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SB 163 research and remarks

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THREE YEARS OLD OR YOUNGER

II. 780-783, modifying 80-3-307.

This removes a provision that has been in the code since 1994 providing that where a child who is three years old or younger cannot return home, the permanency goal shall be adoption.

This provision recognizes the vulnerable period of time when a child's crucial attachments form. This provision promises that these young children will have full membership in a constitutionally-protected family, either through reunification or through adoption.¹

PARENT-TIME

¹ ASFA requires that dispositional determinations such as the permanency goal, reasonable efforts, sibling contact, and parent-time reflect a **child's sense of time**. *See, e.g.*, 42 U.S.C. § 673b(d)(3)(B) (incentives for adoptions where time from removal to finalized adoptions is less than 24 months); 42 U.S.C. § 673b(i) (technical assistance to encourage more adoptions out of foster care system, expedite termination of parental rights, moving children toward adoption as permanency goal; fast-tracking children who have not attained 1 year of age into pre-adoptive placements); 45 C.F.R. § 1355.25(h) (services should be "based on the changing needs of children"); 45 C.F.R. § 1355.21(b)(3) (court to effect alternate permanency goal "in a timely manner"); 63 FR 50074 ("the court that hears child welfare dependency cases must determine whether reasonable efforts are required based on the developmental needs of the child"); 63 FR 50058-01 (system should "respect[] a child's developmental needs and sense of time").

- ll. 85-87 (modifying 80-2a-201, listing constitutional rights *prior* to juvenile court involvement)
- ll.453-58 (modifying 80-3-302, shelter hearing, where court has just found that continued custody would result in serious danger to the physical health or safety of the child)
- ll.824-50 (modifying 80-3-402, which goes to adjudication only)
- ll.933-966 (modifying 80-3-405, general disposition)
- ll. 1111-1130 (modifying 80-3-406, goes to reunification services)
- ll.1228-1254 (modifying 80-3-407, 6-month review)
- ll. 1348-1374 (modifying 80-3-409, goes to permanency hearing, and applies *after* court has changed goal)

This provision makes visitation rights-based, when, under the funding statute, all dispositional determinations should be based on the paramount concern of the child’s health, safety, and welfare.²

This provision applies *after* a juvenile court has found that custody would create a serious danger to the physical health or safety of the child, and *after* the juvenile court and creates a presumption in favor of unsupervised visitation, making visitation rights-based, rather than best-interest based.

This provision does not distinguish between the cases where a parent’s behavior has created a presumption against reunification (think Josh Powell),³

² Once the presumption of fitness has been rebutted by clear and convincing evidence determining abuse, neglect, or dependency, “the state’s interest in the child’s welfare is paramount to the rights of a parent. *Jensen*, 2011 UT 17 at ¶ 74.

Both ASFA and the Utah code provide that all dispositional decisions (reasonable efforts) be based on the paramount concern of the child’s health, safety, and welfare. 42 U.S.C. § 671(a)(15)(A) (“In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which—provides that-- in determining reasonable efforts to be made with respect to a child, as described in this paragraph, and in making such reasonable efforts, the child’s health and safety shall be the paramount concern”); 42 U.S.C. § 678 (“Nothing in this part shall be construed as precluding State courts from exercising their discretion to protect the health and safety of children in individual cases, including cases other than those described in section 671(a)(15)(D) of this title”). See Utah Code Ann. § 80-2-306(1)(b) (in-home services based on paramount concern”); *id.* 80-2a-201(5) (reasonable efforts based on paramount concern); *id.* 80-2a-202(4)(b)(ii) (preremoval services based on paramount concern); *id.* 80-2a-302(2)(a) (same); *id.* 80-3-301(10)(a) (shelter court to make reasonable-efforts determination based on paramount concern); *id.* 80-3-406(4)(c) (post-adjudication reasonable-efforts based on paramount concern).

³ See *e.g.*, 42 U.S.C. § 671(a)(15)(D) (in order to be eligible for payment, state plan must include provision that reasonable efforts not be required for aggravated circumstances such as chronic abuse, felony assault, or prior termination); 42 U.S.C. § 675(5)(E) (case review system means procedure to assure that division files termination petition (or seek to be joined to petition) where child has been in out-of-home care for 15 of 22 months, abandoned infant, felony assault,

where a parent's behavior has created a mandate for the division to file a termination petition.⁴

The provisions do not provide for a court to consider the underlying findings in the adjudication order, as well as all the evidence that comes in for disposition. The provisions do not account for one of the most common reasons for ordering supervision, which is when a parent tells a child that "this is all your fault."

More importantly, in child welfare cases, the child has party status, and the statute provides that the child's voice shall be heard in every dispositional decisions.⁵

aggravated circumstances); 42 U.S.C. § 5106a(b)(2)(B)(xvi) (to be eligible for CIP funding, need provision regarding aggravated circumstances vis a vis reunification). *See, e.g.*, Utah Code Ann. § 80-2a-201(6) (no duty to make reasonable efforts in cases of "sexual abuse, sexual exploitation, abandonment, severe abuse, or severe neglect are involved"); *id.* 80-2a-302(4) (same); *id.* 80-3-406(11) (same); *d.* 80-3-406(5) (list of other circumstances presuming against reunification including registered sex offender and prior termination); *id.* 80-4-203 (division to file termination petition in cases of abandonment, felony assault to other parent or to child); *id.* 80-4-301(3)(b)(i) (no need for reasonable-efforts finding for post-adjudication abuse or neglect).

⁴ Utah Code Ann. § 80-4-203 (mandatory termination petitions).

⁵ The Child's voice is crucial to determining paramount concern of the child's health, safety, and welfare. Both ASFA and the Utah code require that the Child be a party, that the child be represented, and that the child's voice be heard. Indeed, the division, the GAL, and the juvenile court must justify decisions that depart from a child's expressed wishes. 42 U.S.C. § 673(d)(3)(iv) ("With respect to a child who has attained 14 years of age, the child has been consulted regarding the kinship guardianship arrangement"); 42 U.S.C. § 675(1)(B) (written case plan to assure that case plan be developed in consultation with child); 42 U.S.C. § 675(5)(B) (six-month review to consult "with the child in an age-appropriate manner"); 42 U.S.C. § 675(5)(C)(iii) (permanency hearing to consult with child "in an age-appropriate manner" the proposed permanency plan); Utah Code Ann. § 80-2-702(2)(b) (division required to personally interview child prior to removal); *id.* 80-3-108 (child shall be present at postadjudication hearing, court must engage child and ask if child "desires the opportunity to address the juvenile court or testify" and allow minor to do so; desires of minor who is 14 years old or older shall be given added weight); *id.* 80-3-301(4)(a) (child shall be present at shelter hearing); *id.* 80-3-301(5)(a)(ii) (shelter court shall provide opportunity for the child to testify); *id.* 80-3-302(7)(e) (court to consider child's preference and comfort level with proposed placement); *id.* 80-3-302(8)(b)(vii)(B) (juvenile court shall order division to provide sufficient information for court to determine whether child is comfortable with relative); *id.* 80-3-302(17) (juvenile court must justify in writing when its placement decision differs from child's wishes); *id.* 80-3-303(2) (division's placement decision "shall take into consideration the will of the child"); *id.* 80-3-303(3) (division must justify to court and to the GAL in writing when placement decision differs from child's stated wishes); *id.* 80-3-307(3)(ii) (division shall involve child in developing of service plan); *id.* 80-3-409(14)(a) (juvenile court to give added weight to desires of minor who is 14 years old or older); *id.* 80-3-409(14)(b) (juvenile court must justify in writing when its permanency or placement decision differs from minor's wishes).

Finally, parents are often juvenile-court-involved because they need *help* with parenting. The best place to deliver these services is to do so in real time during parent-time sessions. These restrictions would discourage a court from ordering crucially important PCIT therapy and from providing for visitation coaches to help a parent with gain appropriate parenting skills and learn appropriate interactions.

And, if it ain't broke. Consider all the provisions going to parent time.

- Section 80-1-102, providing for definitions governing Title 80:

(70)(a) “Residual parental rights and duties” means the rights and duties remaining with a parent after legal custody or guardianship, or both, have been vested in another person or agency, including: . . .

(iv) the right to reasonable parent-time unless restricted by the court.
- Section 80-3-302(3)(c), governing shelter hearings provides for parent time.

(c) the juvenile court shall order reasonable parent-time with the parent from whose custody the child was removed, unless parent-time is not in the best interest of the child.
- Section 80-3-302(10)(a), governing shelter hearing where child is placed with relatives

(10) If a juvenile court places a child described in Subsection (6) with the child's relative or friend:

(a) the juvenile court shall: . . .

(ii) provide for reasonable parent-time with the parent or parents from whose custody the child is removed, unless parent-time is not in the best interest of the child;
- Section 80-3-307(10), governing the service plan provides:

(10)(a) Except as provided in Subsection (10)(b), parent-time may only be denied by a court order issued in accordance with Subsection 80-3-406(9).

(b) Notwithstanding Subsection (10)(a), the person designated by the division or a court to supervise a parent-time session may deny parent-time for the session if the supervising person determines that, based on the parent's condition, it is necessary to deny parent-time to:

(i) protect the physical safety of the child;

(ii) protect the life of the child; or

(iii) consistent with Subsection (10)(c), prevent the child from being traumatized by contact with the parent.

(c) In determining whether the condition of the parent described in Subsection (10)(b) will traumatize a child, the person supervising the parent-time session shall consider the impact that the parent's condition will have on the child in light of:

- (i) the child's fear of the parent; and
- (ii) the nature of the alleged abuse or neglect.

- Section 80-3-406(9)(a), governs the disposition hearing:

(9)(a) Subject to Subsections (9)(b) and (c), if the juvenile court determines that reunification services are appropriate for the minor and the minor's family, the juvenile court shall provide for reasonable parent-time with the parent or parents from whose custody the minor was removed, unless parent-time is not in the best interest of the minor.

(b) Parent-time is in the best interests of a minor unless the juvenile court makes a finding that it is necessary to deny parent-time in order to:

- (i) protect the physical safety of the minor;
- (ii) protect the life of the minor; or
- (iii) prevent the minor from being traumatized by contact with the parent due to the minor's fear of the parent in light of the nature of the alleged abuse or neglect.

(c) Notwithstanding Subsection (9)(a), a juvenile court may not deny parent-time based solely on a parent's failure to:

- (i) prove that the parent has not used legal or illegal substances; or
- (ii) comply with an aspect of the child and family plan that is ordered by the juvenile court.

- Section 42 U.S.C. § 629a(a)(7)(B)(vii) defines family preservation services to include “Services and activities designed to facilitate access to and visitation of children by parents and siblings.”
- Section 42 U.S.C. § 675(4)(A) provides foster care maintenance payments cover the cost of “reasonable travel to the child’s home for visitation.”
- Section 42 U.S.C. § 675(5)(C)(ii) provides that, with respect to each child
 - (ii) procedural safeguards shall be applied with respect to parental rights pertaining to the removal of the child from the home of his parents, to a change in the child’s placement, and to any determination affecting visitation privileges of parents.

SIBLING CONTACT

ll.88-90 (modifying 80-2a-201, which lists parental constitutional rights *prior* to juvenile court involvement)

ll.446-52 (modifying 80-3-302, which goes to shelter hearing, which takes place 72 hours after removal)

If it ain't broke . . . Consider what the code already provides for regarding sibling contact.

- Section 80-3-307(12), governing service plan provides:
 - (12)(a) The division shall incorporate into the child and family plan reasonable efforts to provide sibling visitation if:
 - (i) siblings are separated due to foster care or adoptive placement;
 - (ii) the sibling visitation is in the best interest of the child for whom the child and family plan is developed; and
 - (iii) the division has consent for sibling visitation from the guardian of the sibling.
 - (b) The division shall obtain consent for sibling visitation from the sibling's guardian if the criteria of Subsections (12)(a)(i) and (ii) are met.
- Section 80-3-405, governing general disposition provides the juvenile court may order sibling visitation. Utah Code Ann. § 80-3-405(2)(c)(iii).
- Section 80-3-406(18), governing reunification services provides:

When a minor is under the custody of the division and has been separated from a sibling due to foster care or adoptive placement, a juvenile court may order sibling visitation, subject to the division obtaining consent from the sibling's guardian, according to the juvenile court's determination of the best interests of the minor for whom the hearing is held.
- Section 80-3-409(3)(b), governing the permanency hearing, requires the juvenile court to
 - (b) attempt to keep the minor's sibling group together if keeping the sibling group together is: (i) practicable; and (ii) in accordance with the best interest of the minor.
- Section 80-3-409(7)(e), governing statutory extensions to reunification services provides:

(e) In determining whether to extend reunification services for a minor, a juvenile court shall take into consideration the status of the minor siblings of the minor.

- Section 42 U.S.C. § 629a(a)(7)(B)(vii) defines family preservation services to include “Services and activities designed to facilitate access to and visitation of children by parents and siblings.”
- Section 42 U.S.C. § 671(a)(31) requires that, to receive federal funds, the state plan must provide that reasonable efforts shall be made
(A) to place siblings removed from their home in the same foster care, kinship guardianship, or adoptive placement, unless the State documents that such a joint placement would be contrary to the safety or well-being of any of the siblings; and

STRUCTURE OF CHILD WELFARE STATUTE.

These comments go to location, but not substance of proposed language:

II. 85-90, modifying 80-2a-201.

Section 80-2a-201 lists a parent’s constitutional rights and responsibilities when *prior* to juvenile court involvement, when the parent still has the presumption of fitness.⁶

Including provisions that are triggered *after* juvenile court involvement and *after* a parent’s presumption of fitness has been rebutted, muddies the water and undermines this provision.

II. 446-458, modifying 80-3-302.

Section 80-3-302 goes to the shelter hearing. Section 80-3-301 sets forth the standard for continued removal (serious danger to physical health of safety of child); and section 80-3-302 is more dispositional, requiring division to *initiate* searches for relatives, siblings, and so forth. The shelter hearing is held 72 hours after removal, during a time when the facts are rapidly developing, and when the juvenile court may not have all the facts at hand. The proposed language is asking

⁶ Section 80-2a-201, formerly numbered as 62A-4a-201, describes general constitutional principles that apply when parental rights are at their strongest, which is prior to juvenile court involvement.

the juvenile court to make detailed findings going to sibling contact and parent time at a time when the juvenile court has limited information.

II. 824-850, modifying 80-3-402.

Section 80-3-402 goes to adjudication. It refers the reader to dispositional statutes that govern disposition. It does not make sense to include dispositional language going to parent-time that belongs in section 80-3-405 and 80-3-406.

II. 1348-74, modifying 80-3-409.

Section 80-3-409 goes to the permanency hearing, where the juvenile court makes a determination regarding the final permanency plan. The juvenile court is required to determine whether the child can return home, whether the parent has committed an aggravated circumstances creating a presumption against reunification services, whether the permanency plan should be termination / adoption. Section 409(8) is then amended to re-instate a presumption in favor of unsupervised parent time that has no relation to the finding the juvenile court has already made.