

ARTICLE: CHILD WELL-BEING IN CONTEXT

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Text

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INTRODUCTION

When children are removed from their parents due to abuse or neglect, there are several issues that need to be immediately addressed by the attorneys for the children and parents, the child welfare workers, and the judge. As judges and attorneys handling child welfare cases, there are many issues to consider; for example, can the child be safe at home? If not, where should she live? Is there a plan in place to help the parents address the problem? What services and supports does the child need? Traditionally, of the triad of goals in child welfare cases of safety, permanency, and well-being, the main focus of systems improvements has been safety and permanency. The goal of safety requires either that protections be placed in the home so children can remain with their parents or be removed and placed with foster parents or relatives. The second goal, permanency, encourages parties to prevent children from languishing in foster care, which can be done by either reunifying the child with her parents as soon as possible or terminating the parents' rights and placing the child up for adoption in addition to a myriad of other options. ¹ However, recently there have been efforts to improve attention to well-being. This consideration is

¹ The permanency option the child welfare agency and the parties are pursuing is referred to as the child's "goal." It is also

driven in part by new research on trauma and **child**-development and an increased focus on what **is** in the **child's** best interests instead of what **is** in the parents' or agency's best interests.

Decisions about safety and permanency **are** difficult and case specific, but they **are** more concrete than concerns regarding **well-being**. If safety concerns drove the removal of a **child**, parties generally do not disagree with services that will enhance the **child's well-being**, like mental health services, even if the **child's** mental health needs did not bring the family into court in the first place. However, when a decision regarding removal or reunification with parents hinges on **well-being** issues, defining "**well-being**" and tying it into safety and permanency can **be** especially controversial. Do you remove a **child** when the home **is** too "dirty"? Do you allow a **child** to go back home if her parents continue smoking marijuana? The threshold between a dirty and an unsafe home can **be** subjective and based on personal opinion. For example, in a Philadelphia family court case, a parent had his rights terminated with regards to one **child** based on the home situation, but the **child's** sibling **was** never removed because a different caseworker believed the home **was** an appropriate place to live.² Similarly, personal opinions about whether **children** can **be** safe with parents who use marijuana may result in some **children being** returned home while similarly situated **children are** left in foster care.

[*107] Stability **is**, of course, hugely important to **child well-being**. Research suggests the benefits of growing up in an intact family can even outweigh some safety concerns. Researchers at the Massachusetts Institute of Technology found that for cases on "the margins" - where caseworkers might disagree about whether or not to remove - long-term **child well-being was** generally better supported by **children** remaining in the home.³ With regards to **well-being**, the main point **is** that **well-being** considerations should not unduly **be** a basis for removal or delay permanency when safety can **be** established. All three goals **are** not legally equal; according to the law, safety should **be** the primary concern and should trump outstanding **well-being** concerns regarding removal and return decisions.⁴ Safety provides some clarity to the gray, murky waters of **well-being**. If the dirty home **is** unsafe - if there **are** glass shards on the floor or animal feces everywhere - the **child** should **be** removed. If the parents **are** unsafe when they **are** high - they cannot function and completely disregard the **child's** needs - the **child** should not **be** returned. Of course, these situations still require subjective interpretation of specific facts, but this measure helps eradicate some of the bias that **is** harming **children** in the name of protecting their **well-being**. Like the refrain from the excellent recruitment advertisements for foster parents, "You don't have to **be** perfect to **be** a perfect parent."⁵ At the end of the day, birth parents do not need to **be** perfect, but they must **be** safe. Ultimately, safety and permanency also support **well-being**.

important to note that terminating parents' rights and releasing a **child** for adoption often does not result in an adoption, causing the **child** to languish in foster care anyway. However, whether there **are** other options that would better support permanency for the **child is** beyond the scope of this Article.

² This anecdote **is** based on the author's personal work experience in Philadelphia Family Court.

³ See Joseph J. Doyle, Jr., **Child** Protection and **Child** Outcomes: Measuring the Effects of Foster Care, 97 *Am. Econ. Rev.* 1583, 1583, 1607 (2007).

⁴ See 45 C.F.R. § 1356.21(b) (2014) ("[The] agency must make reasonable efforts to maintain the family unit and prevent the unnecessary removal of a **child** from his [or] her home, as long as the **child's** safety **is** assured.") (emphasis added); see also, 45 C.F.R. § 1355.25 (2014) ("The following principles ... should guide the States and Indian Tribes in developing, operating, and improving the continuum of **child** and family services... . The safety and **well-being** of **children** and of all family members **is** paramount. When safety can **be** assured, strengthening and preserving families **is** seen as the best way to promote the healthy development of **children**."); 42 U.S.C. § 675(1)(B) (2012) (specifying that a case plan will include a plan to "facilitate return of the **child** to his own safe home or the permanent placement of the **child**"); Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.); Adoption Assistance and **Child** Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C.).

⁵ For the Media, AdoptUsKids, <http://www.adoptuskids.org/for-the-media/help-raise-public-awareness> (last visited Mar. 23, 2015).

This Article explores how **well-being** fits into the legal context with safety and permanency. While there **are** obviously important roles that education, private service providers, health care, and other factors play in **child well-being**, the focus here **is** on the responsibility and authority of the **child** welfare agency and the courts to ensure a **child's well-being**. The Article starts off by exploring how to define **well-being** and how to balance it with permanency and safety. Then this Article addresses when the **child** welfare agency has the authority to intervene solely due to **well-being** concerns and attempts to work through some of the more difficult issues, such as poverty, substance abuse, teenage parents, mental health issues, and "dirty" homes. Finally, the Article will examine some of the options available to **child** welfare agencies and courts to address **well-being** concerns and how best to determine if **children** should **be** returned home.

I. WHAT **IS** "**WELL-BEING**"?

There **is** no statutory definition of "**well-being**." However, it **is** often characterized as [*108] having three broad domains: educational, physical, and emotional. Court performance measures developed by the National Resource Center on Legal and Judicial Issues, the National Center for State Courts, and **Children's** Bureau Court Improvement Program staff consider **child well-being** across the three domains.⁶ Measures of **well-being** include school placement stability, special education, timeliness of health screenings and health assessments, preventative health care, mental health screenings and assessments, psychotropic medications, sibling placement together, sibling and family visitation, transition plans for youth aging out of care, and teenage parents placed with their **children**.⁷

The **Children's** Bureau⁸ also released an Information Memorandum ("IM") in April 2012 on the "**social** and emotional **well-being** of **children** and youth involved in **child** welfare systems."⁹ The IM addresses many factors in **well-being**, including "kinship care, family connections, sibling placements, monthly parent visits, placement stability," school stability, and parental capacities.¹⁰ Taken together, these lists suggest that **well-being is** broadly defined and addresses most aspects of a **child's** life.

II. BALANCING **WELL-BEING**

Focusing on **child well-being** out of context **is** risky. **Child** welfare cases involve one or several issues identified as safety threats; case planning and court orders address specific threats to **children** and attempt to ameliorate inappropriate behaviors of parents or build their protective capacity.¹¹ For **child** welfare involvement, safety threats also have to place the **child** in imminent danger.¹² In one sense, **well-being** can **be** seen on a continuum with safety. As discussed above, there **is** a point where a very dirty house becomes a threat to safety. There **are** cases where a very poor diet can become neglect. However, until the situation moves from a general concern into a

⁶ **Well-Being**: Court Performance Measures for **Children**, Nat'l **Child** Welfare Resource Center on Legal & Jud. Issues, 2 (2011), <http://icmelearning.com/well-being-event/docs/Well-Being-Measures-Courts-Children.pdf>.

⁷ See id. at 17-29, 36-37, 40-46.

⁸ This **is** the federal agency under the **U.S.** Health and Human Services and the Administration for **Children** and Families that oversees **child** welfare matters.

⁹ Information Memorandum, Admin. For **Child** & Families, 1 (Apr. 17, 2012), www.acf.hhs.gov/sites/default/files/cb/im1204.pdf.

¹⁰ Id. at 8. Parental capacities **are** often considered a measure of safety in **child** welfare. See, e.g., Therese Roe Lund & Jennifer Renne, **Child** Safety: A Guide for Judges and Attorneys, A.B.A., 9 (2009), <http://www.americanbar.org/content/dam/aba/uncategorized/child-safety-guide.pdf>.

¹¹ See generally Lund & Renne, supra note 10.

¹² See *Siliven v. Dep't of Child Servs.*, 635 F.3d 921, 926 (7th Cir. 2011) (explaining that an agency's seizure of a **child** must **be** based on a reasonable belief of immediate harm, supported by probable cause, or pursuant to a court order); Lund & Renne, supra note 10, at 2.

serious threat to **well-being**, and thus, a danger to the **child**, the government **is** not empowered by statute or case law to forcefully intervene into a family's life.

Trying to balance safety and **well-being** reflects a tension between competing values. Valuing parents' rights to raise their **children** and the bonds that parents, **children**, and extended family share **is** balanced with the government's interest in **children being** safe and healthy. With the best **social** work and legal practice, these values and interests align and everyone "wins" by [*109] keeping a family intact or pursuing swift permanency options. However, situations involving **child** abuse and neglect **are** rarely so clear-cut. Situations arise where all of the interests cannot all **be** reconciled at once; individuals involved need to look at the context, both of the competing values and of the decision point in the case.

The Supreme Court has repeatedly affirmed that the Fourteenth Amendment gives parents wide discretion to make decisions about their **children**.¹³ The private interest in the custody and care of **children** receives great deference absent a strong governmental interest¹⁴ such as protecting **children** from harm.¹⁵ Further, the level of involvement must **be** proportional to the threats to the **child**. This analysis also holds true when the state's involvement with the family **is** analyzed under the Fourth Amendment as a seizure¹⁶ or under the statutory clause requiring that **children be** placed in "a safe setting that **is** the least-restrictive (most family like) ... setting."¹⁷ The state can only infringe on parents' rights as much as **is** required to protect a **child** from harm. **Well-being** factors **are** generally areas most agree **are** fundamental to raising a **child** and thus protected by the Fourteenth Amendment, such as making educational decisions.¹⁸ Therefore, a **child's well-being** alone often does not rise to a "powerful government interest" that allows uninvited government intervention.

To put the balance between the state and family in practice, the law establishes a threshold of safety that determines when the government can intervene to remove a **child** from the home and when it must return a **child** to her parents. Under the Adoption and Safe Families Act¹⁹ ("ASFA"), the "agency must make reasonable efforts to maintain the family unit and prevent the unnecessary removal of a **child** from his [or] her home, as long as the **child's** safety **is** assured."²⁰ If "out-of-home placement **is** necessary to ensure the immediate safety of the **child**,"

¹³ See *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (foreign languages); *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534-35 (1925) (private school); *Wisconsin v. Yoder*, 406 U.S. 205, 213-14, 232-34 (1972) (school attendance).

¹⁴ See *Stanley v. Illinois*, 405 U.S. 645, 651-53, 656-59 (1972) (determining that unwed father's interest in raising **children** outweighs state's interest if father **is** a fit parent).

¹⁵ See *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944) (maintaining that the state has an interest in protecting the welfare of **children** that can **be** stronger than parents' interest in raising the **child**).

¹⁶ See *Siliven*, 635 F.3d at 926-28 (finding the fact that the agency placed the **child** with the mother based on suspicions of abuse occurring in father's home despite doubts about the identity of the abuser showed less intrusion under Fourth Amendment seizure analysis).

¹⁷ 42 U.S.C. § 675(5)(A) (2012).

¹⁸ **Well-being** can also include factors that help a **child** thrive. One **well-being** indicator **is** "**children** ages 3-5 who **were** read to every day in the last week by a family member." America's **Children** in Brief: Key National Indicators of **Well-Being**, Fed. Interagency F. on **Child** & Fam. Stat., 20 (2012), http://www.childstats.gov/pdf/ac2012/ac_12.pdf. Another **well-being** indicator **is** "percentages of high school graduates completing mathematics, science, and foreign language coursework in high school." Id. at 14.

¹⁹ Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, **111 Stat. 2115** (codified as amended in scattered sections of 42 U.S.C.).

²⁰ See 45 C.F.R. § 1356.21(b) (2014) (emphasis added) (providing regulations to implement the ASFA); 45 C.F.R. § 1355.25 (2014) (same).

efforts must **be** made to safely reunify the family. ²¹ For parents' attorneys, this **is** important because case plans [*110] may require things that will benefit the family, but may not **be** closely related to resolving safety threats. A common example **is** requiring parents to complete a GED even though the home may **be** a safe place for the **child** to live. This **is** not to say that many services geared towards enhancing **well-being** will not result in increased capacity of the **child** and parent to **be** safely together, but safety must **be** the focus for decisions about out-of-home placement. Whether the court may require the parent to complete a GED or other **well-being** focused services after physical return **is** less clear.

III. APPROPRIATE **WELL-BEING** CONSIDERATIONS

Federal law broadly mandates consideration of a **child's well-being** in removal decisions, reasonable efforts determinations, case planning, court reviews, and permanency decisions. Language concerning **child well-being** from the Adoption Assistance and **Child** Welfare Act ("AACWA") of 1980 still survives in Title IV-E of the **Social** Security Act ("Title IV-E"), ²² the federal provision appropriating money to agencies and setting forth requirements. The term "**well-being**" gets brief specific mention in Title IV-E, but there **are** provisions that address all three broad areas: physical, educational, and emotional. ²³

Title IV-E requires that state plans ensure that "in making ...reasonable efforts [to preserve and reunify families], the **child's** health and safety shall **be** the paramount concern." ²⁴ Title IV-E addresses educational **well-being** by requiring that the "education records of the **child**" **be** included in case plans ²⁵ and that an effort **is** made to ensure educational stability. ²⁶ Title IV-E also supports emotional **well-being** by emphasizing the continuity of relationships and familial bonds through relative notice requirements ²⁷ and maintaining sibling connections. ²⁸ **Child** welfare agencies also have a role in ensuring "early and periodic screening, diagnostic, and treatment services" ("EPSD&T"), which directly affect **child well-being**. ²⁹

In court hearings, judges must review whether the **child's** and family's needs - including **well-being** needs - **are being** met. Section 675(5)(B) of Title 42 of the United States Code requires periodic reviews to determine the appropriateness of the placement, compliance with the [*111] case plan, progress made to remedy the issues that led to foster care, and "to project a likely date by which the **child** may **be** returned to and safely maintained in the

²¹ 45 C.F.R. § 1356.21(b) (2014).

²² The AACWA amended Title IV of the **Social** Security Act to add Part E. Adoption Assistance and **Child** Welfare Act of 1980, Pub. L. No. 96-272, [94 Stat. 500, 501 \(1980\)](#) (codified as amended in scattered sections of 42 U.S.C.) (adding [42 U.S.C. §§670-76](#)). While the term "**well-being**" **was** not used in AACWA, the law required written case plans to "improve the conditions in the parents' home, facilitate return of the **child** to his own home or the permanent placement of the **child**, and address the needs of the **child** while in foster care." [94 Stat. at 510](#); see [42 U.S.C. § 675\(1\)\(B\)](#) (2012) (specifying that a case plan will include a plan to "facilitate return of the **child** to his own safe home or the permanent placement of the **child**") (emphasis added).

²³ See [42 U.S.C. § 671\(a\)\(31\)](#) (2012) (regarding sibling contact); [42 U.S.C. § 671\(c\)](#) (2012) (regarding confidentiality). The term "**well-being**" **is** mentioned several times in regulations implementing the **Social** Security Act. See, e.g., 45 C.F.R. § 1357.10(c) (2014) (defining **Child** and Family Services Plans).

²⁴ [42 U.S.C. § 671\(a\)\(15\)\(A\)](#) (2012) (emphasis added).

²⁵ Id. § 675(1)(C).

²⁶ Id. § 675(1)(G).

²⁷ Id. § 671(a)(29).

²⁸ Id. § 671(a)(31). USC § 671(a)(31) (2012)

²⁹ Id. § 1396a(a)(43) (referencing [42 U.S.C. § 1396d\(r\)](#) (2012)).

home or placed for adoption or legal guardianship." ³⁰ Though this section still highlights the safety threshold, the appropriateness of the case plan and placement provisions also involve ***well-being*** factors.

In addition to legislation, case law addresses ***well-being*** issues from a ***child's*** rights perspective holding in some cases that foster ***children are*** entitled to minimum levels of ***well-being***. ³¹ Some federal courts have even held that ***children*** have an individual right to case plans and reviews. ³² There ***are*** circuit splits and the standards set ***are*** fairly low, but there ***is*** at least some authority that ***children*** in the ***child*** welfare system have constitutional due process rights to appropriate care and services. ³³

IV. AUTHORITY TO INTERVENE IN NEGLECT CASES

In cases where ***well-being is*** a primary issue, it may ***be*** true that the ***child's*** situation would ***be*** improved "but for" the concerns presented by the facts in the case. However, the question ***is*** whether the ***child*** welfare agency or courts can compel parents to remedy those conditions. Some states find authority to intervene by including the term "***well-being***" in their statutory definitions of neglect, ³⁴ and others find constructive authority through references to ***well-being*** domains in statutes. The terms "necessary," "essential," and "adequate" ***are*** often found in these sections, showing a threshold ***well*** above merely "best interests" for the system to become involved in a family. ³⁵ For example, in Arkansas, "neglect" includes "failure or irremediable inability to provide for the essential and necessary physical, mental, or emotional needs of the ***child***." ³⁶ In Connecticut, a neglected ***child is*** one "who, for reasons other than ***being*** impoverished ... ***is being*** denied proper care and attention, physically, educationally, [*112] emotionally or morally." ³⁷ A ***child is*** considered neglected when he or she "***is*** not receiving the proper or necessary support or medical or other remedial care recognized under Illinois state law as necessary for a ***child's well-being***, or other care necessary for his or her ***well-being***, including adequate food, clothing and shelter." ³⁸ In Delaware, failing to provide "necessary care" for the ***child's*** "general ***well-being***" can ***be*** considered neglect. ³⁹ Of course, what ***is*** "proper" or "necessary" ***is*** still a subjective determination, but it ***is*** clear that without these supports the ***child*** will ***be*** harmed.

³⁰ Id. § 675(5)(B).

³¹ E.g., [Brian A. ex rel. Brooks v. Sundquist](#), 149 F. Supp. 2d 941, 947 (M.D. Tenn. 2000), aff'd sub nom. [Brian A. ex rel. Brooks v. Hattaway](#), 83 F. App'x 692 (6th Cir. 2003); [Jeanine B. ex rel. Blondis v. Thompson](#), 877 F. Supp. 1268, 1284 (E.D. Wis. 1995).

³² See, e.g., [Brian A.](#), 149 F. Supp. 2d at 947; [Jeanine B.](#), 877 F. Supp. at 1284; contra [Charlie H. v. Whitman](#), 83 F. Supp. 2d 476, 485 (D.N.J. 2000); [Carson P. ex rel. Foreman v. Heineman](#), 240 F.R.D. 456, 542 (D. Neb. 2007).

³³ See, e.g., [Brian A.](#), 149 F. Supp. 2d at 952-56; [Braam ex rel. Braam v. State](#), 81 P.3d 851, 854, 856-57 (Wash. 2003).

³⁴ See, e.g., Ark. Code Ann. § 12-~~18~~-103(14)(A)(ii) (2014); Conn. Gen. Stat. Ann. § 46b-120(6) (West 2015); Del. Code. Ann. tit. 10, § 901(~~18~~)(b)(1) (2014); Idaho Code Ann. § 16-1602(28)(a) (2014); 325 Ill. Comp. Stat. Ann. 5/3 (West 2014); Kan. Stat. Ann. § 38-2202(y) (West 2014) (defining abuse); Ky. Rev. Stat. Ann. § 600.020(1)(a)(8) (West 2014); Miss. Code Ann. § 43-21-105(l)(i) (2014); Mo. Ann. Stat. § 210.110(12) (West 2014); N.J. Stat. Ann. § 9:6-8.21(c)(7) (West 2015); N.M. Stat. Ann. § 32A-4-2(E)(2) (West 2014); Ohio Rev. Code. Ann. § 2151.03(A)(3) (LexisNexis 2014); S.D. Codified Laws § 26-8A-2(4) (2014); Utah Code Ann. § 78A-6-105(27)(a)(iii) (LexisNexis 2014); Wyo. Stat. Ann. § 14-3-202(a)(vii) (LexisNexis 2014).

³⁵ However, if a state law provides authority to remove a ***child*** at a lower ***well-being*** threshold, it might not actually ***be*** a proper case for the state to claim Title IV-E money and the authority to intervene ***is*** questionable in light of parental rights cases cited in note 13 above.

³⁶ Ark. Code Ann. § 12-~~18~~-103(14)(A)(iv) (2014) (emphasis added).

³⁷ Conn. Gen. Stat. Ann. § 46b-120(6) (West 2015) (emphasis added).

³⁸ 325 Ill. Comp. Stat. Ann. 5/3 (West 2014) (emphasis added).

³⁹ Del. Code. Ann. tit.10, § 901(~~18~~)(b)(1) (West 2014) (emphasis added).

State neglect and abuse laws require that a threat **is** "imminent"⁴⁰ or "serious"⁴¹ For example, in Montana a report of abuse or neglect "must **be** based upon perceived present real harm or a perceived present imminent risk of harm."⁴² In California there must **be** a "substantial risk that the **child** will suffer[] serious physical harm" or a "substantial risk of suffering serious emotional damage."⁴³ To **be** considered a "threat of danger," the threat must **be** observable, immediate, severe, and out of control.⁴⁴

Though there **are** some **well-being** situations that can **be** constructed as neglect with serious, imminent harm to a **child** that warrants government involvement, there **are** several common scenarios where **well-being** issues **are** erroneously used to justify state involvement. Again, the problems below can become so extreme that they cross into actionable serious **well-being** threats to safety. Most cases, of course, do not solely involve **well-being** concerns, but the discussion **is** most instructive after safety concerns have **been** remedied and one party continues to advocate for out-of-home placement solely based on **well-being** concerns.

A. Poverty

While extreme poverty may negatively affect **child well-being**, eleven states and the District of Columbia exempt poverty alone from **being** considered "neglect."⁴⁵ Representative language **is** found in the D.C. Code, stating that "the term 'negligent treatment' or [*113] 'maltreatment' means failure to provide [a **child** with] adequate food, clothing, shelter, or medical care, which includes medical neglect, and the deprivation **is** not due to the lack of financial means of his or her parent, guardian, or other custodian."⁴⁶ In other states, parents' attorneys, as **well as children's** attorneys, can argue that intervention by the **child** welfare agency **is** inappropriate when poverty **is** the only issue relating to the safety threshold. If the **child is** safe but living in impoverished conditions, the belief that the **child** would **be** better off in foster care **is** not sufficient. Further, other systems, such as housing authorities, electronic benefits programs, and school lunch programs can help impoverished parents address the agency's concerns without **child** welfare involvement. Support programs that provide for subsistence levels of food and shelter arguably establish a legislatively approved standard for minimally adequate **well-being**.

B. Unsanitary Conditions

"Dirty house" cases can rise to the level of an actionable threat when the home **is** hazardous to the **child**.⁴⁷ The conditions must create more than the basic hazards found in an average household and must present more than a

⁴⁰ See, e.g., D.C. Code § 16-2301(9)(A)(v)(2015); Mont. Code Ann. § 41-3-102(4)(b)(West 2013); N.J. Stat. Ann. 9:6-8.21(c)(4) (West 2015); N.Y. **Soc.** Serv. law § 371(4-a)(i) (McKinney 2014).

⁴¹ Cal. Welf. & Inst. Code § 300(a) (West 2014); Ind. Code Ann. 31-34-1-2(a)(1) (West 2014); Me. Rev. Stat. Ann. tit. 22, § 4002(6)(a) (2013); Minn. Stat. Ann. § 626.556 subdiv.2(f)(2) (West 2015); Mont. Code Ann. § 41-3-102(4)(b) (West 2013); N.H. Rev. Stat. Ann. § 169-C:3(XIX)(b) (2014); N.Y. **Soc.** Serv. law § 371(4-b)(i) (McKinney 2014); 23 **Pa.** Cons. Stat. Ann. § 6303 (West 2014); Wis. Stat. Ann. § 48.02(12g) (West 2014).

⁴² [Gross v. Myers, 748 P.2d 459, 461 \(Mont. 1987\)](#) (emphasis added).

⁴³ Cal. Welf. & Inst. Code § 300(c) (West 2014) (emphasis added).

⁴⁴ Lund & Renne, *supra* note 10, at 9.

⁴⁵ Ark. Code Ann. § 12-~~18~~-103(14)(A)(ii) (2014); D.C. Code § 16-2301(9)(A)(ii) (2015); Fla. Stat. Ann. § 39.01(30)(f) (West 2014); Kan. Stat. Ann. § 38-2202(d)(1) (West 2014); La. **Child**. Code Ann. art. 603(~~18~~) (2014); N.H. Rev. Stat. Ann. § 169-C:3(XIX)(b) (2014); N.D. Cent. Code Ann. § 27-20-02(8)(a) (2013) (exempting poverty from definition of deprived **child**); 23 **Pa.** Cons. Stat. Ann. § 6304(a) (West 2014); Tex. Fam. Code Ann. § 261.001(4)(B)(iii) (West 2013); Wash. Rev. Code Ann. § 26.44.020(16) (West 2014); W.Va. Code Ann. § 49-1-3(11)(A)(i) (LexisNexis 2014); Wis. Stat. Ann. § 48.02(12g) (West 2014).

⁴⁶ D.C. Code § 16-2301(24) (2015) (emphasis added).

⁴⁷ See, e.g., [State v. Laura S. \(In re Kennedy B.\), No. A-10-274, 2010 WL 3958844, at 3, 6-8](#) (Neb. Ct. App. Sept. 28, 2010) (overturning termination of parental rights in a dirty house case after the case worker testified that "the house **was** never so

potential risk of harm. Again, even with such hazards and a substantial risk of harm, the intervention must **be** proportional; an actionable threat does not mean that the lawful action **is** removal. A **child** may **be** able to safely remain home if the agency helps address the hazards. As the California Court of Appeal noted in one case:

County **social** service agencies cannot cast themselves in the role of a super-OSHA for families. While we certainly hope conditions improve in [the **child**s] household, chronic messiness by itself and apart from any unsanitary conditions or resulting illness or accident, **is** just not clear and convincing evidence of a substantial risk of harm... .

The specific hazards which the **social** service agency identified ... **are** trivial to the point of **being** pretextual. A shorted lamp socket could occur in the White House. Motor boats normally have propellers on them. **Children**'s plastic wading pools do not come with filtration systems, and if they **are** filled with water for any amount of time the water **is** going to become dirty. Worse hazards than these may **be** found on practically every farm in America. If such conditions **were** sufficient for removal from the home, generations of Americans who grew up on farms and ranches would have spent their childhoods in foster care.⁴⁸

"Dirty house" cases can **be** some of the most subjective determinations, as described in the introduction. If the **child** will almost certainly **be** harmed by staying in the home, they should [*114] **be** removed. These types of hazards could include the presence of needles, glass, and animal feces that could cause health problems.⁴⁹ "Dirty house" **is** sometimes conflated with a parent's refusal to clean a cluttered home or address a hoarding problem that speaks to the parent's capacity to care for the **child**. If the "dirty house" **is** actually indicative of a parent's mental health issue and not simply their disregard for the safety of the home, it should **be** treated as an issue separate and apart from whether the home **is** a safe place to live.

C. Teen Parents

In cases involving teen parents, courts have held that **children were** improperly removed solely because the teen parent **was** in foster care. In these cases, there **were** no threats to the **child**'s safety; rather, the removal **was** based on the agency's apparent belief that the **child**'s **well-being was** at risk due to the mother's age and status as a foster **child**.⁵⁰ The threshold for intervening based on **well-being is** not met when the sole concern **is** the parents' age or placement in foster care - there must **be** an actual abuse or neglect allegation.⁵¹ These situations sometimes seem to **be** motivated by the state seeking funding for the infant's foster care costs, even though federal regulations provide foster care payments for **children** placed with minor parents.⁵² These payments meet the infant's needs without removal from the minor parent's legal custody.⁵³ Teen parents **are** still afforded the same

unsafe that the **children** could not have a visit"); *In re R.W.*, 930 N.E.2d 1070, 1076 (Ill. Ct. App. 2010) (overturning adjudication finding neglect because mother had cleaned dirty house by the time the petition **was** filed).

⁴⁸ *Orange Cnty. Soc. Servs. Agency v. Susan E. (In re Paul E.)*, 46 Cal. Rptr. 2d 289, 294-95 (Ct. App. 1995) (footnotes omitted).

⁴⁹ A controversial issue right now **is** whether cockroach infestations **are** a health hazard since roaches can exacerbate asthma in **children**. See Cockroaches and Pests, Am. Lung Ass'n, <http://www.lung.org/healthy-air/home/resources/cockroaches-and-pests.html> (last visited Mar. 23, 2015). This **is** certainly an issue that may **be** fact-specific to certain **children** and families, and falls outside the scope of this Article.

⁵⁰ See, e.g., *R.F. v. State Dep't of Human Res.*, 740 So. 2d. 1093, 1093, 1095 (Ala. Civ. App. 1999); *In re Hall*, 703 A.2d 717, 718-19 (Pa. Super. Ct. 1997); See also *In re Tayquon H.*, 821 A.2d 796, 799 (Conn. App. Ct. 2003).

⁵¹ See, e.g., *R.F. v. State Dep't of Human Res.*, 740 So. 2d. at 1095.

⁵² 45 C.F.R § 1356.21(j) (2014) (implementing 42 U.S.C. § 675(4)(B) (2012)).

⁵³ *Id.*

Fourteenth Amendment protections as adult parents; their **children are** not automatically unsafe just because they **are** a minor.⁵⁴

D. Substance Abuse

Judges and attorneys often encounter parental substance use and abuse in **child** welfare cases. Most parties agree that parental substance abuse affects a **child's well-being**, but the more important question **is** whether it affects the **child** in a serious way. A pair of recent cases held it **was** improper to adjudicate **children** neglected due to parental substance abuse without specific evidence of serious threats to the **children's** safety.⁵⁵ These decisions **are** especially important for parents' attorneys whose clients may struggle with substance abuse but otherwise provide a safe placement for the **child**.

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E. Parents with Disabilities

Questions surrounding the ability of parents with disabilities to provide adequate parental care often touch on **well-being**. In *In re N.E.F.-J.*, the appellate court held that the juvenile court improperly concluded that the **child was** subjected to neglect because the mother **was** developmentally delayed.⁵⁶ The mother had limited understanding of **child** development and did not respond perfectly to her **child's** needs, treating her one-year-old like an infant.⁵⁷ She needed the assistance of service providers and the family friend she lived with to help her care for her **children**.⁵⁸ Without her support network, the threat to her **child's well-being** might **be** serious, but her situation lacked the necessary immediacy required for neglect.⁵⁹

If measures **are** in place to increase the parent's capacities and remove threats to the **child** and there **is** no sign that the supports will go away, the potential for harm to **well-being is** not enough for court involvement. When parents have disabilities, advocates should remember to balance the great benefits to **children** in remaining home with their parents.⁶⁰

F. Educational Neglect and Truancy

Education and school attendance usually fall under **well-being**. Educational neglect typically involves a parent's failure to ensure a **child's** proper education while truancy **is** usually focused on a **child's** own failure to attend school. Lack of school attendance can pose a very serious threat to **child well-being**, overcoming the threshold for unwelcome state involvement. School attendance impacts **well-being** areas beyond educational attainment, such as **social** activities, proper nutrition in the case of subsidized lunch programs, and risks the youth may **be** exposed to while unsupervised during school hours. These threats to **well-being** can meet the threshold for agency

⁵⁴ See *L.A.T. v. Dept. of Human Res. (In re J.T.)*, 588 So. 2d 471, (Ala. Civ. App. 1991).

⁵⁵ *Dep't of Human Servs. v. C.Z. (In re K.A.M.)*, 236 P.3d 791, 794-95 (Or. Ct. App. 2010); *S.S. v. Dep't of Children & Families*, 81 So. 3d 618, 621-22, 623-24 (Fla. Dist. Ct. App. 2012).

⁵⁶ *Dep't of Human Servs. v. B.L.J. (In re N.E.F.-J.)*, 268 P.3d 696, 699-700 (Or. Ct. App. 2011).

⁵⁷ *Id.* at 698.

⁵⁸ See *id.* at 698-99.

⁵⁹ *Id.* at 700.

⁶⁰ For more information, see Ella Callow, Maintaining Families When Parents Have Disabilities, 28 *Child L. Prac.* 133 (2009), http://www.americanbar.org/content/dam/aba/publications/center_on_children_and_the_law/parentrepresentation/maintaining_families.pdf.

involvement. Still, parents have wide latitude in choosing how to educate their **children** and there must **be** clear threats due to the parents' actions or inactions to **be** considered neglect. In *In re Alexander G.*, for example, the appellate court found that although the parents **were** uncooperative with the school, failed to address their **child's** behavioral problems, and "demonstrated a lack of good parental judgment," the level of harm from the parents' inaction **was** insufficient for a neglect adjudication.⁶¹

Truancy cases **are** usually dealt with under status offense statutes holding the adolescent responsible. Typically, the **child's** behaviors **are** central in a truancy case whereas educational neglect falls on the parent, but the division between truancy and educational neglect can **be** academic - the difference **is** often merely the **child's** age. In either situation, the parents **are** only responsible if their actions or inactions led to the necessary level of harm regarding education and school attendance. These types of cases **are** also often properly dealt with under the Individuals with Disabilities Education Act⁶² or section 504 of the Rehabilitation Act.⁶³ These laws may require services that help with behaviors or needs that exacerbate the conditions that put the **child** at risk for removal.⁶⁴

V. HOW THE AGENCY MAY INTERVENE

The appropriate balance of parental rights and protecting **children** means that involuntary government action should **be** based on at least serious threats to **well-being**. Further, dispositional decisions after that threshold **is** reached should **be** proportional to the situation. The following explores how **well-being** issues can **be** addressed through increasing levels of **child** welfare agency involvement. Without official court involvement, agencies can offer families voluntary services, but sometimes the services come with the threat of court involvement and can hardly **be** considered voluntary.

A. Voluntary Services

The least amount of interference with the family **is** when an agency merely suggests actions to parents to address **child well-being** concerns but does not file a petition to place the family under court supervision. When there **is** only a lower level **well-being** concern that does not rise to a safety threat, this **is** the only type of intervention an agency can make. Offering voluntary services may also occur when there **is** a report of abuse or neglect that **is** not substantiated (or verified) by the agency. If the agency lacks grounds to file a petition because the situation does not meet the threshold of **being** unsafe or a serious **well-being** threat, the case worker should make it clear to the family that the recommendations **are** merely suggestions.

Voluntary services can **be** a great tool for preventing further state involvement and improving outcomes for **children** when parents **are** agreeable. Caseworkers know about services that may help families mitigate any potential threats before the situation reaches a legally actionable threshold. The agency may also have influence with service providers who can assist the family.

The next level of involvement after purely voluntary services **is** when the agency has grounds to intervene, but the parent voluntarily agrees to a plan to address the problem without the court's involvement. Again, while most agency policies **are** primarily written regarding **child** safety, serious **well-being** concerns could justify entering a

⁶¹ [In re Alexander G., 93 A.D.3d 904, 906 \(N.Y. App. Div. 2012\).](#)

⁶² [20 U.S.C. §§1400-1482](#) (2012).

⁶³ Rehabilitation Act of 1973 § 504, [29 U.S.C. § 794](#) (2012) (amended 2014). For more information, see Joseph B. Tulman, Using Special Education Advocacy to Avoid or Resolve Status Offense Charges, in *Representing Juvenile Status Offenders 89* (Sally Small Inada & Claire S. Chiamulera eds., 2010), http://www.americanbar.org/content/dam/aba/migrated/child/PublicDocuments/RJSO_FINAL.pdf (discussing how lawyers can assist **children** in receiving benefits under the Individuals with Disabilities Education Act and section 504 of the Rehabilitation Act).

⁶⁴ See Tulman, *supra* note 63.

plan with a family in many states. Often the remedy involves a written "safety plan," an agreement put in place to mitigate threats to the child, reduce the child's vulnerability, and increase the parents' ability to care for the child so the child may remain at home if possible.⁶⁵

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B.

"Voluntary" Services

Offering preventative services to families on a voluntary basis when there is no serious threat to the child leads to a number of concerns about whether "voluntary services" are really voluntary. Parents may feel coerced into a safety plan because they believe compliance is required to keep their child, or the agency may threaten to file a dependency petition if the parents do not agree to the plan. Most case law on alleged coercion regarding safety plans unsurprisingly addresses safety concerns, but the potential for improper coercion is high if a case is based largely on well-being allegations.

In Dupuy v. Samuels, the court analogizes the offer of a safety plan to a prosecutor's offer of a plea agreement, and to an interim agreement in a tort settlement - the outcome may be better for the individual if they take the plea or settlement offer, but they are not required to accept.⁶⁶ If the agency threatens to go forward with court proceedings if the parents do not agree to the plan and they have the proper grounds to do so, they are not coercing the parents but asserting their legal rights.⁶⁷ However, because courts are less likely to remove children solely for well-being concerns, the agency must accurately acknowledge the legal actions they could take when negotiating a plan where there are merely threats to well-being. In most jurisdictions no attorneys are assigned to parents in the pre-petition stage, but in the minority where they are, advice of counsel as to likely outcomes and rights regarding voluntary participation can be helpful.

VI. HOW COURTS MAY INTERVENE

Once a well-being concern rises to a serious level where the potential for harm is involved, the agency may file a petition. Again, the level of intervention should still be proportional to the situation with no more agency intervention than is warranted. Filing a petition does not automatically mean the child should be removed. The spectrum of court-ordered services ranges from mandatory services while children remain at home to the removal of the child from the home. Regardless, in all situations court involvement usually brings the benefits of legal representation for the parents and the child and of judicial oversight that holds families and the child welfare agency accountable. A dependency adjudication, or finding that the family is in need of court supervision, also gives the court authority to make orders to promote a child's well-being whether they are placed at home or in care.

A. Court-Ordered In-Home Services

If a child is adjudicated dependent, the court may order the family to take certain actions with or without agency oversight. While it is uncommon for agencies to file petitions when they are not seeking removal, the option of leaving the child in the home with protective services in place is available in every state. The federal requirement that a child be placed in the least-restrictive, most family-like environment⁶⁸ supports this type of action because

⁶⁵ See Lund & Renne, *supra* note 10, at 21.

⁶⁶ [Dupuy v. Samuels, 465 F.3d 757, 761 \(7th Cir. 2006\)](#).

⁶⁷ [Id. at 762](#).

⁶⁸ [42 U.S.C. § 675\(5\)\(A\)](#) (2012); Each child must have a case plan that provides for "a safe setting that is the least restrictive (most family like) and most appropriate setting available and in close proximity to the parents' home, consistent with the best interest and special needs of the child." *Id.*

placement in the [*118] home is the least-restrictive setting if it is safe.⁶⁹ However, the court may or may not agree with the agency's recommendation that the child remain at home once a petition is filed. Agencies might opt for court-ordered services as opposed to voluntary services because the parents' compliance with court-ordered plans has different "teeth" under court supervision. Unlike when a parent voluntarily engages in services,⁷⁰ if parents do not comply with the terms of a court-ordered plan, their lack of compliance may be used against them.⁷¹

B. Removal

While the court may compel cooperation with services when serious well-being concerns arise, a child should not be removed unless the child is unsafe. As discussed above, reasonable efforts must be made to prevent removal; if the child still has to be removed, reasonable efforts must be made immediately to "make it possible for a child to safely return" home.⁷² After removal, efforts by the attorneys and the agency focus on attempting safe reunification, a case plan is intended to "facilitate return of the child to his own safe home"⁷³ and periodic review hearings must be held to review efforts "toward alleviating or mitigating the causes necessitating placement in foster care."⁷⁴ Once a child is removed, safety becomes the main requirement for return.

The need for this higher standard for removal focused on safety, instead of just well-being concerns, long predates current statutes. In 1955, the Pennsylvania Superior Court described a number of well-being concerns that did not meet the threshold for removal, noting that the lives of almost all children can be improved in some way:

A child cannot be declared "neglected" merely because his condition might be improved by changing his parents. The welfare of many children might be served by taking them from their homes and placing them in what the officials may consider a better home. But the [law] was not intended to provide a procedure to take the children of the poor and give them to the rich, nor to take the children of the illiterate and give them to the educated, nor to take the children of the crude and give them to the cultured, nor to take the children of the weak and sickly and give them to the strong and healthy.⁷⁵

Though "safe" is rarely defined in state statutes, years of collaboration with judges, child [*119] welfare workers, and attorneys by the National Child Welfare Resource Centers on Child Protective Services and Legal and Judicial Issues resulted in a definition that has broad consensus: children are unsafe when "threats of danger exist within the family and children are vulnerable to such threats, and parents have insufficient protective capacities to manage or control threats."⁷⁶

As mentioned earlier, extreme situations can arise where well-being concerns cross over into safety domains. For example, while children should probably not eat fast food every day, a daily diet of McDonald's would very rarely

⁶⁹ See *In re L.L.*, No. 10-0469, 2010 WL 1881857, at 4 (Iowa Ct. App. May 12, 2010).

⁷⁰ See *M.C. v. Marion Cnty. Dept. of Child Servs. (In re B.N.)*, 969 N.E.2d 1021, 1026 (Ind. Ct. App. 2012) (refusing to consider the mother's lack of participation in voluntary programs, in determining whether children were in need of services).

⁷¹ *State v. Lerry M. (In re Devin W.)*, 707 N.W.2d 758, 764 (Neb. 2005) (acknowledging the juvenile court's finding that "it would be contrary to [the child's] welfare, health, and safety" for him to remain in the home due to the parents' failure to follow the safety plan).

⁷² 42 U.S.C. § 671(15)(B)(ii) (2012) (emphasis added).

⁷³ 42 U.S.C. § 675(1)(B) (2012) (emphasis added).

⁷⁴ 42 U.S.C. § 675(5)(B) (2012).

⁷⁵ *In re Rinker*, 117 A.2d 780, 783 (Pa. Super. Ct. 1955).

⁷⁶ Lund & Renne, *supra* note 10, at 2 (emphasis omitted).

be considered grounds for intervention or removal. However, in a specific case, such a diet might actually pose certain, immediate harm to a **child**. In *In re Brittany T.*, while discussing the very few cases it found regarding removals due to parents neglecting to address **child** obesity, the New York Court noted, "state intervention would generally "not **be** justified ... simply because a **child was** overweight, or did not simply engage in a healthy and fit lifestyle.' However, where, as here, there **are** clear medical standards and convincing evidence that there exist severe, life-limiting dangers due to parental lifestyle and persistent neglect, removal **is** justified." ⁷⁷

In addition to the practical difficulty of determining when a serious **well-being** threat crosses into unsafe territory, there **is** other potential for confusion. At a disposition stage where a parent seeks to retain custody, the state must prove that removal **is** the least-restrictive alternative that will ensure safety. ⁷⁸ However, many state statutes use "best interests" to guide decisions in removal hearings, assessing factors that can overlap substantially with **well-being**. The federal statute and many state statutes also require the all-encompassing finding that remaining in the home **is** contrary to a **child's** "welfare." ⁷⁹ Some states require both. For example, in Idaho, in an order for "removal of the **child** [or **children**] from the home," the court **is** to make "written, case-specific findings that remaining in the home **is** contrary to the [**child's** or **children's**] welfare and that vesting legal custody with the [agency] **is** in the best interest of the **child** [or **children**]." ⁸⁰ Some confusion likely comes from professionals also working in private custody cases, where "best interests" **is** the correct standard; for example between two parents. ⁸¹

Going back to the triad, especially when statutes require consideration of issues like best interests that overlap with **well-being**, it may seem that **well-being** and safety **are** on equal footing. This **is** not the case: safety first, **well-being** second. If leaving the **child** in the home **is** not safe and cannot **be** made safe, only then **is** it appropriate for the court and the agency to consider what **is** best for the **child** with regards to the **child's well-being**. The proper standard, given the balancing scheme, **is** to consider whether to remove on safety criteria before moving on to **well-being** considerations.

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C. Out-of-Home Care

If the state has assumed physical care for the **child**, the agency has broad authority and an obligation to provide for the **child's well-being**. Less clear **is** the level of authority a parent continues to have over day-to-day **well-being** needs given the agency's often enumerated duties. The best practice **is** that parents with a reunification goal **be** a part of the decision-making process and activities to promote **child well-being**. While the court may have impliedly acknowledged a parent's missteps regarding some safety aspects, it does not automatically follow that the parent can no longer make other decisions. Parents know their **child** better than newly acquainted professionals and caregivers. Thus, their involvement in education, health, and mental health can **be** a benefit from the information-gathering perspective. Additionally, **children** almost always benefit from continued relationships with their parents. ⁸²

⁷⁷ *In re Brittany T.*, 835 N.Y.S.2d 829, 839 (N.Y. Fam. Ct. 2007) (alteration in original) (emphasis added) (citation omitted) (quoting *In re D.K.*, 58 Pa. D. & C.4th 353, 358 (Pa. Ct. C.P. 2002)), rev'd on other grounds, 48 A.D. 3d 995 (N.Y. App. Div. 2008).

⁷⁸ See 42 U.S.C. § 671 (15)(A)-(B) (2012).

⁷⁹ 42 U.S.C. § 672(a)(2)(A)(ii) (2012).

⁸⁰ Idaho Juv. R. 34(b) (2014).

⁸¹ See, e.g., *T.N.L. v. Dep't of Children & Families*, 132 So. 3d 319, 324 (Fla. Dist. Ct. App. 2014).

⁸² See Doyle, *supra* note 3.

Child welfare practice has evolved more than the law to address this issue in recent years. Family-centered practice and other inclusive strength-based approaches focus on greater family involvement in case planning to yield better outcomes for the family.⁸³ The emphasis on parental involvement **is** echoed in federal regulations requiring that case plans **be** developed jointly with parents.⁸⁴ Both casework practice and the requirement of jointly developed case plans let parents participate in decisions when the **child is** in or at risk of out-of-home placement.

Parental visitation and attendance at appointments supports the **child** mentally and emotionally, so courts and attorneys should make every effort to ensure the parent-**child** relationship **is** continually nurtured.

The parent should **be** encouraged to accompany the **child** to medical appointments and therapy sessions. Involvement in the **child's** professional appointments keeps the parent informed about the **child's** developmental progress and special needs, teaches the parent to respond more effectively to the **child's** needs, and reinforces the parent's continuing involvement in and responsibility for the **child's well-being**.⁸⁵

This involvement of course can **be** supported by attorneys. Depending on the case, however, parents' attorneys may need to consider whether parental involvement in these activities should **be** via an informal agreement between the parties or through case plan requirements that could **be** later held against a parent should they fail to meet them. Time constraints should also **be** considered, and prioritization should go towards completion of the most safety-related items. Where the goal **is** for the **child** to return home, parental involvement while the **child is** out of care can support the **child's well-being** and ease the transition home.

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D. Reunification

Decisions to reunify the **child** after removal should **be** based on safety,⁸⁶ not on **well-being** or "best interests." When the goal **is** reunification, the agency has an obligation to develop a case plan with the parents' (and often **child's**) participation that **is** individually tailored to address the specific safety threats and enhance protective capacities so the **child** can return home. Once safety threats have **been** reduced or parental protective capacities have **been** enhanced, the **child** should **be** returned. After the **child** returns home, the court or the agency can continue to **be** involved with voluntary or court-ordered in-home services if serious **well-being** concerns remain.

⁸³ See Nat'l **Child** Welfare Res. Ctr. for Family-Centered Practice, Can We Put Clothes on This Emperor?, Best Prac./Next Prac., Summer 2000, at 7, 7, <http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/newsletter/BNPNSummer00.pdf> (discussing family-centered practice).

⁸⁴ 45 C.F.R. § 1356.21(g)(1) (2014).

⁸⁵ Margaret Smariga, Visitation with Infants and Toddlers in Foster Care: What Judges and Attorneys Need to Know 13 (Claire Sandt Chiamulera ed., 2007), available at http://www.americanbar.org/content/dam/aba/administrative/child_law/visitation_brief.authcheckdam.pdf.

⁸⁶ Periodic reviews **are** required

in order to determine the safety of the **child**, the continuing necessity for and appropriateness of the placement, the extent of compliance with the case plan, and the extent of progress which has **been** made toward alleviating or mitigating the causes necessitating placement in foster care, and to project a likely date by which the **child** may **be** returned to and safely maintained in the home or placed for adoption or legal guardianship[]... .

[42 U.S.C. § 675\(5\)\(B\)](#) (2012) (emphasis added).

If a parent **is** able to provide a safe environment for the **child**, return should not hinge on **well-being** concerns such as whether the parent **is** employed.⁸⁷ A parent's literacy or educational attainment **are** also not safety concerns even though they can serve to support the **child** in valuable ways.⁸⁸ Similarly, financial instability may **be** a concern but it does not rise to the level of a serious threat of harm.⁸⁹ A parent needs to have adequate resources to care for their **child**, but parents and **children** should not **be** separated just because they **are** poor.⁹⁰

Some courts have found on balance that while emotional stability **is** important, a **child** that has not "sufficiently bonded" with her parent should not remain in foster care when the parent **is** a safe caregiver, even if the **child** has a significant bond with another adult.⁹¹ As the California Court of Appeal stated in David B., "it cannot mean merely that the parent in question **is** less than ideal, did not benefit from the reunification services as much as we might have hoped, or seems less capable than an available foster parent or other family member... . We **are** looking for [*122] passing grades here, not straight A's."⁹²

Reunification also cannot **be** denied based on what could potentially happen in the future if all safety threats **are** currently addressed. Like the harm in a neglect finding must **be** serious or imminent, the safety risk to the **child** must **be** real and present to prevent reunification. Recognizing there **is** always some risk in reunification, the court in David B. stated, "if an absolute guarantee of safety **were** required, we have a difficult time envisioning a case in which the court could properly return a **child** to parental custody. Even the mythical perfect parent cannot guarantee anything."⁹³

If the parents **are** unwilling or unable to correct the conditions that resulted in the **child's** placement into care, the court can rule out reunification.⁹⁴ To rule out reunification, the agency must prove that reunification with the parent would risk the **child's** safety and the risks cannot **be** remedied in the reasonable future. When **well-being is** on a continuum with safety, as discussed above, this might mean that the parents **are** not able to downgrade the problem from a safety threat to just a **well-being** concern. Like with the Brittany T. case, there **are** extreme examples where neglecting a **child's well-being** crosses into the safety realm and **is** sufficient to prevent

⁸⁷ See David B. v. Super. Ct. of Orange Cnty., [20 Cal. Rptr. 3d 336, 354-55 \(Ct. App. 2004\)](#) (discussing that there **was** no evidence that the father's home **was** physically unsafe, and that unemployment should not bar reunification with father); see also [In re H.V., 37 A.3d 588, 594-96 \(Pa. Super. Ct. 2012\)](#) (explaining the goal **change** from reunification to relative placement because the mother's boyfriend had a criminal record **was** improper when the offense **was** not for domestic violence or anything **child**-related); [M.E.C. v. Commonwealth, Cabinet for Health & Family Servs., 254 S.W.3d 846, 854-55 \(Ky. Ct. App. 2008\)](#) (holding the mother's hospitalization and incarceration did not constitute abuse or neglect).

⁸⁸ See David B., [20 Cal. Rptr. 3d at 351](#) (explaining that a parent's illiteracy should not **be** considered in the court's determination of parental fitness).

⁸⁹ See [S.C. Dep't of Soc. Servs. v. Mother, 720 S.E.2d 920, 926](#) (S.C. Ct. App.) (refusing to characterize "mother's limited financial ability ... as causing an "unreasonable risk of harm" and determining that continued in-home services should **be** provided instead of **changing** the plan to terminate parental rights).

⁹⁰ See David B., [20 Cal. Rptr. 3d at 354](#) ("We cannot separate parents and their **children** merely because they **are** poor."); [Dep't of Soc. Servs. 720 S.E.2d at 926.](#)

⁹¹ E.g., David B., [20 Cal. Rptr. 3d at 351](#); [M.E.C., 254 S.W.3d at 855.](#)

⁹² David B., [20 Cal. Rptr. 3d at 352.](#)

⁹³ [Id. at 358.](#)

⁹⁴ See, e.g., [In re Dezerea G., 97 A.D.3d 933, 935 \(N.Y. App. Div. 2012\)](#) (holding the mother's relationship with the **child's** abusive father made it clear the **child** would not **be** safe in the home); [Dep't of Human Servs. v. T.R. \(In re T.M.R.\), 282 P.3d 969, 975 \(Or. App. 2012\)](#) (upholding the **change** of the goal away from reunification where parents continued to offer no plausible explanation for **child's** numerous bone fractures and bruises).

reunification if not properly addressed. In L.P.R., the court found return **was** inappropriate due to an emotionally unsafe situation.⁹⁵ The **child** had **been** removed from the mother due to physical abuse and the father had participated in services and in visits.⁹⁶ However, the **child was** diagnosed with post-traumatic stress disorder and **was** particularly sensitive to sound; the father had a history of loud, verbally aggressive behavior that **was** unlikely to **change** due to his mental illness.⁹⁷ Under the particular facts, the court found reunification with the parents would **be** "extremely threatening and detrimental" to the **child's** health, justifying **changing** the permanency plan and ruling out reunification.⁹⁸

E. Other Permanency Goals

When reunification **is** properly ruled out by a court, the case will usually proceed with permanency and **well-being** issues at the forefront. When the court **is** deciding where to place the **child** - whether between relatives or unrelated foster parents - the available options have **been** vetted for safety through home studies. Ideally, parties should use concurrent planning to identify and assess all safe options early in the case, even while reunification efforts **are** in full swing, to prevent a delay in identifying an appropriate placement or goal once reunification **is** ruled out.

[*123] Once reunification **is** no longer an option, the court faces the task of making placement decisions between relatives or other caregivers. Courts **are** given wide discretion in these decisions, though relatives have some advantages over others. Relatives **are** usually given preference in placement and permanency decisions - a recognition that a **child's well-being** and permanency often benefit from relative connections. The ASFA, strengthened by the Fostering Connections to Success and Increasing Adoptions Act⁹⁹ ("Fostering Connections") in this regard, provides that states "shall consider giving preference to an adult relative over a non-related caregiver when determining a placement for a **child**, provided that the relative caregiver meets all relevant state **child** protection standards."¹⁰⁰ Many state statutes **are** even clearer on relative preference. Rather than considering giving a preference, more typical language reads, "the court shall give preferential consideration to an adult relative over a nonrelated caregiver."¹⁰¹ Cases involving the Indian **Child** Welfare Act¹⁰² ("ICWA") have much stronger protections for the family and tribe.¹⁰³

⁹⁵ [Dep't. of Human Servs. v. S.N. \(In re L.P.R.\) 282 P.3d 901, 908 \(Or. Ct. App. 2012\).](#)

⁹⁶ [Id. at 903.](#)

⁹⁷ [Id. at 905, 907-08.](#)

⁹⁸ *Id.*; see also [In re Joseph D., No. B156524, 2002 WL 1288735, at 7](#) (Cal. Ct. App. June 11, 2002) (holding youth's fear of mother because of her prior abuse and youth's desire not to **be** reunited with her constituted compelling evidence that reunification would **be** detrimental to youth).. App. 2012)

⁹⁹ Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, **122 Stat. 3949** (codified as amended in scattered sections of 42 **U.S.C.**).

¹⁰⁰ [42 U.S.C. § 671\(a\)\(19\)](#) (2012).

¹⁰¹ Ark. Code Ann. § 9-9-102 (2014). See also Alaska Stat. § 47.14.100(e)-(f) (2014); Cal. Welf. & Inst. Code § 361.3(a) (West Supp. 2015); Conn. Gen. Stat. Ann. § 46b-129(j)(3) (West 2015); Idaho Code Ann. § 16-1629(11) (2014); Ind. Code § 31-34-4-2 (West 2014); La. **Child**. Code Ann. Art. 622(B)(1)-(2) (2014); Me. Rev. Stat. tit. 22, § 4062(4) (2013); Minn. Stat. § 260C.212 subdiv.2 (West 2015); Mo. Ann. Stat § 210.565(1)-(4) (West 2014); Nev. Rev. Stat. Ann. § 432B.550 (LexisNexis 2013).

¹⁰² Indian **Child** Welfare Act of 1978, Pub. L. No. 95-608, [92 Stat. 3069](#) (codified as amended in scattered sections of 25 **U.S.C.**)

¹⁰³ Family and tribal placement preferences **are** to **be** applied unless there **is** "good cause to the contrary." [25 U.S.C. § 1915\(b\)](#).

Another advantage relatives have **is** that some **well-being** concerns that **are** not safety-related can **be** "waived" for relatives. Fostering Connections added the provision that **child** welfare agencies could establish policies for waiving "non-safety standards" on a "case-by-case basis ... in relative foster family homes for specific **children** in care,"¹⁰⁴ though this practice existed in many states before Fostering Connections passed.¹⁰⁵ According to data provided to the **Children's** Bureau, waivers have often **been** granted to relatives for things such as lacking adequate income, medical problems, home maintenance issues, adequate furnishings, and lacking home telephones.¹⁰⁶ While improving a **child's well-being** cannot **be** the primary reason for removal from her parents or preventing reunification, it can **be** the driving consideration once the parents **are** no longer an option.

[*124]

VII. CONCLUSION

Well-being is regularly addressed by judges and attorneys regarding the **child's** educational needs, which home will provide the most emotional support, and whether physical and mental health services **are being** obtained. These **are** crucial considerations and the oversight of judges and attorneys helps **children** succeed and thrive. While a **child's well-being** should **be** continually addressed, there **are** limited instances when it should **be** the driver in the case. **Well-being** concerns should not outweigh a safe reunification; a **child** should not wait in care while the court works to ensure every aspect of **well-being is** supported in a home that **is** safe. Every childhood could **be changed** to improve **well-being**. The dominating question **is: are** those improvements worth a **child** losing her family?

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¹⁰⁴ [42 U.S.C. § 671\(a\)\(10\)](#) (2010).

¹⁰⁵ Rob Geen, The Evolution of Kinship Care Policy and Practice, 14 *Future Child* 131, 138 (2004), available at http://www.princeton.edu/futureofchildren/publications/docs/14_01_07.pdf.

¹⁰⁶ **Children's** Bureau, Report to Congress on States' Use of Waivers of Non-Safety Licensing Standards for Relative Foster Family Homes 8 (2011), www.acf.hhs.gov/sites/default/files/cb/report_congress_statesuse.pdf.