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November 22, 1999

## **IMPLEMENTATION OF THE ADOPTION AND SAFE FAMILIES ACT**

### **Part II – “AGGRAVATED CIRCUMSTANCES” AND OTHER GROUNDS FOR BYPASSING REUNIFICATION EFFORTS UNDER ASFA**

#### **I. Introduction**

The Adoption and Safe Families Act (“ASFA”) was passed by the U.S. Congress and signed into law in November 1997. New York State implementing legislation for ASFA was enacted in February 1999.

ASFA puts into place the most sweeping changes in federal child welfare policy in two decades. ASFA requires child welfare agencies to pay heightened attention to children’s health and safety and to the need to expedite their placement in safe, permanent homes.

One of the most fundamental changes in child welfare law brought about by ASFA is a provision that allows ACS to ask the Family Court judge for a ruling that the agency does not have to make “reasonable efforts” or “diligent efforts” to reunite the child with his or her birth parents.

This so-called “no reasonable efforts” motion (also known as a “Family Court Act 1039b motion”) may be used where the parent’s past conduct has been so harmful that reunification would be contrary to the health and safety of the child. In those cases, agencies can move quickly to seek permanency for the child through adoption, guardianship or custody.

In certain other cases, the 1039b motion may be filed against only one of the child’s parents. In those situations, the agency could continue to make efforts to reunify the child with the other parent.

These guidelines are intended to inform you of the broad outlines of the “no reasonable efforts” provisions of ASFA. They identify the three sets of circumstances where

ACS may ask the Family Court for permission not to make “diligent efforts” to reunify the child. Since ACS is not *required* to make a “no reasonable efforts” motion in every case where grounds for bypassing reunification efforts may exist, these Guidelines also offer some guidance to ACS and contract agency staff on factors to be considered in deciding whether or not to file such a motion.

**Staff should bear in mind that this is a complicated new area of the law. Case work staff should consult closely with ACS lawyers whenever they have reason to believe that there may be grounds for a motion to bypass reunification efforts. This is equally true for new, incoming cases as well as cases where fact-finding in Family Court is already complete.**

## **II. Grounds for Making a “No Reasonable Efforts” Motion**

Under ASFA, there are three scenarios under which ACS may ask the Family Court for a finding that the agency need not make efforts to reunify the child with the parents. Broadly speaking, these categories are:

1. “Aggravated circumstances” – *i.e.*, where the child has come into foster care due to serious physical or sexual abuse, regardless of whether or not the parent has been criminally convicted of a crime.
2. Criminal convictions – *i.e.*, where the parent has been convicted of certain “ASFA crimes”, such as murder or manslaughter of one’s own child or a serious felony assault on one’s own child.
3. Prior sibling TPR – *i.e.*, where the parent has previously had his or her parental rights to a sibling of the child terminated involuntarily.

A motion to bypass reunification efforts can be made at any time. Cases appropriate for such a motion may be identified by ACS or by a contract agency at any stage of either an Article 10 proceeding or any other kind of Family Court case involving a child in foster care. Similarly, a decision *not* to make a “no reasonable efforts” motion can be re-visited at a later time.

The case may be identified at intake, before the fact-finding, before an extension of placement/permanency hearing, or even between adjourn dates. Any office of ACS (including the Division of Child Protection, the Office of Contract Agency Case Management, Direct Foster Care Services, Adoption Case Management, Direct Care Adoption or the Division of Legal Services) may identify a case where a “no reasonable efforts” application should be considered.

As soon as the program area decides that bypassing reunification efforts would be best for the child, and DLS determines that the case fits the legal criteria for doing so, DLS

will file a motion on notice in Family Court.<sup>1</sup> Notice will be given to the parents and a hearing will be scheduled, at which the Family Court judge will decide whether ACS and/or the foster care agency can be excused from providing reunification services.

### **A. Aggravated Circumstances**

A motion to relieve ACS of the obligation to make reasonable efforts to reunify a family can be made where:

- the parent has severely physically abused the child (“severe abuse”) or
- the child has been sexually abused, either by the parent or by someone whom the parent *knew* to be sexually abusing the child (“sexual abuse”) or
- the parent has repeatedly abused the child (“repeated abuse”)

Cases that fit within the “**severe abuse**” category of aggravated circumstances include cases where the child has suffered severe physical injury at the hands of a parent. For example, “severe abuse” may include cases of burns, torture, severe beating, or shaken baby syndrome. There is no requirement that there have been a criminal investigation, prosecution or conviction.

Cases that fit within the “**sexual abuse**” category of aggravated circumstances include cases where the child has been sexually abused as a result of the parent’s acts. This includes both sexual activity by the parent, as well as situations where the parent knowingly allowed someone else (like a boyfriend or a relative) to sexually abuse the child. Sexual abuse includes (but is not limited to) rape, sodomy, or any act involving sexual intercourse or penetration. Here again, there is no requirement of a criminal investigation, prosecution or conviction. The parent need not have been charged with a felony sex offense.

Cases that fit the “**repeated abuse**” category of aggravated circumstances include cases where the child has been physically or sexually abused and sometime within the previous five (5) years, that same child or another child for whom the parent was legally responsible was found to have been abused. To fall into this category, the abuse need not have been severe. It is sufficient that there be a finding of abuse in the current case and at least one prior finding of abuse within the last five years.

If the motion to bypass reasonable efforts is based on “aggravated circumstances”, the finding in the “severe abuse”, “repeated abuse” or “sexual abuse” case must first be made before the court can grant the “no reasonable efforts” motion. Therefore, even if the motion is made before the finding of abuse, it is likely that a court will not rule on the motion until after a finding of severe, repeated or sexual abuse has been made. For suggestions on what to do during that interim time period, see section III below.

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<sup>1</sup> If a foster care agency becomes aware of circumstances that would warrant the filing of a 1039b motion to bypass reunification efforts, the agency must consult with the supervising DLS attorney in the appropriate borough in order to determine jointly how best to proceed.

## **B. Criminal Convictions**

A motion to relieve the agency of the obligation to make reasonable efforts to reunify a family may also be made if the parent has been convicted of any of the following “ASFA crimes”:

- murder of a sibling of the child
- manslaughter of a sibling of the child
- an attempt, solicitation or conspiracy to commit murder or manslaughter against the child or a sibling of the child
- aggravated assault against the child or a sibling of the child and the assault resulted in serious physical injury.

The conviction may have occurred in New York<sup>2</sup>, in any other State or territory, or in any Federal court. If you become aware that the parent may have such a conviction, you should immediately consult DLS to determine how best to confirm whether there is, in fact, a prior conviction and whether the crime involved the child or a sibling of the child. Although neither ASFA nor New York State law permits routine criminal record checks on birth parents with the New York State Division of Criminal Justice Services (“DCJS”), a court may, in appropriate cases, be able to issue a subpoena to DCJS for a parent’s criminal record.

If the conviction is confirmed, you should make a determination as quickly as possible as to whether it would be in the best interests of the child to continue to work with the parent or not.

In making such a determination, the child’s health, safety and physical and emotional well-being must be your overriding concern. Remember that the convictions you are dealing with involve extremely serious violent physical attacks on the child or a sibling of the child. If you make the determination that it would not be in the child’s best interest to work with the parent, you should immediately consult DLS to determine whether and when a motion should be made.

If the motion is based on the parent’s conviction of an ASFA crime, the motion cannot be brought until there has actually been a conviction. If the acts leading to the conviction are the same as the acts leading to the child’s foster care placement, the criminal conviction may not occur in criminal court until after the abuse case has been completed in Family Court.

However, if the conviction is for a crime that took place prior to the acts which led to the child’s placement in foster care, or if a criminal conviction occurs before the Family

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<sup>2</sup> In New York, the crime would include violations of any of the following sections of the Penal Law: 120.05, 120.10, 120.12, 125.15, 125.20, 125.25, or 125.27. However, social work staff are not expected to make the determination whether a specific section of the Penal Law has been violated. That is the DLS lawyer’s responsibility.

Court case is concluded, then the “no reasonable efforts” motion can be made as soon as you become aware that there has been a conviction.

### **C. Prior Sibling TPR**

Under ASFA, ACS is permitted to seek a court order relieving it of the responsibility to make diligent reunification efforts if the parent has had his or her rights to a sibling of the child involuntarily terminated. This does not include situations where the parent voluntarily surrendered his or her rights, even if the surrender took place during the course of termination proceedings.

In the event of a prior sibling TPR, the decision to seek a “no reasonable efforts” ruling should not be automatic. You should first ask yourself three questions:

1. Is it in the child’s best interests to be reunited with the parent?
2. Is it likely that the child can be safely reunited with his or her parent in the foreseeable future (generally, within 12 to 18 months of the child’s entry into care)?
3. Is it likely that the parent will cooperate fully with the agency in resolving the problems which led to the child’s placement?

In answering these questions, you should examine both the current situation and the circumstances surrounding the prior terminations of parental rights. In looking at prior terminations, the following factors are relevant:

- *the date of the prior termination(s)*. Was the prior TPR recent or did it occur many years ago?
- *the reason for the prior termination(s)*. Did the child who is in foster care now come into care for a reason similar to the reason which led to the earlier TPR or for a different reason? What were the facts underlying the prior TPR case?
- *prior history of reunification efforts*. Has the parent been receptive to prior rehabilitative efforts?
- *the results of a current evaluation of the parent*. Is the parent’s problem – mental illness, substance abuse – the same as at the time of the prior TPR? Has the problem worsened? Has it improved? Are there new services or treatment opportunities not previously available?

For example, if the prior termination was relatively recent and was based on permanent neglect, and the foster care agency had attempted diligently but unsuccessfully to work with the parent, it may be valid to conclude that this parent would most likely not be able to benefit from further rehabilitative efforts. This would be especially true if the same set of problems (e.g., long-term drug use for which past treatment efforts have been unsuccessful) is involved. On the other hand, if, for example, the termination took place many years ago and the parents’ life circumstances have since improved, the prior TPR may have little bearing on the current case.

Once you have assessed the situation and answered the three numbered questions listed above, you should seek a legal consultation. If the answer to all three questions is “no”, you should immediately seek a legal consultation to determine if a motion should be made for a court order to relieve the agency of its legal responsibility to make diligent efforts. If the answer to all three questions is “yes”, you should continue to work with the parent, but you should discuss the case with your attorney if circumstances change. If you answered “yes” to some and “no” to others, you should seek a legal consultation before proceeding further.

In situations involving the prior termination of parental rights to a sibling, the motion for a “no reasonable efforts” finding can be made at any time. All that is required from ACS is proof that a prior termination of parental rights took place. Caseworkers should come to their legal consultation with the prior “B” docket numbers (i.e., the TPR petition docket number), if available.

### **III. What To Do While a “No Reasonable Efforts” Motion Is Pending in Family Court**

In those cases where you have determined that reunification efforts would cause significant harm to the child, you should immediately consult with the attorney handling the “no reasonable efforts” motion to determine how best to proceed while the motion is pending in Family Court.

### **IV. Parents’ Defenses to a “No Reasonable Efforts” Motion**

If the Court finds that the parent has subjected the child to “aggravated circumstances”, has been convicted of an ASFA crime, or has had his/her parental rights to a sibling involuntarily terminated, the judge *must* grant the “no reasonable efforts” motion *unless* the parent can prove that making “reasonable efforts” to reunify :

1. would be in the child’s best interests, AND
2. would not be contrary to the child’s health and safety, AND
3. would likely result in reunification of the parent and child in the foreseeable future.

### **V. What To Do After a “No Reasonable Efforts” Motion Has Been Granted**

#### **A. 30-day Permanency Hearing**

In all cases where a “no reasonable efforts” motion has been granted, the Family Court must hold a permanency hearing within 30 days. The judge may require the filing of a petition for the permanency hearing. For those cases, DLS has created a special Permanency Hearing petition. At that hearing, ACS or the foster care agency must present to the Court a permanency plan for the child and a time frame for finalizing that plan.

The permanency hearing is an opportunity for the Court to take a serious look at the agency's plan for the child. ACS and foster care agency staff must be prepared to explain to the Court where they see the child living permanently or what efforts are being made to locate a permanent family for the child.

### **B. Filing for TPR**

If the permanency plan for the child is adoption, the agency must start the TPR planning process immediately. ACS and the case planning agency will be excused from having to offer services to parents or to prove "diligent efforts" to reunify the family as part of the TPR case in Family Court.

### **C. Meeting and Communicating with Birth Parents**

A parent's legal right to participate in a service plan review (SPR) conference is not automatically cut off by the making or granting of a 1039b motion. Indeed, the parent's presence at an SPR may provide an opportunity to discuss the option of voluntary surrender or any rehabilitative efforts the parent may have made on their own.

## **VI. Visitation**

Parents have an independent legal right to visitation with their children who are in foster care. Their right to visitation is not automatically cut off by the making or granting of a motion under Family Court Act 1039b.

Nonetheless, there are cases where visitation may be harmful to the child's physical or emotional well-being and is not in his or her best interests. Children who have been traumatized by severe physical or sexual abuse, or whose parents have killed a sibling, may be further emotionally or psychologically scarred if they are forced to visit with an abusive parent. In certain cases, a parent may threaten to retaliate against a child who has reported the abuse.

Where visitation would be traumatic to children, ACS has the right and the responsibility to petition the Family Court to restrict or suspend visitation. Alternatively, the petition to restrict or terminate visitation can be filed by the case planning agency, in accordance with ACS *Memorandum on Delegation of Selected Case Management Functions* (April 26, 1999). This motion can be made at any time.

A motion to restrict or suspend visitation should be considered in all "no reasonable efforts" cases involving severe physical or sexual abuse of a child and in all cases involving an ASFA crime. If you feel that it would be in the child's best interests to avoid contact with an abusive parent, you should immediately consult with your ACS attorney about making such a request of the Court.

Before making a motion to restrict or suspend visitation, the child's caseworker should evaluate the child to determine the impact of terminating visitation on the child's emotional or psychological well-being. The worker should assess the impact on the child of any visits that may have already occurred and develop a plan to emotionally prepare the child for a possible suspension of visitation if it is decided that filing a motion to suspend visitation is in the child's best interests

## **" No Reasonable Efforts" Checklist**

**If any of the following circumstances are present, you must discuss them with the DLS attorney assigned to your case. Reunification efforts may not be required if:**

### ***Aggravated Circumstances***

- The parent has severely physically abused the child (*for example*, burns, torture, severe beating, shaken baby syndrome)
- The child has been sexually abused either by the parent or by someone the parent *knew* to be sexually abusing the child (*for example*, rape, sodomy, or any act involving sexual intercourse or penetration)
- The parent has abused the child and there is at least one (1) prior finding of abuse against the same parent within the last 5 years involving either the same child or another child for whom the parent is legally responsible

### ***Criminal Convictions***

- The parent was convicted of murdering a sibling of the child
- The parent was convicted of manslaughter of a sibling of the child
- The parent was convicted of aggravated assault against the child or the child's sibling and the assault resulted in serious physical injury
- The parent was convicted of attempt, solicitation or conspiracy to commit murder or manslaughter against the child or a sibling of the child

### ***Prior Involuntary TPR***

- The parent's rights to a sibling of the child have been involuntarily terminated. Factors to take into account here include:
  - date of prior TPR(s)
  - reason for prior TPR(s)
  - prior history of reunification efforts
  - results of a current evaluation of the parent