

training of lawyers, educators, law enforcement officers, and providers of child welfare, mental health, substance abuse and domestic violence services. When parties have a grasp of the problems that often lead to child abuse and neglect and the services that are available, they can better assist in the appropriate referral to those services. Similarly, when service providers have an understanding of the legal process, they are better able to help the families they are serving.

3. Information Sharing

The juvenile court can work to develop agreements to support appropriate information sharing among and between service agencies, including DFCS and the lawyers representing children and families in deprivation actions. Too often, the various agencies and offices that serve at-risk families operate independently of each other and are overly bound by a misunderstanding of their obligations to keep information confidential. The courts can sponsor or co-sponsor training to local educators and medical providers regarding the workings of the child welfare system and in turn can assist the schools to evaluate their policies to assure sharing of information to address the needs of children who are at risk of experiencing chronic abuse and neglect.

4. Maximizing Federal Funding

Finally, by collaborating with DFCS, the juvenile court helps the agency maximize federal funding under the Title IV-E Foster Care and Adoption Assistance entitlement program.⁹⁰ Title IV-E requirements include a reasonable efforts finding by the court and a finding as to why it is contrary to the welfare of the child to remain in the home. When DFCS makes reasonable efforts to preserve families and otherwise follows federal mandates, then DFCS has begun the process of assuring eligibility for this funding. When DFCS, the Special Assistant Attorney General (SAAG), and the court focus on IV-E requirements of timeliness of hearings and orders reflecting these findings, the state receives federal funding for foster care that otherwise must be paid for through the state budget.⁹¹ Training of judges, SAAGs, DFCS, attorneys, and guardians ad litem assures a strong collaborative relationship in which the court has the ability to make reasonable efforts findings that are meaningful and well documented.

5. Protocols for Reasonable Efforts

When the court works with the local DFCS administration and other parties and advocates to develop protocols for documenting reasonable efforts, DFCS knows what the court expects from DFCS with regard to family preservation efforts. A protocol reflects mutual respect between the court and DFCS. The court does not develop the family preservation plan, but it does review the plan and determine whether the plan is adequate to address the reasons for removal and includes sufficient services to avoid removal—and achieve reunification if removal has already occurred. If the court, DFCS, and other parties have a protocol regarding reasonable efforts

Title IV-E Foster Care Reimbursements

Out of 13,965 children in out-of-home care in Georgia in 2005, only 5,113 children, or 36.6%, received Title IV-E federal foster care assistance.

Title IV-E foster care reimbursements to states constitute the largest federal expenditure to address child abuse and neglect. The federal dollars are matched with state dollars to cover the costs of:

- Foster care maintenance, such as housing, food, and clothing;
- Foster care administration, including case management; and
- Foster care training.

In 2004, Georgia spent \$441,987,629 for child welfare services. Of this amount, 64% was from federal funds, 35% was from state funds, and 1% was from local funds. Of the federal funds Georgia received in 2004 for child welfare, 32% was from Title IV-E Foster Care and Adoption Assistance, 8% came from Title IV-B Child Welfare Services and Promoting Safe and Stable Families, 19% was from Medicaid, 9% came from the Social Services Block Grant, 31% was from TANF, and 1% came from other federal sources.

Source: Child Welfare League of America, Georgia's Children 2008.

⁹⁰ 42 U.S.C. §§ 670-75 (2008).

⁹¹ *Making Reasonable Efforts: A Presentation by Judge Richard FitzGerald*, available at <http://www.law.emory.edu/webcast/fitzgerald.ram>. (last visited Dec. 7, 2008).

to prevent removals, then the court's findings on reasonable efforts will less often come as a surprise to the agency.

As judges work with the local administration, parties, advocates, and community service providers to develop protocols, they must take care that they do not relegate the consideration of reasonable efforts to a mere effort of checking boxes on a form. The findings are based upon individualized sworn testimony for each case as to the nature and extent of the reasonable efforts made to avoid removal. Some courts require the case manager to provide a sworn affidavit prior to the hearing that details the efforts that have been made. When such affidavits are provided to all parties prior to the hearing, the parties' attorneys have the opportunity to review the description of services and other interventions with their clients to determine whether the services were provided, were effective, and if not, why not.

D. Court Findings of Contrary to the Welfare

When authorizing the removal of a child, the court must find that continuation in the home of the parent or legal guardian would be contrary to the child's welfare. The court must make the same finding at subsequent reviews of the court's order.⁹² The determination is not based on a best interest standard as in a case involving a custody dispute between parents, and the decision should not be based on a determination that the child might have better advantages outside of the family home.⁹³ The decision to remove a child from the home must be based on the child's welfare.⁹⁴

1. Judicial Authorization of Removal

The judicial authorization of removal is one of the most critical points in the deprivation case. In some judicial circuits, the judge takes the phone calls from DFCS requesting authority to remove a child from the home, and in other circuits, the judges delegate the authority to an intake officer.⁹⁵ Juvenile courts are responsible for ensuring that DFCS removes children from their families only when there are no reasonable alternatives to ensuring the child's safety.⁹⁶ To be able to evaluate the request for authorization to remove, the judge or intake officer must have a thorough understanding of DFCS policy regarding removal, knowledge of the services that DFCS has provided or could provide to the family to protect the child in the home, and a strong grasp of constitutional rights, due process of law, and the legal requirement of reasonable efforts to prevent the necessity of removal.

A detailed set of questions for the court to ask the DFCS case manager at intake can help to ensure that the judge or officer granting removal authority has sufficient information to make a fair and just decision. The request for judicial authorization to remove may be the first opportunity for the court to set high expectations for DFCS' efforts. DFCS staff should know that they will not get authorization to remove a child from the home

⁹² O.C.G.A. § 15-11-57(a) (2008); 42 U.S.C. § 672(a)(1) (2008).

⁹³ *In re A.P.H.*, 236 Ga. App. 762, 763 (Ga. Ct. App. 1999).

⁹⁴ *In re D.E.K.*, 236 Ga. App. 574, 577 (Ga. Ct. App. 1999).

⁹⁵ O.C.G.A. § 15-11-45(1) (2008); §15-11-45(4) (2008).

⁹⁶ O.C.G.A. § 15-11-46 (2008).

unless they have exhausted the available alternatives to protect the child in the home.

The court should first require information about the extent and results of DFCS' investigation of the maltreatment. The next inquiry should be into DFCS' assessment of the child's safety in the home and its assessment of the risk that the child faces if left in the home. The court should ask for details of the services that DFCS provided directly to the family and also what community resources DFCS tried to connect to the family. If the family received services, there should be inquiry into how active the case manager has been in the case and why services were not successful in avoiding the need to remove the child. Finally, the court should seek information about resources or assistance that could have been available to the family through relatives or friends. A suggested list of questions to be asked at intake is attached as Appendix C.

2. 72-Hour Hearing

If the child is removed from the family in an emergency or based on judicial authorization without a hearing, Georgia law requires that the court hold an informal detention hearing no later than 72 hours after the child is placed into care.⁹⁷ Because the 72-hour hearing—also called the detention hearing, probable cause hearing, or shelter care hearing—is informal, the judge is permitted to consider testimony and other submissions that are not admissible under the rules of evidence. Nonetheless, lawyers representing the parents and the child should still consider objecting to evidence that does not comport with the rules, and judges should be cautious about considering such evidence. It is up to the court to ensure that families are not deprived of due process of law even at this informal stage of the proceedings.

In addition to the incident or events precipitating the removal of the child from the home, the 72-hour hearing focuses on the prior contact between the family and DFCS and other community services. The same questions appropriate to ask at the time of the request for judicial authorization to remove are also appropriate to ask at the 72-hour hearing. The questions should include why the caseworker believes that DFCS' efforts to prevent the need to remove the child from the home were unsuccessful. Furthermore, the court should inquire into how circumstances may have changed in the time between the initial removal of the child from the home and the time of the hearing up to three days later.

After hearing the testimony, the court may determine that the risk to the child's safety in the home is no longer high enough to justify keeping the child in the custody of DFCS or anyone other than the parents. The court may find that there is probable cause to suspect that the child is deprived under Georgia law, but that it would not be contrary to the welfare of the child to return home. The court can then return the child to the family and impose conditions for the child's safety and care.⁹⁸ Alternatively, if the court determines that it is still contrary to the child's welfare to return home, the court may place the child in the temporary custody of DFCS or others as authorized by law.⁹⁹

⁹⁷ O.C.G.A. § 15-11-49(c)(3) (2008).

⁹⁸ O.C.G.A. § 15-11-55(a)(1) (2008).

⁹⁹ O.C.G.A. § 15-11-55 (2008).

Home Under Protective Order

Lawyers for the parties, including the parents or children, may request that the court allow the child to remain in the home or that the court return the child to the home under a protective order. The court may enter a protective order on its own motion at any time that the court is disposing of a case or is about to dispose of a case. O.C.G.A. § 15-11-11. The court can promote the application for protective orders by DFCS by showing a preference for the orders over removals.

The purpose of a protective order is to restrain or otherwise control the conduct of a person. The person who is the subject of the application need not be a party to the case at the time of the application, but the person's conduct in question must affect a party's success in complying with a juvenile court order. The conduct to be controlled must be reasonably related to the issues that bring the child to the court's attention, and the order may not impose unreasonable conditions on the person. The court must always inform the person of the fact that the order may be enforced by a contempt of court citation.

Source: Council of Juvenile Court Judges of Georgia, Bench Book, § XXII at 1.

3. The Welfare of a Child—Guidance from Case Law

It is clear under the Georgia Code that the court must base any order removing a child from the home on a finding that continuation in the home would be contrary to the child's welfare, but the Georgia Code gives no guidance on what factors the court should consider in making the contrary to the welfare finding. The case law from Georgia's appellate courts provides some limited guidance. However, the Georgia Court of Appeals does not often get the chance to review a juvenile court's decision to authorize the initial removal of a child. The very nature of a deprivation case, in which parents and DFCS should be working together to enable the family to reunify as quickly as possible, coupled with quick statutory timelines, does not lend itself to the use of appellate review as a way to address concerns at the beginning of a case.

One of the few decisions addressing the decision to remove a child, *In re D.E.K.*, decided by the Georgia Court of Appeals in 1999, makes clear that a parent's conduct or misconduct does not constitute deprivation that warrants removal unless the parent's conduct has a negative impact on the child's welfare.¹⁰⁰ The Court of Appeals noted the evidence of the unstable life of D.E.K.'s mother, including numerous incidents of domestic violence and substance abuse, and an incident when the mother left her one-year-old child buckled into a car seat in an unattended parked car. The court found, however, that the mother had never injured D.E.K. and that she had met all of the child's basic needs. Therefore, the court held that there was insufficient evidence to support the juvenile court's finding that the child was deprived and that removal was necessary to ensure the child's welfare.¹⁰¹

A more recent case from the Court of Appeals, *In re W.A.P.*, also focused on the needs of a child in the face of evidence of a mother's misconduct, but found that the child was indeed at risk, because there was sufficient evidence of the mother's habit of leaving the one month old child in lengthy "time out," along with evidence that she took the baby out in cold weather without proper clothing and that she allowed him to sleep in a bed with soft blankets and pillows that could suffocate a child of that age.¹⁰² The court held that there was evidence to show that the mother's actions had a negative impact on the child's welfare.¹⁰³

Appellate decisions in cases involving a termination of parental rights can also be instructive to the question of what the court would consider to be contrary to the welfare of a child in a removal setting. When a juvenile court terminates a parent's rights, the court must find that continued deprivation is likely to cause serious physical, mental, emotional, or moral harm to the child.¹⁰⁴ The Court of Appeals found in *In re J.T.W.* that although there was sufficient evidence of continuing deprivation from the mother's instability and pattern of victimization by domestic violence, there was not sufficient evidence that the continuing deprivation would lead to serious harm to the child.¹⁰⁵

¹⁰⁰ *In re D.E.K.*, 263 Ga. App. at 574.

¹⁰¹ *Id.*

¹⁰² *In re W.A.P.*, 293 Ga. App. 433, 435 (Ga. Ct. App. 2008).

¹⁰³ *Id.* at 436.

¹⁰⁴ *In re T.B.*, 249 Ga. App. 283, 286 (Ga. Ct. App. 2001).

¹⁰⁵ *In re J.T.W.*, 270 Ga. App. 26, 36 (Ga. Ct. App. 2004).

It has long been clear that deprivation does not mean that a child is or could be better cared for in another home environment. In *R.C.N. v. State*, the Court of Appeals held that the state may not

blithely intercede [in a family's life] simply because the child's lot is substandard. A mother's failure to fully live up to societal norms for productivity, morality, cleanliness, and responsibility does not summarily rob her of the right to raise her own offspring, nor does it end the child's right to be raised by its own mother.¹⁰⁶

On the other hand, the Court of Appeals has recognized that the definition of deprivation under the law is broad enough to allow the trial court a great deal of discretion in reaching the finding.¹⁰⁷ The Court of Appeals has also repeatedly stated that it is a fair inference that the chronic use of controlled substances has an adverse effect on a minor child.¹⁰⁸

4. The Welfare of a Child—Safety Decisions

As described above in Part II, DFCS policy guides case managers in making decisions about a child's safety and the risk of future maltreatment. Safety decisions require balancing the threat of danger, the child's vulnerability to the danger, and the family's ability to protect the child from the danger.¹⁰⁹

Lawyers representing parties in a deprivation case, as well as the judges making the decision whether to remove the child from the home, need a structure for the decision making process. The court can begin to create such a structure by requiring DFCS to demonstrate that it based its recommendation regarding the child's safety on sufficient information. As noted above, asking DFCS the questions set forth in Appendix C will help lawyers and judges to determine whether DFCS has sufficient information on which to base its recommendation. The answers to those questions will also help the court make its own fully informed decision about the child's safety. To make a good decision, the court needs information about the alleged maltreatment, but it also needs extensive information about the child and the child's family.

The legal professionals in the court must then apply their own analytical skills to the question of whether the child is safe and whether continuation in the home would be contrary to the welfare of the child. It is not uncommon for legal professionals to question whether they should "second guess" DFCS' recommendations. To ensure that the courts are providing meaningful oversight of DFCS' actions, however, the lawyers and the judges in our child welfare system need to have confidence in their own ability to apply logical reasoning to the question of child safety.

Safety—Six Key Questions to be Asked

1. What is the nature and extent of the maltreatment?
2. What circumstances accompany the maltreatment?
3. How does the child function day to day?
4. How does the parent discipline the child?
5. What are the overall parenting practices?
6. How does the parent manage his own life?

Source: Terry Rowe Lund, and Jennifer Renne, National Resource Center, Child Safety: A Guide for Judges and Attorneys.

¹⁰⁶ *R.C.N. v. State*, 141 Ga. App. 490, 491 (Ga. Ct. App. 1977) (overruled on other grounds).

¹⁰⁷ *In re S.S.*, 232 Ga. App. 287, 288-89 (Ga. Ct. App. 1998).

¹⁰⁸ *In re T.L.*, 279 Ga. App. 7, 12 (Ga. Ct. App. 2006) (quoting *In the Interest of J.L.*, 269 Ga. App. 226, 229 (Ga. Ct. App. 2004)); *In re K.W.*, 279 Ga. App. 319, 321 (Ga. Ct. App. 2006).

¹⁰⁹ TERRY ROWE LUND, AND JENNIFER RENNE, NATIONAL RESOURCE CENTER, CHILD SAFETY: A GUIDE FOR JUDGES AND ATTORNEYS 8 (forthcoming 2009) (manuscript on file with authors).