

CHILD WELL-BEING IN CONTEXT

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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 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.

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

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.

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

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).

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 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

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.

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," efforts must be made to safely reunify the family.²¹ For parents' attorneys, this is important because case plans

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 "[c]hildren 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).

²¹ 45 C.F.R. § 1356.21(b) (2014).

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 plans²⁵ 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 requirements²⁷ 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

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).

²⁹ *Id.* § 1396a(a)(43) (referencing 42 U.S.C. § 1396d(r) (2012)).

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 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 “[f]ailure 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,

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).

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.

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 “[t]he term ‘negligent treatment’ or

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).

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).

‘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 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

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 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).

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 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.

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.*

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).

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 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

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.

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

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 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

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.

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

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 placement in the

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.*

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

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).

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 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.

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

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).

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

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.

[T]he 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.

⁸² See Doyle, *supra* note 3.

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/BPNPsummer00.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.

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.

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.*, “[i]t 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

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).

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 “[m]other’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.

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, “[i]f 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 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.

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).

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).

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 [s]tate 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

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.

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).

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.

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?