed strong supportive ties in the community.

El Paso DFPS staff have found the following staff behaviors and attitudes to be essential to the FGDM and family engagement process:

- Being culturally competent and respectful of the family
- Being authentic about the process
- Keeping in mind that the FGDM is the family's meeting, not the department's
- Having the DFPS investigator and caseworker attend the FGDM together, which helps create a seamless transition from investigation to services

Fairfax County (VA) Department of Family Services: Family Partnership Program

The Fairfax County Department of Family Services (DFS) implemented the Family Partnership Program (http://www.fairfaxcounty. gov/dfs/childrenyouth/family-partnership.htm) to ensure families' and children's views are considered when making placement decisions and developing case plans. Family Partnership meetings use a facilitated team approach and are led by one of seven trained facilitators, who otherwise are not associated with the case and do not carry a caseload. Family Partnership meetings can be convened quickly (within 24 hours, if necessary) and are arranged in response to any of the following five designated events: an emergency removal order, the high risk of out of home placement, before a goal change, before a placement change, or at the request of family or staff. DFS strives to reduce barriers to family participation and provides transportation, child care, and phone conference lines, as needed. Additionally, DFS staff are able to travel for a meeting. In one case, DFS arranged for an out-of-State meeting that resulted in achieving permanence for a large sibling group with their paternal relatives.

During the meeting, which includes the parents, children, extended family members, service providers, and other individuals significant to the family, the facilitator helps the group understand why the meeting is taking place and leads them in developing a collaborative solution that will provide safety for the child. The plan developed at the meeting is then incorporated into the overall case plan and utilized in applicable court proceedings. Additionally, the group sometimes schedules a follow-up meeting to ensure the plan is proceeding as discussed.

Benefits of the Family Partnership Program include the discovery of additional family supports and the increased engagement of fathers and paternal relatives in case plan development.

New York Agency Uses SBC to Achieve Family-Driven Case Planning

In late 2010, Graham Windham, a private New York City agency offering an array of services from prevention to postadoption, conducted a national search for a new approach to practice. The agency was looking for a model that would provide their direct practitioners with a practice framework consistent with Graham Windham's commitment to partnering with families in a way that strengthens families' ability to care safely for their children.

The agency began implementing SBC in early 2011, providing intensive training and coaching to supervisors and caseworkers. Caseworkers began to use concrete and specific plans of action, which were co-

developed with families. Case plans targeted needed skills in critical risk areas that could be demonstrated and documented. Family accomplishments were celebrated regularly and in ways meaningful to families. Additionally, tools such as genograms integrated into the case planning process helped prompt staff to have more meaningful, empathic conversations with families, while supporting earlier identification of kin as potential supports to the family.

Graham Windham supervisors have found that leading SBC requires intensive study, along with consistent supervision and coaching to ensure staff follow protocols and safeguard model fidelity. This has led to a new focus on assessing the issues that preceded the maltreatment and to tracking behavior instead of service compliance. These changes are echoed in remarks from a supervisor in the Bronx office who said, "SBC has also allowed me to be more compassionate. In the past… the paperwork says the family did X, Y and Z and so they need to do A, B, and C services. But now, we hear the buildup of circumstances and emotions that preceded the maltreatment."

Workers and supervisors also perceive families as taking more ownership in case planning. As one worker commented, "It's empowering. They're excited to come to the agency. They're not coming in screaming and yelling and we're not getting into that old type of relationship…and we celebrate – we celebrate with kids and families when they make progress in their action plans, but staff are celebrating then too. They're just as excited as the families are."

Agency supervisors are now working toward SBC certification, and this goal has resulted in broad organizational change. When asked how SBC has affected practice with families, Graham Windham President Jess Dannhauser stated, "It changes the entire framework of our interaction with families by focusing the intention of our work and providing tools to deliver on that intention" (personal communication, June 7, 2012).

For more information, contact Jess Dannhauser at Graham Windham at Dannhauserj@graham-windham.org or visit the website at http://www.graham-windham.org/contact-us/

Conclusion

There are myriad ways in which caseworkers and agencies can improve the manner in which they engage families in case planning, ranging from large-scale policy changes to simple changes in day-to-day practice and attitudes. When families are provided with the opportunity to participate in case planning, they are more likely to buy into the plan and work toward its requirements. This eases and enhances the efforts of caseworkers, and most importantly, helps improve outcomes for children and families. By reviewing the concepts presented in this issue brief, child welfare professionals can assess how well their own agencies engage families in case planning and initiate changes to improve their work in this area.

Additional Resources

Child Welfare Information Gateway - The Family-Centered Practice section of the Information Gateway website provides resources on family-centered practice approaches, including engaging families in case planning. http://www.childwelfare.gov/ famcentered/

National Resource Center for Permanency and Family Connections (NRCPFC) - The NRC PFC developed a web-based toolkit on family engagement that provides promising practices, programs, and resources for programs, States, and tribes. http://www.nrcpfc.org/fewpt/introduction.htm

California Social Work Education Center (CalSWEC) - CalSWEC's Family Engagement in Case Planning and Case Management curriculum is designed to help caseworkers better understand the dynamics of engaging families in case planning. http://calswec.berkeley. edu/family-engagement-case-planning-and-casemanagement-version-21

References

American Humane. (n.d.). *Quick reference guide: Various approaches and models to engage the family group in child welfare decision making.* Retrieved August 25, 2011, from http://www.americanhumane.org/assets/pdfs/children/fgdm/quick-reference.pdf

Annie E. Casey Foundation, & Casey Family Services. (n.d.). *Family teaming: Comparing approaches.* Retrieved February 6, 2012, from http://www.caseyfamilyservices.org/userfiles/pdf/ teaming-comparing-approaches-2009.pdf

Antle, B. F, Barbee, A. P, Christensen, D., & Martin, M. H. (2008). Solution-based casework: Preliminary evaluation research. *Journal of Public Child Welfare, 2*(2), 197–227.

Antle, B. F., Christensen, D. N., van Zyl, M. A., & Barbee, A. (2012). The impact of Solution Based Casework (SBC) practice model on federal outcomes in public child welfare. *Child Abuse & Neglect, 36*(4), 342–353. doi: 10.1016/j.chiabu.2011.10.009

Crea, T., & Berzin, S. (2009). Family involvement in child welfare decision-making: Strategies and research on inclusive practices. *Journal of Public Child Welfare, 3*, 305–327.

Dawson, K., & Berry, M. (2001). *Evidence-based best practices in the engagement of families.* Topeka, KS: State of Kansas Commission of Social and Rehabilitation Services.

Dawson, K., & Berry, M. (2002). Engaging families in child welfare services: An evidence-based approach to best practice. *Child Welfare, 81*, 293–317.

Healy, K., Darlington, Y., & Yellowlees, J. (2011). Family participation in child protection practice: An observational study of family group meetings. *Child and Family Social Work, 17*(1), 1–12.

Jones, M. A., McGura, S., & Shyne, A. (1981). Effective practice with families in protective and preventive services: What works? *Child Welfare, 60*(2), 67–80.

Malm, K., & Allen, T. (2011). *Family finding: Does implementation differ when serving different child welfare populations?* Retrieved February 6, 2012, from http://www.childtrends.org/Files/ Child_Trends-2011_10_17_RB_FamilyFinding.pdf

Missouri Department of Social Services. (2011). Child welfare manual, section 7, chapter 25. Retrieved from http://www.dss.mo.gov/cd/info/cwmanual/section7/ch1_33/sec7ch25.htm

Park, K. (2010, April). Assessing child safety through an integrated practice model: The Structured Decision Making System and Signs of Safety. *SDM News.* Retrieved February 6, 2012, from http://www.nccd-crc.org/crc/crc/pubs/sdm_news_apr10.pdf

Trotter, C. (2002). Worker skill and client outcome in child protection. *Child Abuse Review, 11*, 38–50. Turnell, A. (2010). *The Signs of Safety: A comprehensive briefing paper.* Retrieved February 6, 2012, from http://signsofsafety-stuff.s3.amazonaws.com/Signs%20of%20Safety%20Briefing%20Paper%20v1-03.pdf

U.S. Department of Health and Human Services, Children's Bureau. (2011). *Federal Child and Family Services Reviews: Aggregate report: Round 2: Fiscal years 2007–2010.* Retrieved from http://www.acf.hhs.gov/programs/cb/cwmonitoring/results/fcfsr_report.pdf

U.S. Department of Health and Human Services, Children's Bureau. (n.d.). *General findings from the federal Child and Family Services Reviews.* Retrieved from http://www.acf.hhs.gov/ programs/cb/cwmonitoring/results/genfindings04/genfindings04.pdf

Determining the Best Interests of the Child

by Child Welfare Information Gateway

Courts make a variety of decisions that affect children, including placement and custody determinations, safety and permanency planning, and proceedings for termination of parental rights. Whenever a court makes such a determination, it must weigh whether its decision will be in the "best interests" of the child.

All States, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands have statutes requiring that the child's best interests be considered whenever specified types of decisions are made regarding a child's custody, placement, or other critical life issues.

To find statute information for a particular State, go to https://www.childwelfare.gov/systemwide/laws_policies/state/index.cfm

Best Interests Definition

Although there is no standard definition of "best interests of the child," the term generally refers to the deliberation that courts undertake when deciding what type of services, actions, and orders will best serve a child as well as who is best suited to take care of a child. "Best interests" determinations are generally made by considering a number of factors related to the child's circumstances and the parent or caregiver's circumstances and capacity to parent, with the child's ultimate safety and well-being the paramount concern.

Guiding Principles of Best Interests Determinations

State statutes frequently reference overarching goals, purposes, and objectives that shape the analysis in making best interests determinations. The following are among the most frequently stated guiding principles:

- The importance of family integrity and preference for avoiding removal of the child from his/her home (approximately 28 States, American Samoa, Guam, Puerto Rico, and the U.S. Virgin Islands)[1]
- The health, safety, and/or protection of the child (19 States and the Northern Mariana Islands)[2]
- The importance of timely permanency decisions (19 States and the U.S. Virgin Islands)[3]
- The assurance that a child removed from his/her home will be given care, treatment, and guidance that will assist the child in developing into a self-sufficient adult (12 States, American Samoa, and Guam)[4]

Best Interests Factors

Approximately 21 States and the District of Columbia list in their statutes specific factors for courts to consider in making determinations regarding the best interests of the child.[5] While the factors vary considerably from State to State, some factors commonly required include:

- The emotional ties and relationships between the child and his or her parents, siblings, family and household members, or other caregivers (15 States and the District of Columbia)[6]
- The capacity of the parents to provide a safe home and adequate food, clothing, and medical care (nine States)[7]
- The mental and physical health needs of the child (eight States and the District of Columbia)[8]
- The mental and physical health of the parents

(eight States and the District of Columbia)[9]

- The presence of domestic violence in the home (eight States)[10]

In seven of these States and the District of Columbia, all the factors listed in the statute must be considered.[11] For example, Illinois law provides a list of the factors that, within the context of the child's age and developmental needs, "shall be considered" in determining best interests. Similarly, the District of Columbia requires that courts consider each factor listed in its best interests statute in making such decisions. In the remaining 14 States whose statutes list best interests factors, courts making best interests determinations are directed to consider all relevant factors, not only those specifically listed in the statute.[12]

Three States also list factor(s) that should not be considered in the best interests analysis. For example, Connecticut law states that the determination of the best interests of the child shall not be based on the consideration of the socioeconomic status of the birth parent or caregiver. Delaware prohibits courts from assuming that one parent, because of his or her sex, is better qualified than the other parent to act as a custodian or primary residential parent. Idaho does not permit discrimination on the basis of a parent's disability.

Statutes in the remaining 29 States, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands provide more general guidance and give more discretion to the courts to make best interests determinations.[13] Under Alabama law, for example, courts are provided with a set of goals to "facilitate the care, protection, and discipline of children" who come within their jurisdiction.

In California and Iowa, a best interests determination for Indian children must include steps to maintain Tribal relationships and preserve the child's unique Tribal culture and values. When out- of-home care is needed, the child must be placed, whenever possible, with a family that can help the child maintain these connections, as required by the Federal Indian Child Welfare Act (P.L. 95-608).

Other factors that courts commonly take into consideration in making best interests determinations include the following:

- Federal and/or State Constitution protections. For example, New Hampshire law provides that its processes related to reports of child abuse or neglect are to be carried out within a judicial framework that recognizes and enforces the constitutional and other rights of the parties involved. Pennsylvania's statute states that it shall be interpreted so as to provide a means through which parties are afforded a fair hearing and assured the recognition of their constitutional and legal rights.[14]
- The importance of maintaining sibling and other close family bonds. For example, Alaska law notes the importance of frequent, regular, and reasonable visitation with parents and family members when a child has been removed from the home. Florida considers the love, affection, and other emotional ties between the child and his or her parents, siblings, and other relatives to be important in determining the manifest interests of the child.[15]
- The child's wishes. Approximately 11 States and the District of Columbia require courts to consider the child's wishes when making a determination of best interests.[16] In making this determination, the court will consider whether the child is of an age and level of maturity to express a reasonable preference.

This publication is a product of the State Statutes Series prepared by Child Welfare Information Gateway. While every attempt has been made to be as complete as possible, additional information on these topics may be in other sections of a State's code as well as agency regulations, case law, and informal practices and procedures.

Endnotes

1 In Alabama, Alaska, California, Colorado, Georgia, Hawaii, Idaho, Indiana, Kansas, Maine, Mississippi, Missouri, Montana, Nebraska, New Jersey, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Utah, Washington, West Virginia, and Wyoming. The word *approximately* is used to stress the fact that States frequently amend their laws. This information is current as of November 2012.

2 In Arizona, Arkansas, Colorado, Hawaii, Idaho, Illinois, Kansas, Louisiana, Massachusetts, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, Oklahoma, Pennsylvania, Washington, West Virginia, and Wyoming.

3 In Alabama, Alaska, California, Hawaii, Idaho, Iowa,

Kansas, Louisiana, Maine, Nebraska, New Mexico, New York, North Carolina, Oklahoma, South Carolina, Texas, Vermont, Washington, and West Virginia.

4 In Alabama, Colorado, Georgia, Hawaii, Idaho, Kansas, Mississippi, Oklahoma, Pennsylvania, Rhode Island, South Carolina , and West Virginia.

5 Connecticut, Delaware, Florida, Hawaii, Illinois, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Nevada, North Dakota, Ohio, Oregon, South Dakota, Tennessee, Texas, Vermont, Virginia, and Wisconsin.

6 Connecticut, Delaware, Florida, Hawaii, Illinois, Kansas, Maryland, Massachusetts, Michigan, North Dakota, Ohio, Oregon, Tennessee, Vermont, and Virginia.

7 Florida, Hawaii, Illinois, Maryland, Michigan, North Dakota, Texas, Vermont, and Wisconsin.

8 Connecticut, Delaware, Florida, Kansas, Maine, Michigan, Nevada, and Virginia.

9 Delaware, Kentucky, Michigan, North Dakota, South Dakota, Tennessee, Texas, and Virginia.

10 Delaware, Kentucky, Michigan, North Dakota, Oregon, Tennessee, Texas, and Virginia.

11 Illinois, Maine, Maryland, Michigan, Oregon, Vermont, and Virginia.

12 Connecticut, Delaware, Florida, Hawaii, Kansas, Kentucky, Massachusetts, Nevada, North Dakota, Ohio, South Dakota, Tennessee, Texas, and Wisconsin.

13 In Alabama, Alaska, Arizona, Arkansas, California, Colorado, Georgia, Idaho, Indiana, Iowa, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Utah, Washington, West Virginia, and Wyoming.

14 Other States that address the issue of parent and/or child rights within their best interests statutes include Missouri, Montana, Nevada, New Mexico, New York, North Carolina, Oklahoma, South Dakota, Tennessee, Utah, Washington, West Virginia, and Puerto Rico.

15 Other States that address the importance of maintaining family and sibling relationships include California, Colorado, Connecticut, Hawaii, Illinois, Kansas, Maryland, Minnesota, Missouri, Montana, New Hampshire, Ohio, Oklahoma, Oregon, Pennsylvania, Vermont, Virginia, West Virginia, and Wisconsin, as well at the District of Columbia and the U.S. Virgin Islands.

16 Delaware, Florida, Illinois, Maine (when the child is age 12 or older), Massachusetts (when the child is age 12 or older), Michigan, North Dakota, Ohio, Rhode Island, Virginia, and Wisconsin.

State Statutes

Alabama

Ala. Code § 12-15-101 (LexisNexis through 2012 1st Spec. Sess.)

The purpose of this chapter is to facilitate the care, protection, and discipline of children who come within the jurisdiction of the juvenile court, while acknowledging the responsibility of the juvenile court to preserve the public peace and security. In furtherance of this purpose, the following goals have been established for the juvenile court:

- To preserve and strengthen the child's family whenever possible, including improvement of home environment
- To remove the child from the custody of his or her parents only when it is judicially determined to be in his or her best interests or for the safety and protection of the public
- To reunite a child with his or her parents as quickly and as safely as possible when the child has been removed from the custody of his or her parents unless reunification is judicially determined not to be in the best interests of the child
- To secure for any child removed from parental custody the necessary treatment, care, guidance, and discipline to assist him or her in becoming a responsible, productive member of society
- To promote a continuum of services for children and their families from prevention to aftercare, considering wherever possible, prevention, diversion, and early intervention
- To achieve the foregoing goals in the least restrictive setting necessary, with a preference at all times for the preservation of the family and the integration of parental accountability and participation in treatment and counseling programs

This chapter shall be liberally construed to the end that each child coming within the jurisdiction of the juvenile court shall receive the care, guidance, and control, preferably in his or her own home, necessary for the welfare of the child and the best interests of the State.

Alaska

Alaska Stat. § 47.05.065(4)-(5) (LexisNexis through 2012 3rd Spec. Sess.)

It is in the best interests of a child who has been removed from the child's own home for the State to apply the following principles in resolving the situation:

- The child should be placed in a safe, secure, and stable environment.
- The child should not be moved unnecessarily.
- A planning process should be followed to lead to permanent placement of the child.
- Every effort should be made to encourage psychological attachment between the adult caregiver and the child.
- Frequent, regular, and reasonable visitation with the parent or guardian and family members should be encouraged.
- Parents and guardians must actively participate in family support services to facilitate the child's being able to remain in the home. When children are removed from the home, the parents and guardians must actively participate in family support services to make return of their children to the home possible.

Numerous studies establish that:

- Children undergo a critical attachment process before the time they reach 6 years of age.
- A child who has not attached with an adult caregiver during this critical stage will suffer significant emotional damage that frequently leads to chronic psychological problems and antisocial behavior when the child reaches adolescence and adulthood.
- It is important to provide an expedited placement procedure to ensure that all children, especially those under age 6, who have been removed from their homes are placed in permanent homes in a timely manner.

Alaska Stat. § 47.10.082 (LexisNexis through 2012 3rd Spec. Sess.)

In making its dispositional order, the court shall keep the health and safety of the child as the court's paramount concern and consider:

- The best interests of the child
- The ability of the State to take custody and to care for the child to protect the child's best interests
- The potential harm to the child caused by removal of the child from the home and family environment

American Samoa

A.S. Code Ann. § 45.0102 (A.S. Bar through 2012)

The legislature declares that the purposes of this title are to:

- Secure for each child subject to these provisions such care and guidance, preferably with his or her own family, as will best serve his or her welfare and the interests of Samoan society
- Preserve and strengthen *aiga* [extended family] ties whenever possible
- Remove a child from the custody of his or her parents only when his or her welfare and safety or the protection of the public would otherwise be endangered
- Secure for any child removed from the custody of his or her parents the necessary care, guidance, and discipline to assist him or her in becoming a responsible and productive member of society

To carry out these purposes, the provisions of this title shall be liberally construed.

Arizona

Ariz. Rev. Stat. § 8-845(B) (LexisNexis through 2012 2nd Reg. Sess.)

In reviewing the status of the child and in determining its order of disposition, the court shall consider the health and safety of the child as a paramount concern.

Ariz. Rev. Stat. § 8-847(D) (LexisNexis through 2012 2nd Reg. Sess.)

At any periodic review hearing, the court shall consider the health and safety of the child as a paramount concern.

Arkansas

Ark. Code Ann. § 9-27-102 (LexisNexis through 2012 1st Sess.)

The General Assembly recognizes that children are defenseless and that there is no greater moral obligation

upon the General Assembly than to provide for the protection of our children and that our child welfare system needs to be strengthened by establishing a clear policy of the State that the best interests of the children must be paramount and shall have precedence at every stage of juvenile court proceedings. The best interests of the child shall be the standard for juvenile court determinations as to whether a child should be reunited with his or her family or removed from or remain in a home wherein the child has been abused or neglected.

California

Cal. Fam. Code § 175(a) (LexisNexis through 2012 Sess.)

The legislature finds and declares the following:

There is no resource that is more vital to the continued existence and integrity of recognized Indian Tribes than their children, and the State of California has an interest in protecting Indian children who are members of, or are eligible for membership in, an Indian Tribe. The State is committed to protecting the essential Tribal relations and best interests of an Indian child by promoting practices, in accordance with the Indian Child Welfare Act (25 U.S.C. § 1901, *et seq*.) and other applicable law, designed to prevent the child's involuntary out-of-home placement and, whenever the placement is necessary or ordered, by placing the child, whenever possible, in a placement that reflects the unique values of the child's Tribal culture and is best able to assist the child in establishing, developing, and maintaining a political, cultural, and social relationship with the child's Tribe and Tribal community.

It is in the interests of an Indian child that the child's membership in the child's Indian Tribe and connection to the Tribal community be encouraged and protected, regardless of any of the following:

- Whether the child is in the physical custody of an Indian parent or Indian custodian at the commencement of a child custody proceeding
- Whether the parental rights of the child's parents have been terminated
- Where the child has resided or been domiciled

Cal. Welf. & Inst. Code § 16000 (LexisNexis through 2012 Sess.)

It is the intent of the legislature to preserve and strengthen a child's family ties whenever possible, removing the child from the custody of his or her parents only when necessary for his or her welfare or for the safety and protection of the public. If a child is removed from the physical custody of his or her parents, preferential consideration shall be given whenever possible to the placement of the child with a relative as required by law. If the child is removed from his or her own family, it is the purpose of this chapter to secure as nearly as possible for the child the custody, care, and discipline equivalent to that which should have been given to the child by his or her parents. It is further the intent of the legislature to reaffirm its commitment to children who are in out-of-home placement to live in the least restrictive, most family-like setting and to live as close to the child's family as possible. Family reunification services shall be provided for expeditious reunification of the child with his or her family, as required by law. If reunification is not possible or likely, a permanent alternative shall be developed.

It is further the intent of the legislature to ensure that all pupils in foster care and those who are homeless as defined by the Federal McKinney-Vento Homeless Assistance Act have the opportunity to meet the challenging State pupil academic achievement standards to which all pupils are held. In fulfilling their responsibilities to pupils in foster care, educators, county placing agencies, care providers, advocates, and the juvenile courts shall work together to maintain stable school placements; ensure that each pupil is placed in the least restrictive educational programs; and has access to the academic resources, services, and extracurricular and enrichment activities that are available to all pupils. In all instances, educational and school placement decisions must be based on the best interests of the child.

Cal. Fam. Code § 175(b) (LexisNexis through 2012 Sess.)

In all Indian child custody proceedings the court shall consider all of the findings contained in subdivision (a), strive to promote the stability and security of Indian Tribes and families, comply with the Federal Indian Child Welfare Act, and seek to protect the best interests of the child. Whenever an Indian child

is removed from a foster care home or institution, guardianship, or adoptive placement for the purpose of further foster care, guardianship, or adoptive placement, placement of the child shall be in accordance with the Indian Child Welfare Act.

Colorado

Colo. Rev. Stat. Ann. § 19-1-102(1), (1.5) (LexisNexis through 2012 1st Ex. Sess.)

The General Assembly declares that the purposes of this title are:

- To secure for each child subject to these provisions such care and guidance, preferably in his or her own home, as will best serve his or her welfare and the interests of society
- To preserve and strengthen family ties whenever possible, including improvement of the home environment
- To remove a child from the custody of his or her parents only when his or her welfare and safety or the protection of the public would otherwise be endangered and, in either instance, for the courts to proceed with all possible speed to a legal determination that will serve the best interests of the child
- To secure for any child removed from the custody of his or her parents the necessary care, guidance, and discipline to assist him or her in becoming a responsible and productive member of society

The General Assembly declares that it is in the best interests of the child who has been removed from his or her own home to have the following guarantees:

- To be placed in a secure and stable environment
- To not be indiscriminately moved from foster home to foster home
- To have assurance of long-term permanency planning

Connecticut

Conn. Gen. Stat. Ann. § 45a-719 (LexisNexis through 2012 Supp.)

'Best interests of the child' shall include, but not be limited to, a consideration of the age of the child, the nature of the relationship of the child with his or her caregiver, the length of time the child has been in the custody of the caregiver, the nature of the relationship of the child with the birth parent, the length of time the child has been in the custody of the birth parent, any relationship that may exist between the child and siblings or other children in the caregiver's household, and the psychological and medical needs of the child. The determination of the best interests of the child shall not be based on a consideration of the socioeconomic status of the birth parent or the caregiver.

Delaware

Del. Code Ann. Tit. 13, § 722 (LexisNexis through 8-31-12)

The court shall determine the legal custody and residential arrangements for a child in accordance with the best interests of the child. In determining the best interests of the child, the court shall consider all relevant factors, including:

- The wishes of the child's parent or parents as to his or her custody and residential arrangements
- The wishes of the child as to his or her custodian(s) and residential arrangements
- The interaction and interrelationship of the child with his or her parents, grandparents, siblings, persons cohabiting in the relationship of husband and wife with a parent of the child, any other residents of the household or persons who may significantly affect the child's best interests
- The child's adjustment to his or her home, school, and community
- The mental and physical health of all individuals involved
- Past and present compliance by both parents with their rights and responsibilities to their child
- Evidence of domestic violence
- The criminal history of any party or any other resident of the household, including whether the criminal history contains pleas of guilty or no contest or a conviction of a criminal offense

The court shall not presume that one parent, because of his or her sex, is better qualified than the other parent to act as a joint or sole legal custodian for a child or as the child's primary residential parent, nor shall it consider conduct of a proposed sole or joint custodian or primary residential parent that does not affect his or her relationship with the child.

District of Columbia

D.C. Code Ann. § 16-2353 (LexisNexis through 7-18-12)

A judge may enter an order for the termination of the parent and child relationship when the judge finds from the evidence presented, after giving due consideration to the interests of all parties, that the termination is in the best interests of the child. In determining whether it is in the child's best interests that the parent and child relationship be terminated, a judge shall consider each of the following factors:

- The child's need for continuity of care and caregivers and for timely integration into a stable and permanent home, taking into account the differences in the development and the concept of time of children of different ages
- The physical, mental, and emotional health of all individuals involved to the degree that such affects the welfare of the child, the decisive consideration being the physical, mental, and emotional needs of the child
- The quality of the interaction and interrelationship of the child with his or her parent, sibling, relative, and/or caregivers, including the foster parent
- Whether the child was left by his or her parent, guardian, or custodian in a hospital located in the District of Columbia for at least 10 calendar days following the birth of the child, despite a medical determination that the child was ready for discharge from the hospital, and the parent, guardian, or custodian of the child has not taken any action or made any effort to maintain a parental, guardianship, custodial relationship, or contact with the child
- To the extent feasible, the child's opinion of his or her own best interests in the matter
- Evidence that drug-related activity continues to exist in a child's home environment after intervention and services have been provided by law

Florida

Fla. Stat. Ann. § 39.810 (LexisNexis through 2012 Sess.)

For the purpose of determining the manifest best interests of the child, the court shall consider and evaluate all relevant factors, including, but not limited to:

- Any suitable permanent custody arrangement with a relative of the child
- The ability and disposition of the parent(s) to provide the child with food, clothing, medical care, or other remedial care, and other material needs of the child
- The capacity of the parent(s) to care for the child to the extent that the child's safety; well-being; and physical, mental, and emotional health will not be endangered upon the child's return home
- The present mental and physical health needs of the child and such future needs of the child to the extent that such future needs can be ascertained based on the present condition of the child
- The love, affection, and other emotional ties existing between the child and the child's parent(s), siblings, and other relatives, and the degree of harm to the child that would arise from the termination of parental rights and duties
- The likelihood of an older child remaining in long-term foster care upon termination of parental rights due to emotional or behavioral problems or any special needs of the child
- The child's ability to form a significant relationship with a parental substitute and the likelihood that the child will enter into a more stable and permanent family relationship as a result of permanent termination of parental rights and duties
- The length of time that the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity
- The depth of the relationship existing between the child and the present custodian
- The reasonable preferences and wishes of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference
- The recommendations for the child provided by the child's guardian *ad litem* or legal representative

The availability of a nonadoptive relative placement may not receive greater consideration than any other factor weighing on the manifest best interests of the child.

Georgia

Ga. Code Ann. § 15-11-94(a) (LexisNexis through 2012 Reg. Sess.)

In considering the termination of parental rights, the court shall first determine whether there is clear and convincing evidence of parental misconduct or inability. If there is clear and convincing evidence of such parental misconduct or inability, the court shall then consider whether termination of parental rights is in the best interests of the child, after considering the physical, mental, emotional, and moral condition and needs of the child who is the subject of the proceeding, including the need for a secure and stable home.

Ga. Code Ann. § 15-11-1 (LexisNexis through 2012 Reg. Sess.)

This chapter shall be liberally construed to the end:

- That children whose well-being is threatened shall be assisted, protected, and restored, if possible, as secure law- abiding members of society
- That each child coming within the jurisdiction of the court shall receive, preferably in his or her own home, the care, guidance, and control that will be conducive to the child's welfare and the best interests of the State
- That when a child is removed from the control of his or her parents, the court shall secure care for the child as nearly as possible equivalent to that which his or her parents should have given the child

Guam

Guam Code Ann. Tit. 19, § 5129 (LexisNexis through 5-10-12)

This chapter shall be liberally construed to the end that each child within the jurisdiction of the court shall receive such care, guidance, and control, preferably in his or her home, as will enhance the child's welfare and be in the best interests of the territory; then when such child is removed from the control of his or her parents, the court shall secure such care as nearly as possible equivalent to that which should have been given to him or her by the parents.

Hawaii

Haw. Rev. Stat. § 587A-2 (LexisNexis through 2012 Reg. Sess.)

This chapter creates within the jurisdiction of the family court a child protective act to make paramount the safety and health of children who have been harmed or are in life circumstances that threaten harm. Furthermore, this chapter makes provisions for the service, treatment, and permanent plans for these children and their families.

The legislature finds that children deserve and require competent, responsible parenting and safe, secure, loving, and nurturing homes. The legislature finds that children who have been harmed or are threatened with harm are less likely than other children to realize their full educational, vocational, and emotional potential, and become law-abiding, productive, self-sufficient citizens, and are more likely to become involved with the mental health system, the juvenile justice system, or the criminal justice system, as well as become an economic burden on the State. The legislature finds that prompt identification, reporting, investigation, services, treatment, adjudication, and disposition of cases involving children who have been harmed or are threatened with harm are in the children's, their families', and society's best interests because the children are defenseless, exploitable, and vulnerable. The legislature recognizes that many relatives are willing and able to provide a nurturing and safe placement for children who have been harmed or are threatened with harm.

Haw. Rev. Stat. § 587A-2 (LexisNexis through 2012 Reg. Sess.)

The policy and purpose of this chapter includes the protection of children who have been harmed or are threatened with harm by:

- Providing assistance to families to address the causes for abuse and neglect
- Respecting and using each family's strengths, resources, culture, and customs
- Ensuring that families are meaningfully engaged and children are consulted in an age-appropriate manner in case planning
- Enlisting the early and appropriate participation of family and the family's support networks
- Respecting and encouraging the input and views of caregivers
- Ensuring a permanent home through timely adoption or other permanent living arrangement, if safe reunification with the family is not possible

The child protective services under this chapter shall be provided with every reasonable effort to be open, accessible, and communicative to the persons affected by a child protective proceeding without endangering the safety and best interests of the child under this chapter.

This chapter shall be liberally construed to serve the best interests of the children affected and the purpose and policies set forth herein.

Haw. Rev. Stat. § 587A-2 (LexisNexis through 2012 Reg. Sess.)

The policy and purpose of this chapter is to provide children with prompt and ample protection from the harms detailed herein, with an opportunity for timely reconciliation with their families if the families can provide safe family homes, and with timely and appropriate service or permanent plans to ensure the safety of the child so they may develop and mature into responsible, self-sufficient, law-abiding citizens.

The service plan shall work toward the child's remaining in the family home, when the family home can be immediately made safe with services, or the child's returning to a safe family home. The service plan shall be carefully formulated with the family in a timely manner. Every reasonable opportunity should be provided to help the child's legal custodian to succeed in remedying the problems that put the child at substantial risk of being harmed in the family home. Each appropriate resource, public and private, family and friend, should be considered and used to maximize the legal custodian's potential for providing a safe family home for the child. Full and careful consideration shall be given to the religious, cultural, and ethnic values of the child's legal custodian when service plans are being discussed and formulated. Where the court has determined, by clear and convincing evidence, that the child cannot be returned to a safe family home, the child shall be permanently placed in a timely manner.

Idaho

Idaho Code § 16-1601 (LexisNexis through 2012 Reg. Sess.)

The policy of the State of Idaho is hereby declared to be the establishment of a legal framework conducive to the judicial processing, including periodic review of child abuse, abandonment, and neglect cases and the protection of any child whose life, health, or welfare is endangered. At all times, the health and safety of the child shall be the primary concern.

Each child coming within the purview of this chapter shall receive, preferably in his or her own home, the care, guidance, and control that will promote his or her welfare and the best interests of the State of Idaho; and if he or she is removed from the control of one or more of his or her parents, guardian, or other custodian, the State shall secure adequate care for him or her, provided, however, that the State of Idaho shall, to the fullest extent possible, seek to preserve, protect, enhance, and reunite the family relationship.

Nothing in this chapter shall be construed to allow discrimination on the basis of disability. This chapter seeks to coordinate efforts by State and local public agencies, in cooperation with private agencies and organizations, citizens' groups, and concerned individuals, to:

- Preserve the privacy and unity of the family, whenever possible
- Take such actions as may be necessary and feasible to prevent the abuse, neglect, abandonment, or homelessness of children
- Take such actions as may be necessary to provide the child with permanency, including concurrent planning
- Clarify for the purpose of this act the rights and responsibilities of parents with joint legal or joint physical custody of children at risk

Illinois

705 Ill. Comp. Stat. Ann. 405/1-3(4.05) (LexisNexis through 2012 Sess.)

Whenever a 'best interests' determination is required, the following factors shall be considered in the context of the child's age and developmental needs:

- The physical safety and welfare of the child, including food, shelter, health, and clothing
- The development of the child's identity
- The child's background and ties, including familial, cultural, and religious
- The child's sense of attachments, including:
  - Where the child actually feels love, attachment, and a sense of being valued (as opposed to where adults believe the child should feel love, attachment, and a sense of being valued)
  - The child's sense of security

  - The child's sense of familiarity
  - Continuity of affection for the child
  - The least disruptive placement alternative for the child
- The child's wishes and long-term goals
- The child's community ties, including church, school, and friends
- The child's need for permanence, which includes the child's need for stability and continuity of relationships with parent figures, siblings, and other relatives
- The uniqueness of every family and child
- The risks attendant to entering and being in substitute care
- The preferences of the persons available to care for the child

Indiana

Ind. Code Ann. § 31-34-19-6 (LexisNexis through 2012 2nd Reg. Sess.)

If consistent with the safety of the community and the best interests of the child, the juvenile court shall enter a dispositional decree that:

- Is in the least restrictive (most family-like) and most appropriate setting available
- Is close to the parents' home, consistent with the best interests and special needs of the child
- Least interferes with family autonomy
- Is least disruptive of family life
- Imposes the least restraint on the freedom of the child and the child's parent, guardian, or custodian
- Provides a reasonable opportunity for participation by the child's parent, guardian, or custodian

Iowa

Iowa Code Ann. § 232B.2 (LexisNexis through 2011 Supp.)

The State is committed to protecting the essential Tribal relations and best interests of an Indian child by promoting practices, in accordance with the Federal Indian Child Welfare Act and other applicable law, designed to prevent the child's voluntary or involuntary out-of-home placement and, whenever such placement is necessary or ordered, by placing the child, whenever possible, in a foster home, adoptive home, or other type of custodial placement that reflects the unique values of the child's Tribal culture and is best able to assist the child in establishing, developing, and maintaining a political, cultural, and social relationship with the child's Tribe and Tribal community.

Iowa Code Ann. § 232.104(1)(c) (LexisNexis through 2011 Supp.)

During the [permanency] hearing, the court shall consider the child's need for a secure and permanent placement in light of any permanency plan or evidence submitted to the court and the reasonable efforts made concerning the child. Upon completion of the hearing, the court shall enter written findings and make a determination based on identifying a primary permanency goal for the child.

Kansas

Kan. Stat. Ann. § 38-2201(b) (LexisNexis through 8-17-12)

The code shall be liberally construed to carry out the policies of the State, which are to:

- Consider the safety and welfare of a child to be paramount in all proceedings under the code
- Provide that each child who comes within the provisions of the code shall receive the care, custody, guidance, control, and discipline that will best serve the child's welfare and the interests of the State, preferably in the child's home and recognizing that the child's relationship with such child's family is important to the child's well-being
- Make the ongoing physical, mental, and emotional needs of the child decisive considerations in proceedings under this code
- Acknowledge that the time perception of a child differs from that of an adult and to dispose of all proceedings under this code without unnecessary delay
- Encourage the reporting of suspected child abuse and neglect
- Investigate reports of suspected child abuse and neglect thoroughly and promptly
- Provide for the protection of children who have been subject to physical, mental, sexual, or emotional abuse or neglect

- Provide preventative and rehabilitative services, when appropriate, to abused and neglected children and their families so, if possible, the families can remain together without further threat to the children
- Provide stability in the life of a child who must be removed from the home of a parent
- Place children in permanent family settings, in the absence of compelling reasons to the contrary

Kentucky

Ky. Rev. Stat. Ann. § 620.023 (LexisNexis through 2012 1st Ex. Sess.)

Evidence of the following circumstances, if relevant, shall be considered by the court in all proceedings in which the court is required to render decisions in the best interests of the child:

- Mental illness or an intellectual disability of the parent, as attested to by a qualified mental health professional, that renders the parent unable to care for the immediate and ongoing needs of the child
- Acts of abuse or neglect toward any child
- Alcohol and other drug abuse that results in an incapacity by the parent or caregiver to provide essential care and protection for the child
- A finding of domestic violence and abuse, whether or not committed in the presence of the child
- Any other crime committed by a parent that results in the death or permanent physical or mental disability of a member of that parent's family or household
- The existence of any guardianship or conservatorship of the parent pursuant to a determination or disability or partial disability

In determining the best interests of the child, the court may consider the effectiveness of rehabilitative efforts made by the parent or caregiver intended to address circumstances in this section.

Louisiana

La. Children's Code Art. 601 (LexisNexis through 2012 Reg. Sess.)

The purpose of this title is to protect children whose physical or mental health and welfare is substantially at risk of harm by physical abuse, neglect, or exploitation and who may be further threatened by the conduct of others, by providing for the reporting of suspected cases of abuse, exploitation, or neglect of children; by providing for the investigation of such complaints; and by providing, if necessary, for the resolution of child in need of care proceedings in the courts. The proceedings shall be conducted expeditiously to avoid delays in achieving permanency for children. This title is intended to provide the greatest possible protection as promptly as possible for such children. The health, safety, and best interests of the child shall be the paramount concern in all proceedings under this title. This title shall be administered and interpreted to avoid unnecessary interference with family privacy and trauma to the child, and yet, at the same time, authorize the protective and preventive intervention needed for the health, safety, and well-being of children.

La. Children's Code Ann. Art. 675(A) (LexisNexis through 2012 Reg. Sess.)

The case plan shall be designed to achieve placement in the least restrictive, most family-like, and most appropriate setting available, and in close proximity to the parents' homes, consistent with the best interests and special needs of the child. The health and safety of the child shall be the paramount concern in the development of the case plan.

Maine

Me. Rev. Stat. Ann. Tit. 22, § 4055(2)-(3) (LexisNexis through 8-29-12)

In deciding to terminate parental rights, the court shall consider the best interests of the child; the needs of the child, including the child's age; the child's attachments to relevant persons; periods of attachment and separation; the child's ability to integrate into a substitute placement or back into the parent's home; and the child's physical and emotional needs.

The court shall consider, but is not bound by, the wishes of a child age 12 or older in making an order under this section.

Me. Rev. Stat. Ann. Tit. 22, § 4003 (LexisNexis through 8-29-12)

Recognizing that the health and safety of children must be of paramount concern and that the right to family integrity is limited by the right of children to be protected from abuse and neglect, and recognizing

also that uncertainty and instability are possible in extended foster home or institutional living, it is the intent of the Legislature that this chapter:

- Authorize the department to protect and assist abused and neglected children, children in circumstances that present a substantial risk of abuse and neglect, and their families
- Provide that children will be taken from the custody of their parents only where failure to do so would jeopardize their health or welfare
- Give family rehabilitation and reunification priority as a means for protecting the welfare of children, but prevent needless delay for permanent plans for children when rehabilitation and reunification are not possible
- Place children who are taken from the custody of their parents with an adult relative, when possible
- Promote the early establishment of permanent plans for the care and custody of children who cannot be returned to their family

Maryland

Md. Code Ann. Fam. Law § 5-525(f)(1) (LexisNexis through 2012 2nd Spec. Sess.)

In developing a permanency plan for a child in an out-of-home placement, the local department shall give primary consideration to the best interests of the child, including consideration of both in-State and out-of-State placements. The local department shall consider the following factors in determining the permanency plan that is in the best interests of the child:

- The child's ability to be safe and healthy in the home of the child's parent
- The child's attachment and emotional ties to the child's natural parents and siblings
- The child's emotional attachment to the child's current caregiver and the caregiver's family
- The length of time the child has resided with the current caregiver
- The potential emotional, developmental, and educational harm to the child if moved from the child's current placement
- The potential harm to the child by remaining in State custody for an excessive period of time

Massachusetts

Mass. Gen. Laws Ann. Ch. 119, § 1 (LexisNexis through 2012 Sess.)

The health and safety of the child shall be of paramount concern and shall include the long-term well-being of the child. In all matters and decisions by the department, the policy of the department, as applied to children in its care and protection or children who receive its services, shall be to define best interests of the child as that which shall include, but not be limited to:

- Considerations of precipitating factors and previous conditions leading to any decisions made in proceedings related to the past, current, and future status of the child
- The current state of the factors and conditions together with an assessment of the likelihood of their amelioration or elimination
- The child's fitness, readiness, abilities, and developmental levels
- The particulars of the service plan designed to meet the needs of the child within his or her current placement whether with the child's family or in a substitute care placement, and whether such service plan is used by the department or presented to the courts with written documentation
- The effectiveness, suitability, and adequacy of the services provided and of placement decisions, including the progress of the child or children therein

The department's considerations of appropriate services and placement decisions shall be made in a timely manner in order to facilitate permanency planning for the child.

In all department proceedings that affect the child's past, current, and future placements and status, when determining the best interests of the child, there shall be a presumption of competency that a child who has attained age 12 is able to offer statements on his or her own behalf and shall be provided with timely opportunities and access to offer such statements, which shall be considered by the department if the child is capable and willing. In all matters relative to the care and protection of a child, the ability, fitness, and capacity of the child shall be considered in all department proceedings.

Michigan

Mich. Comp. Laws Ann. § 722.23 (LexisNexis through 2012 Sess.)

As used in the act, 'best interests of the child' means the sum total of the following factors to be considered, evaluated, and determined by the court:

- The love, affection, and other emotional ties existing between the parties involved and the child
- The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any
- The capacity and disposition of the parties involved to provide the child with food, clothing, medical care, or other remedial care recognized and permitted under the laws of this State in place of medical care and other material needs
- The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity
- The permanence, as a family unit, of the existing or proposed custodial home or homes
- The moral fitness of the parties involved
- The mental and physical health of the parties involved
- The home, school, and community record of the child
- The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference
- The willingness of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and parents
- Domestic violence, regardless of whether the violence was directed against or witnessed by the child
- Any other factor considered by the court to be relevant to a particular child custody dispute

Minnesota

Minn. Stat. Ann. § 260C.193, Subd. 3(f)-(h) (LexisNexis through 2012 1st Spec. Sess.)

Placement of a child cannot be delayed or denied based on race, color, or national origin of the foster parent or the child.

Whenever possible, siblings should be placed together unless it is determined not to be in the best interests of siblings. If siblings were not placed together, the responsible social services agency shall report to the court the efforts made

to place the siblings together and why the efforts were not successful. If the court is not satisfied that the agency has made reasonable efforts to place siblings together, the court must order the agency to make further reasonable efforts.

If siblings are not placed together, the court shall order the responsible social services agency to implement the plan for visitation among siblings required as part of the out-of-home placement plan.

This subdivision does not affect the Indian Child Welfare Act (25 U.S.C. § 1901, *et seq.*) and the Minnesota Indian Family Preservation Act, §§ 260.751 to 260.835.

Minn. Stat. Ann. § 260C.193, Subd. 3(a)-(e) (LexisNexis through 2012 1st Spec. Sess.)

The policy of the State is to ensure that the best interests of children in foster care, who experience transfer of permanent legal and physical custody to a relative, or adoption are met by requiring individualized determinations under § 260C.212, subd.2(b), of the needs of the child and of how the selected home will serve the needs of the child. No later than 3 months after a child is ordered removed from the care of a parent, the court shall review and enter findings regarding whether the responsible social services agency made:

- Diligent efforts to identify and search for relatives as required under § 260C.221
- An individualized determination as required under § 260C.212 to select a home that meets the needs of the child If the court finds the agency has not made the required efforts, and there is a relative who qualifies to be licensed to provide family foster care, the court may order the child placed with the relative consistent with the child's best interests.
- If the agency's efforts are found to be sufficient, the court shall order the agency to continue to appropriately engage relatives who responded to the notice under § 260C.221 in placement

and case planning decisions and to appropriately engage relatives who subsequently come to the agency's attention.

If the child's birth parent or parents explicitly request that a relative or important friend not be considered, the court shall honor that request if it is consistent with the best interests of the child. If the child's birth parent or parents express a preference for placing the child in a foster or adoptive home of the same or a similar religious background to that of the birth parent or parents, the court shall order placement of the child with an individual who meets the birth parent's religious preference.

Mississippi

Miss. Code Ann. § 43-21-103 (LexisNexis through 2012 Reg. Sess.)

This chapter shall be liberally construed to the end that each child coming within the jurisdiction of the youth court shall become a responsible, accountable, and productive citizen, and that each such child shall receive such care, guidance, and control, preferably in such child's own home, as is conducive toward that end and is in the State's and the child's best interests. It is the public policy of this State that the parents of each child shall be primarily responsible for the care, support, education, and welfare of such children; however, when it is necessary that a child be removed from the control of such child's parents, the youth court shall secure proper care for such child.

Missouri

Mo. Ann. Stat. § 210.001(1) (LexisNexis through 2012 2nd Reg. Sess.)

The Department of Social Services shall address the needs of homeless, dependent, and neglected children in the supervision and custody of the Division of Family Services and to their families-in-conflict by:

- Serving children and families as a unit in the least restrictive setting available and in close proximity to the family home, consistent with the best interests and special needs of the child
- Insuring that appropriate social services are provided to the family unit both prior to the removal of the child from the home and after family reunification
- Developing and implementing preventive and early intervention social services that have demonstrated the ability to delay or reduce the need for out-of-home placements and ameliorate problems before they become chronic

Mo. Ann. Stat. § 211.443 (LexisNexis through 2012 2nd Reg. Sess.)

The provisions of this section shall be construed to promote the best interests and welfare of the child as determined by the juvenile court in consideration of the following:

- The recognition and protection of the constitutional rights of all parties in the proceedings
- The recognition and protection of the birth family relationship, when possible and appropriate
- The entitlement of every child to a permanent and stable home

Montana

Mont. Code Ann. § 41-3-101 (LexisNexis through 2012 Spec. Sess.)

It is the policy of the State of Montana to:

- Provide for the protection of children whose health and welfare are or may be adversely affected and further threatened by the conduct of those responsible for their care and protection
- Achieve these purposes in a family environment and preserve the unity and welfare of the family, whenever possible
- Ensure that there is no forced removal of a child from the family based solely on an allegation of abuse or neglect unless the department has reasonable cause to suspect that the child is at imminent risk of harm
- Recognize that a child is entitled to assert the child's constitutional rights
- Ensure that all children have a right to a healthy and safe childhood in a permanent placement
- Ensure that whenever removal of a child from the home is necessary, the child is entitled to maintain ethnic, cultural, and religious heritage, whenever appropriate

It is intended that the mandatory reporting of abuse or endangerment cases by professional people and other community members to the appropriate

authority will cause the protective services of the State to seek to prevent further abuses, protect and enhance the welfare of these children, and preserve family life, whenever appropriate.

Whenever it is necessary to remove a child from the child's home, the department shall, when it is in the best interests of the child, place the child with the child's noncustodial birth parent or with the child's extended family, including adult siblings, grandparents, great-grandparents, aunts, and uncles, when placement with the extended family is approved by the department, prior to placing the child in an alternative protective or residential facility. Prior to approving a placement, the department shall investigate whether anyone living in the home has been convicted of a crime involving serious harm to children.

In implementing this policy, the child's health and safety are of paramount concern.

Nebraska

Neb. Rev. Stat. Ann. § 43-533 (LexisNexis through 2012 2nd Sess.)

The following principles shall guide the actions of State government when involved with families and children in need of assistance or services:

- Prevention, early identification of problems, and early intervention shall be guiding philosophies when the State plans or implements services for families or children when such services are in the best interests of the child.
- When families or children request assistance, State and local government resources shall be utilized to complement community efforts to help meet the needs of such families. The State shall encourage community involvement in the provision of services to families and children, in order to encourage and provide innovative strategies in the development of services for families and children.
- The State shall develop methods to coordinate services and resources for families and children. Every child- serving agency shall recognize that the jurisdiction of such agency serving children with multiple needs is not mutually exclusive.
- When children are removed from their home, permanency planning shall be the guiding philosophy. It shall be the policy of the State:
  - To make reasonable efforts to reunite the child with his or her family in a timeframe appropriate to the age and developmental needs of the child as long as the best interests of the child--the health and safety of the child being of paramount concern--and the needs of the child have been given primary consideration in making a determination whether reunification is possible
  - When a child cannot remain with parents, to give preference to relatives as a placement resource
  - To minimize the number of placement changes for children in out-of-home care as long as the needs, health, safety, and best interests of the child in care are considered
- When families cannot be reunited and when active parental involvement is absent, adoption shall be aggressively pursued. Absent the possibility of adoption, other permanent settings shall be pursued. In either situation, the health, safety, and best interests of the child shall be the overriding concerns. Preference shall be given to relatives for the permanent placement of the child.

Nevada

Nev. Rev. Stat. Ann. § 128.005(2)(c) (LexisNexis through 6-1-12)

The legislature declares that the preservation and strengthening of family life is a part of the public policy of this State. The legislature finds that:

- Severance of the parent and child relationship is a matter of such importance in order to safeguard the rights of parent and child as to require judicial determination.
- Judicial selection of the person or agency to be entrusted with the custody and control of a child after such severance promotes the welfare of the parties and of this State.
- The continuing needs of a child for proper physical, mental, and emotional growth and development are the decisive considerations in proceedings for termination of parental rights.

New Hampshire

N.H. Rev. Stat. Ann. § 169-C:2(I) (LexisNexis through 2012 Sess.)

It is the purpose of this chapter, through the mandatory reporting of suspected instances of child abuse or neglect, to provide protection to children whose life, health, or welfare are endangered and to establish a judicial framework to protect the rights of all parties involved in the adjudication of child abuse or neglect cases. Each child coming within the provisions of this chapter shall receive, preferably in his or her own home, the care, emotional security, guidance, and control that will promote the child's best interests; and, if the child should be removed from the control of his or her parents, guardian, or custodian, adequate care shall be secured for the child. This chapter seeks to coordinate efforts by State and local authorities, in cooperation with private agencies and organizations, citizens' groups, and concerned individuals, to:

- Protect the safety of the child
- Preserve the unity of the family, whenever possible
- Provide assistance to parents to deal with and correct problems in order to avoid removal of children from the family
- Take such action as may be necessary to prevent abuse or neglect of children
- Provide protection, treatment, and rehabilitation, as needed, to children placed in alternative care

N.H. Rev. Stat. Ann. § 169-C:2(II) (LexisNexis through 2012 Sess.)

This chapter shall be liberally construed to the end that its purpose may be carried out, as follows:

- To encourage the mental, emotional, and physical development of each child coming within the provisions of this chapter, by providing him or her with the protection, care, treatment, counseling, supervision, and rehabilitative resources that he or she needs and has a right to receive
- To achieve the foregoing purposes and policies, whenever possible, by keeping a child in contact with his or her home community and in a family environment by preserving the unity of the family and separating the child from his or her parents only when the safety of the child is in danger or when it is clearly necessary for his or her welfare or the interests of public safety, and when it can be clearly shown that a change in custody and control will plainly be better for the child
- To provide effective judicial procedures through which the provisions of this chapter are executed and enforced and that recognize and enforce the constitutional and other rights of the parties and assures them a fair hearing

New Jersey

N.J. Stat. Ann. § 30:4C-1(a), (b), (f) (LexisNexis through 2012 1st Sess.)

This act is to be administered strictly in accordance with the general principles laid down in this section, which are declared to be the public policy of this State, whereby the safety of children shall be of paramount concern:

- That the preservation and strengthening of family life is a matter of public concern as being in the interests of the general welfare, but the health and safety of the child shall be the State's paramount concern when making a decision on whether or not it is in the child's best interests to preserve the family unit
- That the prevention and correction of dependency and delinquency among children should be accomplished so far as practicable through welfare services that will seek to continue the living of such children in their own homes
- That each child placed outside his or her home by the State has the need for permanency:
    - Through return to the child's own home, if the child can be returned home without endangering the child's health or safety
    - Through adoption, if family reunification is not possible
    - Through an alternative permanent placement, if termination of parental rights is not appropriate

N.J. Stat. Ann. § 30:4C-1.1(c)-(g) (LexisNexis through 2012 1st Sess.)

The legislature finds and declares that:

- Because the safety of children must always be paramount, allegations of child abuse and neglect must be investigated quickly and thoroughly and protective actions must be taken immediately, if necessary.
- Concerns about the safety, permanency, and well-being of children require significant changes

in the organization of the child welfare system, the ability to implement best practices within the system, the development of effective services to meet the needs of children and families, and the elimination of impediments to the quick and efficient management of abuse and neglect cases.

- Children need safe, stable, and positive relationships with caring adults in order to thrive, and, if their parents are incapable of providing such a caring relationship, the State must look to other families to provide this kind of relationship.
- To ensure the best outcomes for children and their families, these substitute families must be viewed and treated as 'resource families' and provided with appropriate support, training, and responsibilities, which will include: expedited licensure for this purpose, equalized payment rates for care among the various types of resource families, and enhanced access to necessary support services tailored to their respective needs.
- Youth must be provided with supports and services in their communities that will enable them to grow into healthy and productive adults, and those youth who previously received child welfare services must continue to receive those services beyond the age of 18, up to age 21, as appropriate.

N.J. Stat. Ann. § 30:4C-11.1(a) (LexisNexis through 2012 1st Sess.)

In accordance with the provisions of § 30:4C-11.1(b)-(d), when determining the reasonable efforts to be made and when making the reasonable efforts, the child's health and safety shall be of paramount concern.

New Mexico

N.M. Stat. Ann. § 32A-4-28(A) (LexisNexis through 2012 Spec. Sess.)

In proceedings to terminate parental rights, the court shall give primary consideration to the physical, mental, and emotional welfare and needs of the child, including the likelihood of the child being adopted if parental rights are terminated.

N.M. Stat. Ann. § 32A-1-3 (LexisNexis through 2012 Spec. Sess.)

The Children's Code shall be interpreted and construed to effectuate the following legislative purposes:

- First, to provide for the care, protection, and wholesome mental and physical development of children coming within the provisions of this code, and then to preserve the unity of the family, whenever possible
- To provide judicial and other procedures through which the provisions of the Children's Code are executed and enforced and in which the parties are assured a fair hearing, and their constitutional and other legal rights are recognized and enforced
- To provide a continuum of services for children and their families from prevention to treatment, considering, whenever possible, prevention, diversion, and early intervention, particularly in the schools
- To provide children with services that are sensitive to their cultural needs
- To provide for the cooperation and coordination of the civil and criminal systems for investigation, intervention, and disposition of cases, to minimize interagency conflicts and to enhance the coordinated response of all agencies to achieve the best interests of the child victim
- To provide continuity for children and families appearing before the family court by assuring that, whenever possible, a single judge hears all successive cases or proceedings involving a child or family

The child's health and safety shall be the paramount concerns. Permanent separation of the child from the child's family, however, would especially be considered when the child or another child of the parent has suffered permanent or severe injury or repeated abuse. It is the intent of the legislature that, to the maximum extent possible, children in New Mexico shall be reared as members of a family unit.

New York

N.Y. Soc. Serv. Law § 358-a(3)(c) (LexisNexis through 2012 Sess.)

For the purpose of this section, 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 concerns.

N.Y. Soc. Serv. Law § 384-b(1) (LexisNexis through 2012 Sess.)

The legislature recognizes that the health and safety

of children are of paramount importance. To the extent it is consistent with the health and safety of the child, the legislature further finds that:

- It is desirable for children to grow up with a normal family life in a permanent home and that such circumstance offers the best opportunity for children to develop and thrive.
- It is generally desirable for the child to remain with or be returned to the birth parent because the child's need for a normal family life will usually best be met in the home of his or her birth parent, and that parents are entitled to bring up their own children unless the best interests of the child would be thereby endangered.
- The State's first obligation is to help the family with services to prevent its breakup or to reunite it if the child has already left home.
- When it is clear that the birth parent cannot or will not provide a normal family home for the child, and when continued foster care is not an appropriate plan for the child, then a permanent alternative home should be sought for the child.

The legislature further finds that many children who have been placed in foster care experience unnecessarily protracted stays in such care without being adopted or returned to their parents or other custodians. Such unnecessary stays may deprive these children of positive, nurturing family relationships and have deleterious effects on their development into responsible, productive citizens. Provision of a timely procedure for the termination of the rights of the birth parents, in appropriate cases, could reduce such unnecessary stays.

It is the intent of the legislature to provide procedures not only assuring that the rights of the birth parent are protected, but also, where positive, nurturing parent-child relationships no longer exist, furthering the best interests, needs, and rights of the child by terminating parental rights and freeing the child for adoption.

North Carolina

N.C. Gen. Stat. Ann. § 7B-507(d) (LexisNexis through 2012 Reg. Sess.)

In determining reasonable efforts to be made with respect to a juvenile and making such reasonable efforts, the juvenile's health and safety shall be the paramount concerns.

N.C. Gen. Stat. Ann. § 7B-100 (LexisNexis through 2012 Reg. Sess.)

This subchapter shall be interpreted and construed to implement the following purposes and policies:

- To provide procedures for the hearing of juvenile cases that assure fairness and equity and that protect the constitutional rights of juveniles and parents
- To develop a disposition in each juvenile case that reflects consideration of the facts, the needs and limitations of the juvenile, and the strengths and weaknesses of the family
- To provide services for the protection of juveniles by means that respect both the right to family autonomy and the juveniles' needs for safety, continuity, and permanence
- To provide standards for the removal, when necessary, of juveniles from their homes and for the return of juveniles to their homes consistent with preventing the unnecessary or inappropriate separation of juveniles from their parents
- To provide standards, consistent with the Adoption and Safe Families Act of 1997, P.L. 105-89, for ensuring that the best interests of the juvenile are of paramount consideration by the court and that when it is not in the juvenile's best interest to be returned home, the juvenile will be placed in a safe, permanent home within a reasonable amount of time

North Dakota

N.D. Cent. Code Ann. § 14-09-06.2(1) (LexisNexis through 2011 Sess.)

The best interests and welfare of the child are determined by the court's consideration and evaluation of all factors affecting the best interests and welfare of the child. These factors include all of the following, when applicable:

- The love, affection, and other emotional ties existing between the parents and child and the ability of each parent to provide the child with nurturing, love, affection, and guidance
- The ability of each parent to assure that the child receives adequate food, clothing, shelter, medical care, and a safe environment
- The child's developmental needs and the ability of

each parent to meet those needs, both in the present and in the future

- The sufficiency and stability of each parent's home environment, the impact of extended family, the length of time the child has lived in each parent's home, and the desirability of maintaining continuity in the child's home and community
- The willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child
- The moral fitness of the parents, as that fitness impacts the child
- The mental and physical health of the parents, as that health impacts the child
- The home, school, and community records of the child and the potential effect of any change
- Evidence of domestic violence
- The interaction and interrelationship, or the potential for interaction and interrelationship, of the child with any person who resides in, is present, or frequents the household of a parent and who may significantly affect the child's best interests
- The making of false allegations not made in good faith, by one parent against the other, of harm to a child
- Any other factors considered by the court to be relevant to a particular parental rights and responsibilities dispute

N.D. Cent. Code Ann. § 14-09-06.2(1)(i)-(j) (LexisNexis through 2011 Sess.)

If the court finds by clear and convincing evidence that a child is of sufficient maturity to make a sound judgment, the court may give substantial weight to the preference of the mature child. The court also shall give due consideration to other factors that may have affected the child's preference, including whether the child's preference was based on undesirable or improper influences.

In determining parental rights and responsibilities, the court shall consider evidence of domestic violence. If the court finds credible evidence that domestic violence has occurred, and there exists one incident of domestic violence that resulted in serious bodily injury or involved the use of a dangerous weapon or there exists a pattern of domestic violence within a reasonable time proximate to the proceeding, this combination creates a rebuttable presumption that a parent who has perpetrated domestic violence may not be awarded residential responsibility for the child. This presumption may be overcome only by clear and convincing evidence that the best interests of the child require that the parent have residential responsibility.

Northern Mariana Islands

N.M.I. Commonwealth Code Tit. 6, § 5311 (2012)

This chapter seeks to:

- Ensure that each abused child and the child's family receive such care, preferably in their own home, as will serve the emotional, mental, and physical welfare of the minor and the best interests of the Commonwealth
- Require reporting of child abuse incidents so such children and their families may be identified and given any treatment and assistance deemed to be in the best interests of the child and the Commonwealth

Ohio

Ohio Rev. Code Ann. § 2151.414(D)(1) (LexisNexis through 8-6-12)

In determining the best interests of a child at a hearing, the court shall consider all relevant factors including, but not limited to, the following:

- The interaction and interrelationship of the child with the child's parents, siblings, relatives, foster caregivers, and out-of-home providers, and any other person who may significantly affect the child
- The wishes of the child, as expressed directly by the child or through the child's guardian *ad litem*, with due regard for the maturity of the child
- The custodial history of the child, including whether the child has been in the temporary custody of one or more public children's services agencies or private child-placing agencies for 12 or more months of a consecutive 22-month period ending on or after March 18, 1999
- The child's need for a legally secure permanent placement and whether that type of placement can be achieved without a grant of permanent custody to the agency

- Whether any of the factors in § 2151.414(E)(7)-(11) apply in relation to the parents and child

Oklahoma

Okla. Stat. Ann. Tit. 10A, § 1-1-102(A) (LexisNexis through 2012 2nd Reg. Sess.)

For the purposes of the Oklahoma Children's Code, the legislature recognizes that:

- Parents have a natural, legal, and moral right, as well as a duty, to care for and support their children, and such rights are protected by State and Federal laws as well as the Constitution. To that end, it is presumed that the best interests of a child are ordinarily served by leaving the child in the custody of the parents, who are expected to have the strongest bond of love and affection and to be best able to provide a child those needed qualities that make a child's life safe and secure. Nevertheless, this presumption may be rebutted where there is evidence of abuse and neglect or threat of harm.
- A child has a right to be raised by the mother and father of the child as well as a right to be raised free from physical and emotional abuse or neglect. When it is necessary to remove a child from a parent, the child is entitled to a permanent home and to be placed in the least restrictive environment to meet the needs of the child.
- Because the State has an interest in its present and future citizens as well as a duty to protect those who, because of age, are unable to protect themselves, it is the policy of this State to provide for the protection of children who have been abused or neglected and who may be further threatened by the conduct of persons responsible for the health, safety, and welfare of such children. To this end, where family circumstances threaten the safety of a child, the State's interest in the welfare of the child takes precedence over the natural right and authority of the parent to the extent that it is necessary to protect the child and assure that the best interests of the child are met.

Okla. Stat. Ann. Tit. 10A, § 1-1-102(C)-(E) (LexisNexis through 2012 2nd Reg. Sess.)

Whenever it is necessary for a child to be placed outside the home pursuant to the Oklahoma Children's Code, it is the intent of the legislature that:

- Each child shall be assured the care, guidance, and supervision in a permanent home or foster home that will serve the best interests of the child including, but not limited to, the development of the moral, emotional, spiritual, mental, social, educational, and physical well-being of the child.
- When a child is placed in foster care, the foster parent shall be allowed to consider the child as part of the family.
- Whenever possible, siblings shall be placed together, and when it is not possible, efforts shall be made to preserve the relationships through visitation and other methods of communication.
- Permanent placement is achieved as soon as possible.

A foster parent has a recognizable interest in the familial relationship that the foster parent establishes with a foster child and shall therefore be considered an essential participant with regard to decisions related to the care, supervision, guidance, rearing, and other foster care services to the child.

It is the intent of the legislature that the paramount consideration in all proceedings within the Oklahoma Children's Code is the best interests of the child.

Okla. Stat. Ann. Tit. 10A, § 1-1-102(B) (LexisNexis through 2012 2nd Reg. Sess.)

It is the intent of the legislature that the Oklahoma Children's Code provides the foundation and process for State intervention into the parent-child relationship whenever the circumstances of a family threaten the safety of a child and to properly balance the interests of the parties stated herein. To this end, it is the purpose of the laws relating to children alleged or found to be deprived to:

- Intervene in the family only when necessary to protect a child from harm or threatened harm
- Provide expeditious and timely judicial and agency procedures for the protection of the child
- Preserve, unify, and strengthen the family ties of the child whenever possible when in the best interests of the child to do so
- Recognize that the right to family integrity, preservation, or reunification is limited by the right of

the child to be protected from abuse and neglect

- Make reasonable efforts to prevent or eliminate the need for the removal of a child from the home and make reasonable efforts to return the child to the home unless otherwise prescribed by the Oklahoma Children's Code
- Recognize that permanency is in the best interests of the child
- Ensure that when family rehabilitation and reunification are not possible, the child will be placed in an adoptive home or other permanent living arrangement in a timely fashion
- Secure for each child the permanency, care, education, and guidance as will best serve the spiritual, emotional, mental, and physical health, safety, and welfare of the child

Oregon

Or. Rev. Stat. Ann. § 107.137(1) (LexisNexis through 9-26-12)

In determining the custody of a minor child, the court shall give primary consideration to the best interests and welfare of the child. In determining the best interests and welfare of the child, the court shall consider the following relevant factors:

- The emotional ties between the child and other family members
- The interest of the parties in and attitude toward the child
- The desirability of continuing an existing relationship
- The abuse of one parent by the other
- The preference of the primary caregiver of the child, if the caregiver is deemed fit by the court
- The willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child

The court may not consider such willingness and ability if one parent shows that the other parent has sexually assaulted or engaged in a pattern of behavior of abuse against the parent or a child and that a continuing relationship with the other parent will endanger the health or safety of either parent or the child.

Pennsylvania

Pa. Cons. Stat. Tit. 42, § 6301(b)(1), (1.1), (3), (4) (LexisNexis through 2012 Reg. Sess.)

This chapter shall be interpreted and construed as to effectuate the following purposes:

- To preserve the unity of the family whenever possible or to provide another alternative permanent family when the unity of the family cannot be maintained
- To provide for the care, protection, safety, and wholesome mental and physical development of children coming within the provisions of this chapter
- To achieve the foregoing purposes in a family environment whenever possible, separating the child from parents only when necessary for his or her welfare, safety, or health, or in the interests of public safety
- To provide means through which the provisions of this chapter are executed and enforced and in which the parties are assured a fair hearing, and their constitutional and other legal rights recognized and enforced

Puerto Rico

P.R. Laws Ann. Tit. 1, § 421 (LexisNexis through Dec. 2009)

The public policy of the Government of Puerto Rico seeks to uphold and guarantee the rights of children and the respect of their dignity. By so providing, we hereby take into account the variable degree of vulnerability to which children are subject during their process of development and socialization, until they attain full legal standing, and the State's responsibility to provide the means and resources needed to safeguard their interests and advance their welfare.

All measures concerning children as well as all interventions of the State involving the powers and authority germane to *patria potestas* or guardianship, shall have as their guiding principle the protection of the family as an institution, and the best interests and welfare of children, taking into consideration the degree of development of their capabilities, and free from any discrimination motivated by origin, race, color, birth [sic], political or religious beliefs, disabilities, sex, socioeconomic or cultural status of the children, or for any other personal consideration.

The State recognizes that the parents or guardians are primarily responsible for the control, supervision, and guidance of their children.

Rhode Island

R.I. Gen. Laws § 42-72-2(1)-(2) (LexisNexis through 2012 Sess.)

The State finds and declares that:

- Parents have the primary responsibility for meeting the needs of their children, and the State has an obligation to help them discharge this responsibility or to assume this responsibility when parents are unable to do so.
- The State has a basic obligation to promote, safeguard, and protect the social well-being and development of the children of the State through a comprehensive program providing for:
  - Social services and facilities for children who require guidance, care, control, protection, treatment, or rehabilitation
  - A permanent home and safe environment for children, services to children and their families to prevent the unnecessary removal of children from their homes, and foster care and services to children with special needs who must be removed from their families to meet their particular needs
  - The strengthening of the family unit and making the home safe for children by enhancing the parental capacity for good child care

R.I. Gen. Laws § 15-7-7(c) (LexisNexis through 2012 Sess.)

In considering the termination of rights, the court shall give primary consideration to the physical, psychological, mental, and intellectual needs of the child insofar as that consideration is not inconsistent with other provisions of this chapter.

The consideration shall include the following: If a child has been placed in foster family care, voluntarily or involuntarily, the court shall determine whether the child has been integrated into the foster family to the extent that the child's familial identity is with the foster family and whether the foster family is able and willing to permanently integrate the child into the foster family; provided, that in considering integrating into a foster family, the court should consider:

- The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining that environment and continuity for the child
- The reasonable preference of the child, if the court determines that the child has sufficient capacity to express a reasonable preference

South Carolina

S.C. Code Ann. § 63-1-30 (LexisNexis through 2011 Reg. Sess.)

This article shall be liberally construed to the end that families whose unity or well-being is threatened shall be assisted, protected, and restored, if possible, as secure units of law-abiding members; and that each child coming within the jurisdiction of the court shall receive, preferably in his or her own home, the care, guidance, and control that will conduce to his or her welfare and best interests of the State, and that when he or she is removed from the control of his or her parents, the court shall secure for him or her care as nearly as possible equivalent to that which they should have given him or her.

S.C. Code Ann. § 63-1-20(D) (LexisNexis through 2011 Reg. Sess.)

For children in need of services, care, and guidance, the State shall secure those services as are needed to serve the emotional, mental, and physical welfare of children and the best interests of the community, preferably in their homes or the least restrictive environment possible. When children must be placed in care away from their homes, the State shall insure that they are protected against any harmful effects resulting from the temporary or permanent inability of parents to provide care and protection for their children. It is the policy of the State to reunite the child with his or her family in a timely manner, whether or not the child has been placed in the care of the State voluntarily. When children must be permanently removed from their homes, they shall be placed in adoptive homes so that they may become members of a family by legal adoption or, absent that possibility, other permanent settings.

South Dakota

S.D. Codified Laws § 26-7A-56 (LexisNexis through 2012 Sess.)

Except as otherwise provided in this chapter and related chapters 26-8A, 26-8B, and 26-8C, the rules of civil procedure and the rules of evidence apply to adjudicatory hearings. All other hearings shall be conducted under rules prescribed by the court. The rules may be designed by the court to inform the court fully of the exact status of the child and to ascertain the history, environment, and the past and present physical, mental, and moral condition of the child and the child's parents, guardian, and custodian, as may be necessary or appropriate to enable the court to determine suitable disposition of the child according to the least restrictive alternative available in keeping with the child's best interests and with due regard to the rights and interests of the parents, guardian, custodian, the public, and the State.

Tennessee

Tenn. Code Ann. § 36-1-101(d) (LexisNexis through 2012 Reg. Sess.)

In all cases, when the best interests of the child and those of the adults are in conflict, such conflict shall always be resolved to favor the rights and the best interests of the child, which interests are hereby recognized as constitutionally protected, and, to that end, this part shall be liberally construed.

Tenn. Code Ann. § 36-1-113(i) (LexisNexis through 2012 Reg. Sess.)

In determining whether termination of parental or guardianship rights is in the best interests of the child pursuant to this part, the court shall consider, but is not limited to, the following:

- Whether the parent or guardian has made such adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interests to be in the home of the parent or guardian
- Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible
- Whether the parent or guardian has maintained regular visitation or other contact with the child
- Whether a meaningful relationship has otherwise been established between the parent or guardian and the child
- The effect a change of caregivers and physical environment is likely to have on the child's emotional, psychological, and medical condition
- Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional, or psychological abuse, or neglect toward the child or another child or adult in the family or household
- Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner
- Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child
- Whether the parent or guardian has paid child support consistent with the child support guidelines

Texas

Tex. Fam. Code Ann. § 263.307(a), (c) (LexisNexis through 2011 1st Sess.)

In considering the factors established by this section, the prompt and permanent placement of the child in a safe environment is presumed to be in the child's best interests.

In the case of a child age 16 or older, the following guidelines should be considered by the court in determining whether to adopt the permanency plan submitted by the department:

- Whether the permanency plan submitted to the court includes the services planned for the child to make the transition from foster care to independent living
- Whether this transition is in the best interests of the child

Tex. Fam. Code Ann. § 263.307(b) (LexisNexis through 2011 1st Sess.)

The following factors should be considered in determining whether the child's parents are willing and able to provide the child with a safe environment:

- The child's age and physical and mental vulnerabilities
- The frequency and nature of out-of-home placements
- The magnitude, frequency, and circumstances of the harm to the child
- Whether the child has been the victim of repeated harm after the initial report and intervention by the department or other agency
- Whether the child is fearful of living in or returning to the child's home
- The results of psychiatric, psychological, or developmental evaluations of the child, the child's parents, other family members, or others who have access to the child's home
- Whether there is a history of abusive or assaultive conduct by the child's family or others who have access to the child's home
- Whether there is a history of substance abuse by the child's family or others who have access to the child's home
- Whether the perpetrator of the harm to the child is identified
- The willingness and ability of the child's family to seek out, accept, and complete counseling services and to cooperate with and facilitate an appropriate agency's close supervision
- The willingness and ability of the child's family to effect positive environmental and personal changes within a reasonable period of time
- Whether the child's family demonstrates adequate parenting skills, including providing the child and other children under the family's care with:
    - Minimally adequate health and nutritional care
    - Care, nurturance, and appropriate discipline consistent with the child's physical and psychological development
    - Guidance and supervision consistent with the child's safety
    - A safe home environment
    - Protection from repeated exposure to violence even though the violence may not be directed at the child
    - An understanding of the child's needs and capabilities
- Whether an adequate social support system consisting of an extended family and friends is available to the child

Utah

Utah Code Ann. § 78A-6-503(8), (12) (LexisNexis through 2012 4th Spec. Sess.)

It is in the best interests and welfare of a child to be raised under the care and supervision of the child's natural parents. A child's need for a normal family life in a permanent home and for positive, nurturing family relationships is usually best met by the child's natural parents. Additionally, the integrity of the family unit and the right of parents to conceive and raise their children are constitutionally protected.

Wherever possible, family life should be strengthened and preserved, but if a parent is found, by reason of his or her conduct or condition, to be unfit or incompetent based upon any of the grounds for termination described in this part, the court shall then consider the welfare and best interests of the child of paramount importance in determining whether termination of parental rights shall be ordered.

Vermont

Vt. Stat. Ann. Tit. 33, § 5114 (LexisNexis through 2011 Sess.)

At the time of a permanency review, a modification hearing, or at any time a petition or request to terminate all residual parental rights of a parent without limitation as to adoption is filed by the commissioner or the attorney for the child, the court shall consider the best interests of the child in accordance with the following:

- The interaction and interrelationship of the child with his or her parents; siblings; foster parents, if any; and any other person who may significantly affect the child's best interests
- The child's adjustment to his or her home, school, and community
- The likelihood that the parent will be able to resume or assume parental duties within a reasonable period of time

- Whether the parent has played and continues to play a constructive role, including personal contact and demonstrated emotional support and affection, in the child's welfare

Except in cases where a petition or request to terminate all residual parental rights of a parent without limitation as to adoption is filed by the commissioner or the attorney for the child, the court shall also consider whether the parent is capable of playing a constructive role, including demonstrating emotional support and affection, in the child's welfare.

Vt. Stat. Ann. Tit. 15A, § 3-504(c) (LexisNexis through 2011 Sess.)

At the time of the hearing under this section, the court shall consider the best interests of the child in accordance with the following criteria:

- The likelihood that the respondent will be able to assume or resume his or her parental duties within a reasonable period of time
- The child's adjustment to his or her home, school, and community
- The interaction and interrelationship of the child with his or her parents, siblings, and any other person who may significantly affect the child's best interests
- Whether the parent or alleged parent has played and continues to play a constructive role, including personal contact and demonstrated love and affection, in the child's welfare

Virgin Islands

V.I. Code Ann. Tit. 5, § 2501(e) (LexisNexis through 2012 Reg. Sess.)

When children or their families request help, Federal and territorial government resources shall be utilized to complement community efforts to help meet the needs of children by aiding in the prevention and resolution of their problems. The territory shall direct its efforts first to strengthen and encourage family life as the most appropriate environment for the care and nurturing of children. To this end, the territory shall assist and encourage families to utilize all available resources. For children in need of services, care, and guidance, the territory shall attempt to secure those services needed to serve the emotional, mental, and physical welfare of children and the best interests of the community, preferably in their homes or in the least restrictive environment possible.

When children must be placed in care away from their homes, the territory shall attempt to ensure that they are protected against harmful effects resulting from the temporary or permanent inability of parents to provide care and protection of their children. It is the policy of this territory to reunite children with their families in a timely manner, whether or not the child has been voluntarily placed in the care of a department. When children must be permanently removed from their homes, they shall, if practicable, be placed in adoptive homes so that they may become members of a family by legal adoption or, absent that possibility, they shall be placed in other permanent settings.

Virginia

Va. Code Ann. § 20-124.3 (LexisNexis through 2012 Spec. Sess.)

In determining the best interests of a child for purposes of determining custody or visitation arrangements, including any *pendente lite* orders pursuant to law, the court shall consider the following:

- The age and physical and mental condition of the child, giving due consideration to the child's changing developmental needs
- The age and physical and mental condition of each parent
- The relationship existing between each parent and each child, giving due consideration to the positive involvement with the child's life, the ability to accurately assess and meet the emotional, intellectual, and physical needs of the child
- The needs of the child, giving due consideration to other important relationships of the child, including, but not limited to, siblings, peers, and extended family members
- The role that each parent has played and will play in the future, in the upbringing and care of the child
- The propensity of each parent to actively support the child's contact and relationship with the other parent, including whether a parent has unreasonably denied the other parent access to or visitation with the child
- The relative willingness and demonstrated ability

of each parent to maintain a close and continuing relationship with the child, and the ability of each parent to cooperate in and resolve disputes regarding matters affecting the child

- The reasonable preference of the child, if the court deems the child to be of reasonable intelligence, understanding, age, and experience to express such a preference
- Any history of family abuse as that term is defined in § 16.1-228 or sexual abuse
- Such other factors as the court deems necessary and proper to the determination

If the court finds a history [of abuse], the court may disregard the factors above [regarding a parent's willingness to support the child's relationship with the other parent].

Washington

Wash. Rev. Code Ann. § 13.34.020 (LexisNexis through 2012 2nd Spec. Sess.)

The legislature declares that the family unit is a fundamental resource of American life that should be nurtured. Toward the continuance of this principle, the legislature declares that the family unit should remain intact unless a child's right to conditions of basic nurture, health, or safety is jeopardized. When the rights of basic nurture, physical and mental health, and safety of the child and the legal rights of the parents are in conflict, the rights and safety of the child should prevail. In making reasonable efforts under this chapter, the child's health and safety shall be the paramount concern. The right of a child to basic nurturing includes the right to a safe, stable, and permanent home and a speedy resolution of any proceeding under this chapter.

West Virginia

W. Va. Code Ann. § 49-1-1(a)(1)-(a)(8), (b) (LexisNexis through 2012 1st Ex. Sess.)

The purpose of this chapter is to provide a coordinated system of child welfare and juvenile justice for the children of this State that has goals to:

- Assure each child's care, safety, and guidance
- Serve the mental and physical welfare of the child
- Preserve and strengthen the child's family ties
- Recognize the fundamental rights of children and parents
- Adopt procedures and establish programs that are family-focused rather than focused on specific family members, except where the best interests of the child or the safety of the community are at risk
- Involve the child and his or her family or caregiver in the planning and delivery of programs and services
- Provide services that are community-based and in the least restrictive settings that are consonant with the needs and potentials of the child and his or her family
- Provide for early identification of the problems of children and their families, and respond appropriately with measures and services to prevent abuse and neglect or delinquency

In pursuit of these goals, it is the intention of the legislature to provide for removing the child from the custody of his or her parents only when the child's welfare or the safety and protection of the public cannot be adequately safeguarded without removal; and when the child has to be removed from his or her family, to secure for the child custody, care, and discipline consistent with the child's best interests and other goals herein set out. It is further the intention of the legislature to require that any reunification, permanency, or preplacement preventative services address the safety of the child.

Wisconsin

Wis. Stat. Ann. § 48.426(2)-(3) (LexisNexis through 9-12-12)

The best interests of the child shall be the prevailing factor considered by the court in determining the disposition of all proceedings under this subchapter. In considering the best interests of the child under this section, the court shall consider, but not be limited to, the following:

- The likelihood of the child's adoption after termination of the parent's parental rights
- The age and health of the child, both at the time of the disposition, and, if applicable, at the time the child was removed from the home
- Whether the child has substantial relationships with the parent or other family members, and whether it would be harmful to the child to sever these relationships

- The wishes of the child
- The duration of the separation of the parent from the child
- Whether the child will be able to enter into a more stable and permanent family relationship as a result of the termination of the parent's parental rights, taking into account the conditions of the child's current placement, the likelihood of future placements, and the results of prior placements

Wyoming

Wyo. Stat. Ann. § 14-3-201 (LexisNexis through 2012 Sess.)

The purpose of §§ 14-3-201 through 14-3-216 is to delineate the responsibilities of the State agency, other governmental agencies or officials, professionals, and citizens to intervene on behalf of a child suspected of being abused or neglected, to protect the best interests of the child, to further offer protective services when necessary in order to prevent any harm to the child or any other children living in the home, to protect children from abuse or neglect that jeopardize their health or welfare, to stabilize the home environment, to preserve family life whenever possible, and to provide permanency for the child in appropriate circumstances. The child's health, safety, and welfare shall be of paramount concern in implementing and enforcing this article.

Michigan Attorney General Opinion: Application of Michigan Medical Marihuana Act to Child-Protective Proceedings

STATE OF MICHIGAN

BILL SCHUETTE, ATTORNEY GENERAL

MICHIGAN MEDICAL MARIHUANA ACT: Application of Michigan Medical Marihuana Act to child-protective proceedings

MICHIGAN JUVENILE CODE:

CUSTODY:

A properly registered patient or primary caregiver, who engages in the "medical use" of marihuana "in accordance with" the Michigan Medical Marihuana Act (MMMA), Initiated Law 1 of 2008, MCL 333.26421 et seq., may invoke the protections provided in sections 4(a) and (b) of the Act in a child-protective proceeding under the Michigan Juvenile Code, MCL 712A.1 et seq. MCL 333.26424(a) and (b). But the protections are subject to the exception in section 4(c) of the MMMA for behavior that creates an unreasonable danger to a minor that can be clearly articulated and substantiated. MCL 333.26424(c).

Whether a person's actions associated with the medical use of marihuana present an "unreasonable danger" to a child under section 4(c) of the Michigan Medical Marihuana Act, Initiated Law 1 of 2008, MCL 333.26424(c), is a fact-specific inquiry dependent upon the circumstances of each case. Any assertion that a person's behavior associated with the medical use of marihuana presents an unreasonable danger to a child must be clearly expressed and supported by evidence.

To invoke the protections provided for in sections 4(a) and (b) of the Michigan Medical Marihuana Act, Initiated Law 1 of 2008, MCL 333.26424(a) and (b), in a child-protective proceeding under the Michigan Juvenile Code, MCL 712A.1 et seq., a patient or primary caregiver must have been issued and possess a valid registry identification card. The affirmative defense provided for in section 8(a) of the MMMA only applies in a criminal prosecution, and thus is not available in a child-protective proceeding under the Juvenile Code. MCL 333.264248(a).

The Michigan Medical Marihuana Act, Initiated Law 1 of 2008, MCL 333.26421 et seq., does not permit a court in a child-protective proceeding under the Michigan Juvenile Code, MCL 712A.1 et seq., to independently determine whether a person is a qualifying patient. But the court may review evidence to determine whether a person's conduct related to marihuana is for the purpose of treating or alleviating the person's debilitating medical condition or symptoms associated with the condition. MCL 333.26424(d)(2). If the person's use or possession of marihuana is not for that purpose, and thus not "in accordance with" the MMMA, the person is not entitled to invoke the protections offered in section 4(a) in a child-protective proceeding. MCL 333.26424(a), MCL 333.26427(a).

Opinion No. 7271
May 10, 2013

Honorable Rick Jones
State Senator
The Capitol
Lansing, MI 48909

You ask several questions concerning the application of the Michigan Medical Marihuana Act (MMMA), Initiaed Law 1 of 2008, MCL 333.26421 *et seq.*, in child-protective proceedings brought under the Michigan Juvenile Code (Juvenile Code), MCL 712A.1 *et seq*.[1][1]

I.

You first ask whether an individual in a child-protective proceeding brought under the Juvenile Code may invoke the protections provided under the MMMA relating to the medical use of marihuana.

The purpose of the Juvenile Code is to serve a child's welfare. MCL 712A.1(3); MCR 3.902(B)(1); *In re Jagers*, 224 Mich App 359, 362; 568 NW2d 837 (1997). And consistent with that purpose, child-protective proceedings protect children from unfit homes and possible injury or mistreatment, and thus safeguard their physical, mental, and emotional well-being. *In re Brock*, 442 Mich 101, 107-108; 499 NW2d 752 (1993); *In re Baby X*, 97 Mich App 111, 116; 293 NW2d 736 (1980). A child-protective proceeding is initiated by filing a petition that sets forth "[t]he essential facts that constitute an offense against the child under the Juvenile Code." MCR 3.961(B)(3). The court acquires subject-matter jurisdiction when the allegations in the petition are not frivolous, and the court may thereafter exercise jurisdiction upon finding probable cause to believe the allegations within the petition are true. *In re Hatcher,* 443 Mich 426, 437-438; 505 NW2d 834 (1993). Subsequently, as explained in *In re Brock,* 442 Mich at 108, "[c]hild protective proceedings are generally divided into two phases: the adjudicative and the dispositional. The adjudicative phase determines whether the [ ] court may exercise jurisdiction over the child. If the court acquires jurisdiction, the dispositional phase determines what action, if any, will be taken on behalf of the child."

To exercise continuing jurisdiction, the circuit court "must determine by a preponderance of the evidence that the child comes within the statutory requirements of MCL 712A.2." *Id.* MCL 712A.2(b)(1) provides that a circuit court has jurisdiction over a child under the age of 18, whose parent or custodian "neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health

1 In addition to the Juvenile Code, there are a number of other public acts that involve the care or custody of minors. Many of these acts are included in Chapter 722, Children, of the Probate Code of 1939. This opinion, however, addresses only child-protective proceedings under the Juvenile Code.

or morals, who is subject to a substantial risk of harm to his or her mental well-being, who is abandoned by his or her parents, guardian, or other custodian, or who is without proper custody or guardianship." In addition, jurisdiction may be established under MCL 712A.2(b)(2) for those minors "[w]hose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult, or other custodian, is an unfit place for the juvenile to live in." If continuing jurisdiction is established, "the [ ] court has several options, one of which is to return the children to their parents. Not every adjudicative hearing results in removal of custody." *In re Brock*, 442 Mich at 111 (citation omitted). In order to permanently terminate parental rights, the statutory grounds for termination must be proven by clear and convincing evidence. MCL 712A.19b(3).

The MMMA permits the medical use of marihuana "to the extent that it is carried out in accordance with the provisions of [the] act." MCL 333.26427(a), 333.26424(d)(1) and (2). Pursuant to section 7(e), "[a]ll other acts and parts of acts inconsistent with [the MMMA] do not apply to the medical use of marihuana as provided for by this act." MCL 333.26427(e). The Michigan Supreme Court has explained that the purpose of the MMMA is to "allow a limited class of individuals the medical use of marijuana . . . . To meet this end, the MMMA defines the parameters of legal medical-marijuana use, promulgates a scheme for regulating registered patient use and administering the act, and provides for an affirmative defense, as well as penalties for violating the MMMA." *People v Kolanek*, 491 Mich 382, 393-394; 817 NW2d 528 (2012) (footnotes omitted). But the "MMMA does *not* create a general right for individuals to use and possess marijuana in Michigan." *Id.* (emphasis in original).[2][2]

The MMMA provides that a qualifying patient or primary caregiver who has been issued and possesses a registry identification card "shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act." MCL 333.26424(a) and (b). See also 333.26424(d)(1) and (2), MCL 333.26427(a). The term "medical use" is broadly defined and includes the "acquisition, possession, cultivation, manufacture, use, internal possession, delivery, transfer, or transportation of marihuana." MCL 333.26423(e).[3][3]

2 All marijuana-related activity in Michigan remains prohibited by the federal Controlled Substances Act, 21 USC 812(c), 823(f), and 844(a), regardless of whether the individual is registered under the MMMA.

3 A qualifying patient with a valid registry identification card may possess up to 2.5 ounces of usable marihuana, and cultivate up to 12 marihuana plants, unless the patient has designated a primary caregiver and specified that the caregiver will cultivate marihuana for the patient. MCL 333.26424(a). A primary caregiver who has a valid registration card may assist up to 5 patients and possess up to 2.5 ounces of usable marihuana per patient to whom the caregiver is connected by registration, and may also cultivate 12 marihuana plants per patient if the patient has so specified. MCL 333.26424(b) and 333.26426(d).

In addition to the general protection from arrest, prosecution, or other penalty provided for in sections 4(a) and (b), MCL 333.26424(a) and (b), the MMMA also provides an affirmative defense. Section 8(a), MCL 333.26428(a), states that "a patient and a patient's primary caregiver, if any, may assert the medical purpose for using marihuana *as a defense to any prosecution involving marihuana.*" (Emphasis added.) And relevant to your question, the MMMA includes a specific provision concerning child custody and visitation:

> A person *shall not be denied* custody or visitation of a minor for *acting in accordance with* this act, *unless* the person's behavior is such that it creates an unreasonable danger to the minor that can be clearly articulated and substantiated. [MCL 333.26424(c); emphasis added.] [4][4]

You ask whether an individual may invoke section 4(c), MCL 333.26424(c), in a child-protective proceeding under the Juvenile Code.

"[B]ecause the MMMA was the result of a voter initiative, [the] goal is to ascertain and give effect to the intent of the electorate, rather than the Legislature, as reflected in the language of the law itself. We must give the words of the MMMA their ordinary and plain meaning as would have been understood by the electorate." *Kolanek,* 491 Mich at 397. See also *Welch Foods, Inc v Attorney General*, 213 Mich App 459, 461; 540 NW2d 693 (1995). And when construing a statute, the provision must be read in context with the entire statute, and any construction that would render any part of a statute surplusage or nugatory should be avoided. *Robinson v City of Lansing,* 486 Mich 1, 21; 782 NW2d 171 (2010).

While your question suggests that section 4(c) provides an independent source of immunity or protection that is not the function of the provision. Rather, as explained below, section 4(c) creates an exception to the immunity or protection provided in sections 4(a) and (b) that would otherwise apply in a child-protective proceeding.

As noted above, sections 4(a) and (b) provide that registered patients and primary caregivers shall not be subject to "*penalty in any manner*, or [be] *denied any right or privilege*, including but not limited to civil penalty . . . for the medical use of marihuana *in accordance with this act*." MCL 333.26424(a) and (b) (emphasis added). The broad language of these provisions must reasonably be understood to encompass proceedings involving child custody or visitation issues. The United States Supreme Court has held that parents have a right to the "companionship, care, custody, and management" of their children. *Stanley v Illinois*, 405 US 645, 651; 92 S Ct 1208; 31 L Ed 2d 551 (1972). And the Michigan Supreme Court has stated that "[i]t is well established that parents have a significant interest in the companionship, care, custody, and management of their children. This

4 The medical marihuana laws of Arizona, Delaware, and Maine include a provision similar to Michigan's section 4(c). See Ariz Rev Stat Ann, section 36-2813(D); Del Code Ann tit 16, section 4905A(b); Me Rev Stat Ann tit 22, section 2423-E(3).

interest has been characterized as an element of 'liberty' to be protected by due process." *In re Brock*, 442 Mich at 109.

An order or judgment in a child-protective proceeding under the Juvenile Code that imposes restrictions on custody or visitation, requires the removal of a child from a home, or results in the termination of parental rights, plainly results in the "denial" of a "right or privilege" for purposes of sections 4(a) and (b) of the MMMA. Thus, registered patients and primary caregivers may invoke the protection or immunity provided for in sections 4(a) and (b) in a child-protective proceeding under the Juvenile Code. But they may do so *only* if they are properly registered as patients or primary caregivers, possess a registration card, and their "medical use" of marihuana was "in accordance with the act." MCL 333.26424(a) and (b).

But this immunity is not absolute. Again, section 4(c) provides: "[1] A person shall not be denied custody or visitation of a minor for acting in accordance with this act, [2] *unless the person's behavior is such that it creates an unreasonable danger to the minor that can be clearly articulated and substantiated.*" (Emphasis added.) The first clause of this provision simply echoes the protection or immunity afforded registered patients and primary caregivers under sections 4(a) and (b). But the second clause creates an exception or limitation to that protection where the patient's or primary caregiver's medical use of marihuana "creates an unreasonable danger to the minor that can be clearly articulated and substantiated."[5][5] In other words, a registered patient or primary caregiver will lose the immunity accorded their medical use of marihuana, thereby allowing the marihuana use to be used as a basis to restrict or deny custody or visitation with a child, if the use creates an unreasonable danger to the child. This result is no different than what would occur where participation in any other lawful activity by a parent or caregiver creates an unreasonable risk of harm to a child.

It is my opinion, therefore, that a properly registered patient or primary caregiver, who engages in the "medical use" of marihuana "in accordance with" the MMMA, may invoke the protections provided in sections 4(a) and (b) of the Act in a child-protection proceeding under the Juvenile Code. MCL 333.26424(a) and (b). But the protections are subject to the exception in section 4(c) of the MMMA for behavior that creates an unreasonable danger to a minor that can be clearly articulated and substantiated. MCL 333.26424(c).

5 Section 4(c) applies to a "person" "acting in accordance with" the MMMA, MCL 333.26424(c), and is not limited to patients or primary caregivers. Thus, a "person" acting in accordance with sections 4(g), MCL 333.26424(g), relating to "marihuana paraphernalia," and 4(i), MCL 333.26424(i), relating to a person assisting in the administration of marihuana, would also be subject to the exception or limitation set forth in section 4(c). Presumably, however, most situations will involve patients or primary caregivers, and for purposes of this question, it is assumed that the person in question is a patient or primary caregiver.

II.

In relation to your first question, you express concern with the lack of guidance as to "what would constitute an unreasonable danger to the minor that can be clearly articulated and substantiated" for purposes of the exception created by section 4(c), MCL 333.26424(c).

Again, section 4(c) creates an exception to the protection available under sections 4(a) and (b) where the patient's or primary caregiver's "behavior is such that it creates an *unreasonable danger* to the minor that can be clearly *articulated and substantiated*." MCL 333.26424(c) (emphasis added). The MMMA does not define the terms "unreasonable danger" or "articulated and substantiated," nor has any court issued a decision expressly interpreting the application of section 4(c).[6][6]

Turning first to the term "unreasonable danger," no other Michigan statute defines or uses this same phrasing in a sufficiently similar context to be helpful. Moreover, it is reasonable to assume that the term was left undefined because what will constitute an "unreasonable danger" to a child will require a fact-specific inquiry based on the particular circumstances of each case. The courts already conduct a similar inquiry under the Child Protection Law (CPL), 1975 PA 238, MCL 722.621 *et seq*.[7][7] Under section 18(1) of the CPL, the Department of Human Services must file a petition under the Juvenile Code if it determines that someone residing in a child's home is abusing a child or a sibling of the child. MCL 722.638(1)(a). And under section 18(2), "if a parent is a suspected perpetrator or is suspected of placing the child at an *unreasonable risk of harm* due to the parent's failure to take reasonable steps to intervene to eliminate that risk, the department shall include a request for termination of parental rights at the initial dispositional hearing as authorized under" the Juvenile Code. MCL 722.638(2). Like the MMMA, the CPL does not define "unreasonable risk of harm"; rather, the Department and any reviewing court must make an assessment based on the circumstances of the case.

6 The Michigan Court of Appeals has issued several decisions in parental termination of rights cases that note the medical use of marihuana by a parent, but none specifically address or interpret section 4(c). See *In re Niblock*, unpublished opinion per curiam of the Court of Appeals, decided May 8, 2012 (Docket Nos. 306612, 306954); *In re Homister*, unpublished opinion per curiam of the Court of Appeals, decided February 16, 2012 (Docket No. 305448); *In re Amormino*, unpublished opinion per curiam of the Court of Appeals, decided November 15, 2011 (Docket Nos. 303172, 303216); *In re McEachern,* unpublished opinion per curiam of the Court of Appeals, decided September 1, 2011 (Docket Nos. 300601, 303176); *In re MJM*, unpublished opinion per curiam of the Court of Appeals, decided June 7, 2011 (Docket Nos. 299893, 299894).

7 The broad purpose of the CPL is to prevent child abuse and neglect. *Becker-Witt v Bd of Examiners of Social Workers*, 256 Mich App 359, 364; 663 NW2d 514 (2003), citing *Williams v Coleman*, 194 Mich App 606, 614-615; 488 NW2d 464 (1992). To effectuate that purpose, the act defines conduct that is abusive or neglectful, and establishes methods for the reporting to, and the investigation of, instances of abuse and neglect by the Department of Human Services. See, e.g., *Michigan Ass'n of Intermediate Special Educ Administrators v Dep't of Social Services*, 207 Mich App 491; 526 NW2d 36 (1994).

In making such an assessment, the Department of Human Services has issued guidance regarding drug or controlled substance use by a parent or caregiver, which includes medical marihuana. The Department's policy provides that:

> Substance abuse, or the addiction of the parent-caretaker or adult living in the home to alcohol or drugs, does not in and of itself constitute evidence of abuse or neglect of the child. Parents use drugs (including, but not limited to, legally or illegally obtained controlled drugs such as *medically prescribed marijuana*, methadone, pain-killers and anti-depressants) and/or alcohol to varying degrees and many remain able to care for their child without harming the child. A careful evaluation must be made to determine whether a child is at risk. [Children Protective Services Manual, PSM 716-7; p 1; PSB 2012-004 (7-1-2012); emphasis added.]

This policy is consistent with the MMMA, and may be applied where a parent or caregiver, who is also a registered patient, invokes the protection provided by sections 4(a) or (b). In other words, under the terms of the MMMA, the medical use of marihuana alone does not create an unreasonable danger to a child. But if the marihuana use affects the parent or caregiver's ability to adequately care for a child, or if the marihuana use presents a particular danger, say to an asthmatic child, such circumstances could create an unreasonable danger to the child. See, e.g. *In re Alexis E.*, 90 Cal Rptr 3d 44, 54 (2009) ("While it is true that the mere use of marijuana by a parent will not support a finding of risk to minors, the risk to the minors here is not speculative. There is a risk to the children of the negative effects of secondhand marijuana smoke.") (citations omitted). See also David Malleis, Note, *The High Price of Parenting High: Medical Marijuana and its Effects on Child Custody Matters*, 33 U La Verne L Rev 357 (2012). A careful evaluation of the facts and circumstances of each case must be made to determine whether the parent's or caregiver's behavior poses an unreasonable danger to the child in question. This conclusion is consistent with how a parent's or caregiver's use of other drugs or controlled substances is to be treated.

The MMMA also requires that the unreasonable danger be "articulated and substantiated." MCL 333.26424(c). Again, these terms are not defined within the MMMA.[8][8] When a term is not defined in the statute it should be accorded its plain and ordinary meaning, taking into account the context in which the words are used. MCL 8.3a; *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 748; 641 NW2d 567 (2002). In this context, the term "articulated" means "[t]o express in coherent verbal [or written] form; give words to." *The American Heritage College Dictionary, Third Edition* (1997). The term "substantiated" means "[t]o support with

8 Unlike Michigan, two of the other three states that have provisions similar to section 4(c), see footnote 4, *supra*, incorporate a "clear and convincing evidence" standard. See Ariz Rev Stat Ann, section 36-2813(D) and Del Code Ann tit 16, section 4905A(b).

proof or evidence; verify." *Id.*[9][9] Applying these definitions to section 4(c), the bases for asserting that a parent's medical use of marihuana presents an unreasonable danger to the child must (1) be clearly expressed, and (2) supported with evidence. With respect to a child-protective proceeding under the Juvenile Code, depending upon whether the proceeding is in the adjudicative or dispositional phase, the unreasonable danger must be "substantiated" or supported by either a preponderance of the evidence (adjudicative phase), or by clear and convincing evidence (dispositional phase). See *In re Brock*, 442 Mich at 108, 111-112; MCR 3.972(C)(1); MCR 3.977(E)(3), (F)(1)(b), and (H)(3)(a).[10][10]

It is my opinion, therefore, that whether a person's actions associated with the medical use of marihuana present an "unreasonable danger" to a child under section 4(c) of the MMMA is a fact-specific inquiry dependent upon the circumstances of each case. MCL 333.26424(c). Any assertion that a person's behavior associated with the medical use of marihuana presents an unreasonable danger to a child must be clearly expressed and supported by evidence.

III.

You next ask whether an individual must be issued and possess a registry identification card under the MMMA in order to raise an affirmative defense under MCL 333.26428(a) or invoke statutory immunity under MCL 333.26424(a) and (b) in a child-protective proceeding under the Juvenile Code.

With respect to section 8's affirmative defense,[11][11] by its own terms the provision only applies to a criminal "*prosecution* involving marihuana." MCL 333.26428(a) (emphasis added); *State v McQueen*, 493 Mich 135, 159; 828 NW2d 644 (2013). Child-protective proceedings are civil actions, not criminal prosecutions. MCL 712A.1(2); *In re Stricklin*, 148 Mich App 659, 666; 384 NW2d 833, lv den 425 Mich 856 (1986). Thus, section 8(a) may not be invoked in child-protective proceedings brought under the Juvenile Code.

Sections 4(a) and (b) each expressly require that a patient or primary caregiver be registered and possess a registry identification card in order to invoke the immunity or protections provided therein. A patient or

9 The CPL includes an express definition of the term "substantiated" for purposes of child abuse and neglect cases. See MCL 722.622(d) and (aa), and MCL 722.628d(1)(d) and (e). This opinion's definition of the term "substantiated" for purposes of applying section 4(c) of the MMMA does not otherwise replace the definition set forth in the CPL.

10 However, for Native American children, the burden of proof is beyond a reasonable doubt. MCR 3.977(G)(2).

11 An affirmative defense "'admits the doing of the act charged, but seeks to justify, excuse, or mitigate it. . . .' It does not 'negate selected elements or facts of the crime.'" *People v Lemons,* 454 Mich 234, 246 n 15; 562 NW2d 447 (1997) (citations omitted); see also *Kolanek*, 491 Mich 382, *supra*.

primary caregiver "who has been *issued and possesses a registry identification card* shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau," for the medical use of marihuana or for assisting a patient in the medical use of marihuana. MCL 333.26424(a) and (b) (emphasis added).[12][12]

It is my opinion, therefore, that to invoke the protections provided for in sections 4(a) and (b) of the MMMA in a child-protective proceeding under the Juvenile Code, a patient or primary caregiver must have been issued and possess a valid registry identification card. MCL 333.26424(a) and (b). The affirmative defense provided for in section 8(a) of the MMMA only applies in a criminal prosecution, and thus is not available in a child-protective proceeding under the Juvenile Code. MCL 333.264248(a).

IV.

Finally, you ask whether a trial court has authority within the context of a child-protective proceeding under the Juvenile Code, to independently determine whether a person is a "qualifying patient" with a "debilitating condition" under the MMMA, by either ordering the person to release his or her medical records to the court or to participate in an independent medical assessment.

Under MCL 712A.6, a court has jurisdiction over an adult and may make orders affecting the adult that, in the opinion of the court, are necessary for the physical, mental, or moral well-being of a child under the court's jurisdiction. See also MCL 712A.6b (orders regarding nonparent adults). A court may compel adults to participate in services necessary for a child's welfare as set forth in an initial service plan. MCR 3.973(F)(2). And, specific to your question, the "[t]he court may order that a minor or a parent, guardian, or legal custodian be examined or evaluated by a physician, dentist, psychologist, or psychiatrist." MCR 3.923(B); *In re Johnson*, 142 Mich App 764, 766; 371 NW2d 446 (1985). Consistent with state and federal law, medical records for a parent, guardian, or legal custodian may be obtained through execution of a voluntary release, 42 USC 290dd-2(b)(1), or by subpoena, 42 USC 290dd-2(b)(2)(C). See also MCL 722.631, MCR 3.973(E)(1), and 45 CFR 164.512(e)(1)(i) - (ii)(A) or (B).

12 [12] Under section 9(b), MCL 333.26429(b), a valid application for a registry identification card will be "deemed" a "registry identification card" if a card is not issued within 20 days of submission of the application.

Although a court may order these evaluations and receive into evidence any medical records pertaining to members of a child's household, nevertheless the MMMA does not permit the court to independently determine whether a person is a qualifying patient.

The MMMA defines a "qualifying patient" as "a person who has been diagnosed by a physician as having a debilitating medical condition." MCL 333.26423(h).[13][13] The MMMA defines the term "debilitating medical condition" to include a number of conditions and their symptoms. MCL 333.26423(a).[14][14] To enjoy full protection under the MMMA, as discussed above, a patient must apply for and obtain a "registry identification card." MCL 333.26424(a).[15][15] To receive a registry identification card, a patient must obtain a "written certification" from a physician, which is defined as:

> [A] document signed by a physician, stating the patient's debilitating medical condition and stating that, in the physician's professional opinion, the patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana to treat or alleviate the patient's debilitating medical condition or symptoms associated with the debilitating medical condition. [MCL 333.26423(*l*).]

The patient must then complete and file an application with the Michigan Department of Licensing and Regulatory Affairs (Department). MCL 333.26426(a). The Department must verify the information contained in the application and must approve the application if the patient's submission is complete. MCL 333.26426(a) and (c). The Department may only deny an application if it is incomplete, "or if the department determines that the information provided was falsified." MCL 333.26426(c). The Department's denial of an application is subject to

13 A "physician" must be licensed "under Part 170 of the public health code, 1978 PA 368, MCL 333.17001 to 333.17084, or an osteopathic physician under Part 175 of the public health code, 1978 PA 368, MCL 333.17501 to 333.17556." MCL 333.26423(f).

14 The MMMA defines "[d]ebilitating medical condition" to mean "1 or more of the following":

(1) Cancer, glaucoma, positive status for human immunodeficiency virus, acquired immune deficiency syndrome, hepatitis C, amyotrophic lateral sclerosis, Crohn's disease, agitation of Alzheimer's disease, nail patella, or the treatment of these conditions.

(2) A chronic or debilitating disease or medical condition or its treatment that produces 1 or more of the following: cachexia or wasting syndrome; severe and chronic pain; severe nausea; seizures, including but not limited to those characteristic of epilepsy; or severe and persistent muscle spasms, including but not limited to those characteristic of multiple sclerosis.

(3) Any other medical condition or its treatment approved by the department, as provided for in section 5(a). [MCL 333.26423(a)(1) – (3).]

15 "Registry identification card" means "a document issued by the department that identifies a person as a registered qualifying patient or registered primary caregiver." MCL 333.26423(i). As enacted, the reference to "department" meant the Department of Community Health. MCL 333.26423(b). However, the duties and functions relating to the medical marihuana program were transferred from that department to the Department of Licensing and Regulatory Affairs.

judicial review in the Ingham County Circuit Court. MCL 333.26426(c).

A patient who completes this process, receives a registry identification card, and is otherwise in compliance with the MMMA is entitled to a rebuttable presumption that the patient's use and possession of marihuana is for a medical purpose:

> (d) There shall be a presumption that a qualifying patient or primary caregiver is engaged in the medical use of marihuana in accordance with this act if the qualifying patient or primary caregiver:
>
> (1) is in possession of a registry identification card; and
>
> (2) is in possession of an amount of marihuana that does not exceed the amount allowed under this act. *The presumption may be rebutted by evidence that conduct related to marihuana was not for the purpose of alleviating the qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition, in accordance with this act*. [MCL 333.26424(d)(1) and (2); (emphasis added).]

Under this process, a licensed physician diagnoses a patient with a qualifying debilitating medical condition and certifies that the patient will benefit from the medical use of marihuana. If the patient obtains this certification and properly submits an application to the Department, the patient is entitled to a registry identification card. The MMMA does not authorize or otherwise provide an opportunity for the courts to decide whether someone is qualified for registration as a patient under the MMMA.

Rather, what a court may do is entertain "evidence" that a patient's use of marihuana "was not for the purpose of alleviating" the patient's "debilitating medical condition or symptoms associated with the debilitating medical condition." MCL 333.26424(d). Thus, the court could order the person to undergo a medical examination, procure the patient's medical records,[16][16] and review any other evidence, including testimony, regarding the person's use of marihuana to determine whether the person's conduct relating to marihuana is for the purpose of treating or alleviating the person's debilitating condition or associated symptoms. If the evidence supports a contrary conclusion, then the court can determine that the person's use or possession of marihuana is

16 [Notably, the MMMA imposes confidentiality rules regarding information relating to patients and primary caregiver:

> (1) *Applications and supporting information submitted by qualifying patients, including information regarding their primary caregivers and physicians, are confidential*.
>
> (2) The department shall maintain a confidential list of the persons to whom the department has issued registry identification cards. Individual names and other identifying information on the list is confidential and is exempt from disclosure under the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246. [MCL 333.26426(h)(1) and (2); emphasis added.]

not "in accordance with" the MMMA and the person is not entitled to the Act's protections in the context of a child-protective proceeding under the Juvenile Code. MCL 333.26424(a) and MCL 333.26427(a).

It is my opinion, therefore, that the MMMA does not permit a court in a child-protective proceeding under the Juvenile Code, to independently determine whether a person is a qualifying patient. But the court may review evidence to determine whether a person's conduct related to marihuana is for the purpose of treating or alleviating the person's debilitating medical condition or symptoms associated with the condition. MCL 333.26424(d)(2). If the person's use or possession of marihuana is not for that purpose, and thus not "in accordance with" the Act, the person is not entitled to invoke the protections offered in section 4(a) in a child-protective proceeding. MCL 333.26424(a), MCL 333.26427(a)

BILL SCHUETTE
Attorney General

State Bar of Michigan
Michael Franck Building
306 Townsend Street
Lansing, MI 48933-2012