

Engaging Fathers in the Child Protection Process: The Judicial Role

By Judge Leonard Edwards

I. INTRODUCTION

Non-custodial fathers appear only infrequently in child protection proceedings.¹ Several reasons stand out including difficulty in locating the father, the mother's ambivalent feelings about engaging the father, the social worker's ambivalence about working with the father, state legislation and court rules that may not emphasize engaging the father, the father's reluctance to engage in court proceedings, and a general feeling throughout the court process that a father's participation is not valued.²

¹ Many terms are used to describe legal proceedings brought on behalf of allegedly abused, neglected, or abandoned children, including abuse and neglect proceedings, juvenile dependency, children in need of protection, and child protection. I will use child protection throughout this paper.

² "I think fathers come into system expecting the worst and often get discouraged if they feel like they are not treated fairly . . . They expect to be discriminated against and often don't try once they receive the slightest hint that we are relegating them to the traditional role of 'breadwinner' and excluding them from more satisfying roles of nurturer and caretaker." E-mail from Judge J. Robert Lowenbach (ret.) to author, Sept. 30, 2008 (on file with author); "I think there is an inherent bias in our system that suggests that no matter what a father does, the father will not gain custody unless the father is married, living with the grandmother, etc. In other words, we accept the concept of single mothers raising kids, but don't accept the concept of single fathers raising kids." E-mail from Gary C. Seiser, supervising deputy, Juvenile Dependency Division of the San Diego County Office of County Counsel and co-author of *California Juvenile Courts Practice and Procedure* (e-mail on file with author); "Fathers reported feeling unfairly treated by the child welfare system and courts. Many feel that even when they try to be involved, courts make the process more difficult and unfairly require them to jump through hoops and prove their commitment and sincerity, even when they were not involved in the maltreatment that led to child welfare intervention." J. Kendall, K. Kessen, & J. Reynolds, *Engaging Dads in Child Welfare Cases*, 26 CHILD LAW PRACTICE, ABA, 2007, at 108-110.

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Despite these obstacles and despite the fact that some fathers will present problems for the parties and for the court process, after 26 years as a judge, primarily in juvenile court deciding thousands of child protection cases, I have concluded that fathers are important to the child and to the legal process.³ Moreover, the juvenile court judge can play a critical role in engaging fathers in the child protection process. This article will explore the following areas:

- Why it is important to engage fathers in the child protection process;
- The judge's role in determining the father's identity and in establishing paternity;
- The judge's role in monitoring agency actions concerning the father's identification, location, notification, and support;
- The judicial role in engaging fathers in the child protection process including strategies judges can use both in and outside the courtroom. These include the judge's oversight of the children's services agency (the agency) actions, the importance of court-appointed legal representation for indigent fathers, the importance of identifying the father's extended family, the use of mediation and other group decision-making processes to assist in the engagement process, the negative impact the adversarial process can have on the father's engagement, the importance of father-child visitation, the importance of services to engage the father, and special problems relating to the incarcerated father;
- Comments from judicial officers who have considered the engagement issue with highlights from jurisdictions that employ excellent practices;
- Safety considerations for the mother and child as the father is brought into the child protection process should he present dangers to one or both.

The article will emphasize that judges must take a leadership role for fathers to become involved in the child protection process. Whether the issue is identification or location of the father, ensuring that the father receives all the rights to which he is entitled, or employing strategies to engage the father with his child, the judge plays a critical role in making certain that the father is a fully engaged participant in the child protection system.

II. MAKING FATHER ENGAGEMENT A PRIORITY

Understanding why fathers are important in child protection cases is the first step to engaging them more fully in the legal process. If the child protection system does not have a role for fathers, if fathers are nothing more than an irritant to all the other participants, then developing strategies to engage fathers would seem to be a waste of time. We know from experience that some mothers are reluctant to reveal the father's

³ NATIONAL CHILD WELFARE RESOURCE CENTER FOR FAMILY-CENTERED PRACTICE, CHILDREN'S BUREAU, FATHER INVOLVEMENT IN CHILD WELFARE: ESTRANGEMENT AND RECONCILIATION (Summer 2002), at 1-2. (hereinafter FATHER INVOLVEMENT).

name or location. Many mothers have had violent or unhealthy episodes with the father, and others have a new romantic relationship and want to forget about their child's biological father. Some mothers may want to protect him from involvement with the court.⁴ Still others are reluctant to bring the current abuse or neglect episode to the father's attention, fearing he will ask for custody.⁵

We know that some social workers are ambivalent about finding the father.⁶ Some have had negative experiences with fathers and suspect that the father is not interested in the child in any case. Still others fear that bringing the father into the child protection case may introduce another abusive person or possibly increase conflict between the parents.⁷ Social workers know that engaging fathers will result in more work, will be more costly to the agency, and many find that working with mothers alone is easier.⁸ We also know that the legal system, including the judge and the attorneys, may not place a high priority on locating or engaging the father, particularly if he is not married to the mother, is incarcerated, or has a violent or criminal history.⁹

For legal, social, economic, and developmental reasons, as well as just plain common sense, fathers need to be engaged in the lives of their children¹⁰ unless they pose a threat of harm to them. Absent any risk of harm, the judge in the child protection case must take steps to ensure that fathers participate in the court process.¹¹

Protecting the father's legal rights. Legally, the father has a right to participate in the proceedings. Whether he will be identified and receive notice of the proceedings will vary from case to case and state to state, but his involvement may result in better outcomes for the child including avoidance of out-of-home placement altogether or relative placement.

⁴ See, for example, *G.P. v Florida*, 842 S.2d. 1059, 28 Fla. L. Weekly D1008, 2003 in which the court of appeals held that a mother had a constitutional privacy right to withhold the name of her child's father.

⁵ L. Harris, *Involving Nonresident Fathers in Dependency Cases: New Efforts, New Problems, New Solutions*, 9 JOURNAL OF LAW & FAMILY STUDIES, 2007, at 299-397.

⁶ K. MALM, J. MURRAY, R., & GEEN, WHAT ABOUT THE DADS? CHILD WELFARE AGENCIES' EFFORTS TO IDENTIFY, LOCATE AND INVOLVE NONRESIDENT FATHERS, (The U.S. Department of Health and Human Services, Office of the Assistant Secretary of Planning and Evaluation, Washington, DC, 2006), at ix, 85-86.

⁷ *Id.* at 25.

⁸ In focus groups sponsored by the Annie E. Casey Foundation, caseworkers indicated they preferred working with single mothers than with fathers, particularly when there were multiple fathers. See J. Rosenberg, & W.B. Wilcox, THE IMPORTANCE OF FATHERS IN THE HEALTHY DEVELOPMENT OF CHILDREN, (U.S. Department of Health & Human Services, 2006), at 33.

⁹ FATHER INVOLVEMENT, *op.cit.*, note 3 at 1-2.

¹⁰ "... the evidence is clear that most children do best when they receive the emotional and financial support of both parents." PARENTING OUR CHILDREN: IN THE BEST INTEREST OF THE NATION, A REPORT TO THE PRESIDENT AND CONGRESS, (Submitted by the U.S. Commission on Child and Family Welfare, Sept. 1996), at 1; "A healthy, positive and ongoing relationship with a father, father figure or male role model is a critical aspect of every young person's development." A. Green, *Policy and Practice Reform to Engage Non-Resident Fathers in Child Welfare Proceedings* (Part 1) 10 CHILD COURTWORKS, August 2008; D. Popenoe, *Life Without Father*, in LOST FATHERS, (C. Daniels, ed., St. Martin's Griffin, 1998), at 33-49; S. McClanahan, *Growing Up Without Father*, in LOST FATHERS, (C. Daniels, ed., St. Martin's Griffin, 1998), at 87-108.

¹¹ "Putative fathers must be located and brought into court process as quickly as possible." NCJFCJ, ADOPTION AND PERMANENCY GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES, (2000), at 10 (hereinafter ADOPTION GUIDELINES).

State laws differ on father's rights, but many states include notice provisions for both parents.¹²

Whether the father participates will be determined by a number of factors including whether the father receives notice and comes to court. Thereafter, his participation will be determined by factors such as whether he was married to the mother, whether he lived with the child and held her out as his own, whether there is an existing custody order, whether he has acknowledged he is the father, whether he asks to participate in the proceedings, and similar considerations, which will be discussed in Section III.

Failure to provide the father his legal rights may have serious negative consequences for everyone involved in the child protection system, and particularly for the child. If the court process does not include the father, in some states he may be able to attack the proceedings when he discovers what has happened. The father's "late arrival" in the proceedings can have an enormous impact on the outcome for the child and can delay permanency for months and years.¹³ In some situations the child protection process must start over from the beginning to give the father a fair opportunity to reunify with his child. If the father was never served with notice of the proceedings, even an adoption could be overturned.¹⁴

Promoting children's social well-being. Socially, research reveals that children have better outcomes when they have two parents involved with their upbringing.¹⁵ A father can be a critical person in a child's life and help a child understand who he is and how he fits into the social scheme of the world around him. The father's family provides an additional resource for the child socially, emotionally, and financially. Indeed, the father's family, on average, will provide the child with one-half of her relatives. Studies of families show that this can mean scores if not hundreds of potential relative connections.¹⁶ Federal law encourages placement of children in so-called kinship foster care (with relatives).¹⁷

12 Many states base their statutes on the Uniform Parentage Act of 1973 which provides that once the parent-child relationship is established between a man and a child, the rights and duties inherent in that relationship are the same as for all other parents and children. *See for example*, California Welfare and Institutions Code section 311 (West, 2008), "The probation officer shall thereupon notify each parent or each guardian of the minor of the time and place of the hearing . . ."

13 "Timely resolution of paternity issues is both in the best interests of the child and essential to avoiding delays at subsequent points in the court process." ADOPTION GUIDELINES, *op.cit.*, note 11 at 10.

14 For example, *see* State ex rel. DHS v. Rardin, 134 P.3d 940 (Or. 2006); In re Shaiesha O., 887 a.2d 415 (Conn. App. Ct. 2006); In re Deztiny C., 723 N.W.2d 652 (Neb. Ct. App.) 2006; In re Dylan Z., 697 N.W.2d 707 (Neb. Ct. App. 2005).

15 M. PARKE, ARE MARRIED PARENTS REALLY BETTER FOR CHILDREN? WHAT RESEARCH SAYS ABOUT THE EFFECTS OF FAMILY STRUCTURE ON CHILD WELL-BEING, (Center for Law and Social Policy, Washington, DC, 2003); S. McLanahan, & G. Sandefur, GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS, (Harvard University Press, Cambridge, MA, 1994); W. Horn, & T. Sylvester, FATHER FACTS, 4th ed., (National Fatherhood Initiative, Gaithersburg, MD, 2002), at 15.

16 L. Edwards, & I. Sagatun-Edwards, *The Transition to Group Decision Making in Child Protection Cases: Obtaining Better Results for Children and Families*, 58 JUVENILE & FAMILY COURT JOURNAL, Winter 2007, at 8-9 (hereinafter *Group Decision Making*); K. Beck, L. Edwards, D. Meyers, & J. Walter, *Finding Family Connections for Foster Youth*, 27 ABA CHILD LAW PRACTICE, Oct. 2008, at 113-125 (hereinafter *Finding Family Connections*).

17 42 U.S.C. section 671(a)(19) (2008).

As of 2002, kinship placements provide homes for more than 400,000 children, with grandparents providing over one-half of those homes.¹⁸ New federal legislation places even greater emphasis on identifying extended family members and including them in placement and permanency planning discussions.¹⁹

Providing financial resources for the child. A father can bring financial support directly or through child support to the caretaker.²⁰ The father may also be able to provide health and dental insurance. If the father dies, the child may be entitled to receive Social Security benefits and/or a share of his life insurance or other assets if he dies intestate, and some or all of those benefits if he has a will. The chances of entering college, completing high school, and finding job opportunities are enhanced with a father's involvement in a child's life. The father's extended family offers additional opportunities for economic support.

Promoting healthy child development. A father's presence can give the child a sense of belonging to a complete family. Young boys, in particular, look to the father to see who they will some day be. Failure to know who one's father is can lead to a lifetime of questioning and searching for one's "roots."²¹ A father's involvement also will impact future generations. Researchers have concluded that fathers' participation in their children's lives will benefit the father as well as the child. Fathers who participate in the child rearing process are more likely to become societally generative at midlife.²² Indeed, "[t]he quality of a young adult's life may be linked, for better or worse, with the quality of the fathering he or she received as a child."²³ Additionally, many national policy makers have concluded that the father should be involved in child protection proceedings, and that his identification and engagement should be promoted as early as possible in the court process.²⁴

Finally, our common sense tells us that fathers should be involved in their children's lives. We do not need data or studies to conclude that a father's involvement will improve the child's quality of life.

18 U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, REPORT TO THE CONGRESS ON KINSHIP FOSTER CARE, Washington, DC (2000), at vi.

19 H.R. 6893, THE FOSTERING CONNECTIONS TO SUCCESS AND INCREASING ADOPTIONS ACT OF 2008, sections 102, 103 and 104.

20 Children in father-absent homes are five times more likely to be poor. U.S. CENSUS BUREAU, CHILDREN'S LIVING ARRANGEMENTS AND CHARACTERISTICS: March 2002, P20-547, Table C3. (Washington, DC: GPO, 2003).

21 The literature is replete with stories of persons searching for their fathers. See ALEX HALEY, ROOTS (1976); S. Kershaw, *In Adoptee's Search for Roots, Loss and Gain Collide*, THE NEW YORK TIMES, Aug. 11, 2008, at A17; <http://www.rootsweb.ancestry.com>.

22 G. Valliant, *Foreword* to HOW FATHERS CARE FOR THE NEXT GENERATION, by John Snarey, Harvard University Press, 1993, at xii. "Societally generative" in this context refers to the power within a man to be productive socially and in his own life.

23 Snarey, *id.*, at 149.

24 ADOPTION GUIDELINES, *op.cit.*, note 11 at 10; L. Edwards, *Improving Juvenile Dependency Courts: Twenty-Three Steps*, 48 JUVENILE AND FAMILY COURT JOURNAL, 1997, 1-24, at 6.

III. IDENTIFYING FATHERS AND DETERMINING PATERNITY

“Father” is a term of art. There are different types of fathers, with different names, and the laws in many states treat each type of father differently.²⁵ These statements are counter-intuitive for the person on the street. After all, we all think of father as the child’s male biological parent. He is the man who provides the reproductive material that joins with the female egg to form a fetus. But whether the law will acknowledge him as a father entitled to all of the legal rights and protections given to the mother will be determined by other factors such as: was he married to the mother at the time of conception? If not, did he acknowledge that he is the child’s father? When did he do so? Was he present at the child’s birth? Did he acknowledge paternity at the hospital or place his name on the birth certificate? Did he live with and support the child after birth? Did he attempt to have contact with and support the child after birth? Was he prevented from doing so? Does more than one person claim to be the father? Did he register on a putative father’s registry? Depending on the state law and answers to the issues raised above, biological fathers in some jurisdictions may find they have fewer rights than they would in others.

The judge must sort all this out and declare who the father is and what legal status he will have with regard to the child before the court. To accomplish this task, the judge must aggressively pursue the issue of paternity from the outset of the case.²⁶ As often as not, the information the social worker collects before the initial hearing will be incomplete regarding the father’s identity, location, and legal status. The judge’s first task is to obtain as much information from the mother as possible. The following courtroom exchange typifies the judge’s role in determining the identity and location of the father from a reluctant mother. (Please note that names used in the dialogues are fictitious and do not pertain to any persons involved in specific cases.)

25 “There is no standard definition for ‘father’ in statutes across the States.” *The Rights of Presumed (Putative) Fathers*, Child Welfare Information Gateway, U.S. Dept. of Health and Human Services, ACF, Children’s Bureau, at 2, available online at http://www.childwelfare.gov/systemwide/laws_policies/statutes/putative.cfm. In summary, an *alleged* father is someone the mother or someone else has identified as being the father; a *biological* father is the man whose sperm impregnated the mother and produced the child; a *presumed* or *putative* father is someone who is married to the mother at the time of birth or who because of his relationship to the mother and the child or because of a hospital declaration is given special legal consideration over all others claiming to be the father of the child. (This paper will use the term *putative* instead of *presumed* throughout.) A *de facto* father is a man who has served in the parental role even though he is not the biological father, nor is he married to the mother. Finally, California has a special type of father called a *Kelsey* father. He is a biological father who has tried to establish his paternity, but who has been frustrated by the mother, relatives, or the court process. In California, a so-called *Kelsey* father will be given special consideration by the court process. See *In re the Adoption of Kelsey S.*, 1 Cal.4th 816, 4 Cal.Rptr.2d 615 (1992). See generally, M. Mathews, *Am I My Child’s Parent? Recent Developments in the Law of Parentage*, 23 CHILDREN’S LEGAL RIGHTS JOURNAL, Summer 2003, at 44-51.

26 In some states the paternity enquiry is required by statute to occur at the initial hearing. See California Welfare & Institutions Code section 316.2(a) and California Rule of Court 1413(b). This is a best practice since it focuses upon a critical issue at the earliest court hearing. See also L. Edwards, *Achieving Timely Permanency in Child Protection Courts: The Importance of Frontloading the Court Process*, 58 JUVENILE AND FAMILY COURT JOURNAL, Spring 2007 (hereinafter *Achieving Timely Permanency*).

Judge: Good morning Ms. Jones. Thank you for coming to court today. As you know, we are here today regarding the legal proceedings involving your child. I have several questions I must ask you at the outset. These questions have to do with the identity of your child's father. They are so important that I am going to ask you to raise your right hand and give an oath that you will tell the truth. (The oath is administered). First, are you married?

Mother: No.

Judge: Have you ever been married?

Mother: Yes, but I think we are divorced. At least, he said he was going to get a divorce. I haven't seen him for years.

Judge: What is that person's name?

Mother: Jack Williams.

Judge: How can we contact him?

Mother: I have his address because the child support people have been getting him to pay child support for my other child.

Judge: Will you please give that information to the social worker after court?²⁷

Mother: All right.

Judge: Who is the father of your newborn son, Charlie?

Mother: I don't know.

Judge: Ms Jones, it is necessary that I know who the father is. These are important legal proceedings and you must answer my questions. Who is Charlie's father?

Mother: I only met him once.

Judge: Where did you meet him?

Mother: In a bar.

Judge: What is the name of the bar?

Mother: I forget.

Judge: Where is the bar?

Mother: It's on the corner of 4th and Washington, downtown.

Judge: What did you call him when you met him?

Mother: He just went by "Big Al."

Judge: Did you see him there more than once?

Mother: Yea, he hangs out there.

Judge: Did he say where he worked?

Mother: No.

Judge: Did he say where he lived?

Mother: No.

Judge: Have you seen him lately?

Mother: Once in a while.

Judge: Have you told him about Charlie?

Mother: I may have told him.

Judge: Was he present at the birth of the baby?

Mother: No way!!

Judge: Has he ever seen the baby?

Mother: No way, I wouldn't let him near the baby.

Judge: Did he ever see you when you were pregnant?

Mother: I don't remember.

²⁷ This follow-up by the social worker is important. If the divorce was never finalized (and often it has not been), this man is the putative father of the child since he and she were married at the time of the conception and birth. However, someone else is the biological father of the child. If the husband can be found, he is entitled to notice. Usually, he tells the social worker or comes to court and states he is not the father and does not want to have any involvement in the case.

Judge: Did he ever talk about his family?

Mother: I don't remember.²⁸

Judge: Ms. Jones. . . . this is very important. Did he tell you about his family?

Mother: He said he lived with his mother and aunt.

Judge: Could you show the social worker or your attorney where the bar is?

Mother: I guess so.

Judge: Could you point out Big Al to them if you saw him?

Mother: I guess so, but you have to watch out, as I hear he is dangerous.

Judge: Thank you, Ms. Jones. Ms. Tompkins (the social worker), did you hear the answers that Ms. Jones gave? I order you to follow up on that information. Moreover, I order you to continue this search as long as this child's case is before the court.²⁹

These courtroom exchanges have resulted in many fathers being identified and located for involvement in court proceedings. The judge's stature is such that answers are likely to be forthcoming, answers that may not be revealed to a social worker or even to an attorney. It takes extra time for judicial questioning, but the results are well worth it.

Ordering the social worker to follow up. The court can then order the social worker to follow up on the information disclosed and to investigate to locate the father and give him notice of the proceedings. At later hearings, the court can follow up on the social worker's progress.

Questioning potential fathers directly. Sometimes a man claiming to be the father will appear at the courthouse. The judge must be aware of the presence of anyone claiming to be a father. The person bringing parties into the courtroom may not include such a man, particularly if the mother says she does not want him in the courtroom.³⁰ Once before the court, the judge must ask a number of questions regarding paternity.

28 "Not asking about, or assuming uninvolved, or accepting 'I don't know where my child's father's family lives,' are all examples of inadequate approaches to seeking out father in the lives of children in foster care—and not just father's, but 'their families' too." G. Mallon, *Engaging Fathers in Permanency Planning: Early Identification of Paternal Resources*, National Resource Center for Foster Care & Permanency Planning, Winter 2003, 1-5, at 1.

29 This hypothetical situation reflects some real world situations. After I wrote this hypothetical court dialogue, I received the following e-mail from Judge J. Dean Lewis (ret.) about a similar situation: "I recall one case when there was a CASA volunteer present at the first hearing and when I asked my litany of questions about the identity of the father, the mother said she did not know the father's full name but did know his first name and that he worked in a bar in a town close by. The CASA volunteer went to the bar and found the man and we did a DNA test and he was the father. His mother (paternal grandmother) took custody and was thrilled to know she had a grandchild who otherwise would have been in foster care because the mother was petitioning to enter into a voluntary relinquishment of parental rights." (Sept. 26, 2008; on file with the author).

30 This may seem to be a trivial matter, but some courtrooms I have observed it is a court officer or bailiff who is designated to collect the parties for each case and then escort them into court. In most states, the proceedings are confidential, and this sometimes results in the court officer excluding persons she believes should not be permitted. The excluded person may be an unmarried person claiming to be a father, a relative, or other interested person. The court must establish a system that provides the court with information about all persons who wish to be present in any child protection case. The court can then decide who will be permitted to be present in the courtroom and for what portion of the proceedings. Another best practice is for the judge to ask the social worker whether she has had any contact with anyone claiming to be the father of the child. If that has happened, the judge should follow up with additional questions, such as "Did you offer him the opportunity to take tests to determine his paternity?" and "Did you inform him of these court proceedings and his right to be present?"

Judge: Good morning. What is your name?

Father: Good morning, Judge. I'm John Soto and I'm the father of the child, little Harry.

Judge: Well, I am going to ask you some important questions about your relationship to Ms Rivera and the child, little Harry. Would you please stand while my clerk administers the oath? (oath administered). Are you married to the mother, Ms. Rivera?

Father: No sir, I'm not, but I know he's my son.

Judge: Are you living with Ms. Rivera?

Father: No sir, she and I have had a falling out and she won't talk to me, and she wouldn't let me see the boy.

Judge: Were you present when the baby was born a few months ago?

Father: I wanted to be, but she wouldn't tell me where the hospital was.

Judge: Do you want to be a father to this child?

Father: I sure do and so does my family. My mother and father and a sister are outside the courtroom and they want to visit with the child also. My sister would love to have the child live with her, if he can't return to his mother's care or live with me.

Judge: Ms. Rivera, do you believe that Mr. Soto is Harry's biological father?

Mother: I guess so, judge.

Judge: Madam Social Worker, I order you to arrange for DNA testing to determine if Mr. Soto is the biological father of the child. I want that completed as soon as possible at department expense³¹ with the results returned to court in 14 days.³² Furthermore, in light of the financial affidavit that Mr. Soto has filled out I am appointing Mr William Frank to represent Mr. Soto through these proceedings. My court attendant will give you Mr. Frank's telephone number, Mr. Soto.

This scenario could have different answers and outcomes, but the judge is demonstrating the importance of determining paternity at the earliest possible stage.³³ If the father had shown ambivalence and decided he did not want to participate in the proceedings, he might decide not to participate further in the legal proceedings.

31 The issue of payment for paternity testing has been raised in several states. It is in the best interests of the child, the family, and the court process that paternity be established as soon as possible. The state has an interest in this determination and should be responsible for the cost of the testing. Since the state also has an interest in identifying fathers for child support purposes, social workers should be ready to work in tandem with child support authorities to complete paternity testing. Putting the burden on the father to arrange for blood or DNA testing or requiring him to file a paternity action is unduly burdensome and unrealistic, particularly if he is indigent; it is also time consuming. It is in the best interests of the child to have paternity established as soon as possible. Some courts have located a genetic testing site within the courthouse, which can save time in the paternity determination process. Cook County (Chicago) is a model for this practice.

32 In some courts, the question of paternity can be and is determined immediately. If the parties are living together and each claims that the person claiming to be father is indeed the father, the court could place both parties under oath, examine them about their relationship, advise the father of his right to have a formal court hearing on the issue of paternity, advise the father of the rights and responsibilities relating to a paternity determination, and make a finding of paternity. If there is any question about the issue, DNA or other testing is necessary. If the father has any questions about the legal issues, an attorney should be appointed prior to the paternity examination and finding. However, it is also true that some dependency (abuse and neglect) courts do not have the authority to determine paternity and must refer the alleged father to another court to make that determination. This is not a best practice. It slows down the proceedings and presents an additional barrier to involving the father in the court process. State legislatures or court rules should restructure the law so that the child protection court can make binding paternity determinations.

33 "The biological father of the child should be identified at the earliest possible moment . . . The courts have a responsibility to society and each child to provide swift determination of paternity as soon as possible after the child's birth." Judge Sharon Townsend, *Fatherhood: A Judicial Perspective*, 41 FAMILY COURT REVIEW, July 2003, 354-361, at 357.

Protecting the alleged father's legal rights. Unfortunately, some state statutes place obstacles in the way of non-resident fathers, including fathers who might be interested in connecting with their children and participating in the juvenile court child protection proceedings. These statutes may require the father to file a legal action to determine his paternity, register in a putative fathers' registry, or take other independent action to have the right to receive notice and participate in the proceedings.³⁴

One troublesome situation involves a man who the unwed mother claims is the father and who otherwise would not qualify as a putative father under the Uniform Parentage Act.³⁵ In many states this person is called an alleged father. The best practice is for the court to order that he be served with notice of the proceedings. In some jurisdictions, the court will immediately appoint counsel to represent him, to assist in the search for his location, and to advise him of his rights.³⁶ In most states, no attorney will be appointed unless paternity is established. In some states, attorneys are rarely or never appointed for a father or mother at this or any stage of the proceedings.³⁷

It is important that the court devote time and energy to determine whether any alleged father is the child's biological father. This means providing him notice of the proceedings and an opportunity to determine whether he is the father. Regardless of whether the court or other legal system participants believe that he is unworthy of the court's attention and efforts, the fact is that many children are born out of wedlock,³⁸ and many children in child protective proceedings come from unmarried parents. These children did not choose their parents or their parents' marital status. To punish them for their parents' behaviors is a form of abuse.³⁹ It is also unconstitutional.⁴⁰ These children deserve the same level of advocacy and assistance in connecting

³⁴ See, generally, Iowa Code section 232.91(1); South Dakota Codified Laws, Title 25, Chapter 25-6-1.1; Code of Virginia, Title 16.1, Chapter 11, Article 8, section 16.1-277.01B4; Florida Statutes Annot., Title VI, Chapter 63, 63.062; Idaho Code Annot., Title 16, Chapter 15, section 16-1505 (2) et.seq.

³⁵ Uniform Parentage Act, available at <http://www.nccusl.org>. Also, see note 25.

³⁶ D.C. Code section 16-2304 (and see notes 58-59 and accompanying text *infra*.) In Massachusetts, an attorney appointed to represent a father may have to locate him. See A. Cohen, *Special Considerations in Representing Parents*, CHILD WELFARE PRACTICE IN MASSACHUSETTS, Vol. II, Chapter 22, Massachusetts Continuing Legal Education, 2006, section 22.2.4(a).

³⁷ In Nevada, indigent parents do not have a legal right to representation and as a result only have representation when the judge orders it. This is also true in Indiana. In Minnesota, as of the date of this article, the Office of Public Defender has stopped representing parents so there are no state-funded attorneys for indigent parents in the child protection system.

³⁸ The National Center for Health Statistics reports that 38.5% of all births in the United States in 2006 were to unmarried mothers, another all-time high. http://www.cdc.gov/nchs/data/nvsr/nvsr57/nvsr57_07.pdf

³⁹ Our language is replete with words reflecting the negative status of children born to unmarried parents. "Bastard," "whoreson," "son of a bitch," "illegitimate," and "son of a whore" are just a few terms reflecting the negative social stigma attaching to these children that has been passed on through the centuries. Recall *The Scarlet Letter* by Hawthorne when Hester Prynne and her child return from jail and the community's response—throwing mud on mother and child. For the legal system to continue this age-old discrimination against children and their unmarried parents is unconscionable.

⁴⁰ ". . . imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent . . . the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth."

to and reunifying with family as children of married parents. They deserve a legal system that looks out for their interests, identifies and attempts to engage their father, provides support for both parents, and assists in permitting them to know their families.

The judge's role at these early stages of the proceedings is to ensure that all potential fathers are given notice of the proceedings and an opportunity to determine their paternity and to participate fully in the proceedings should paternity be established. This is true whether the father is unmarried, incarcerated, has been violent toward the mother, or presents other concerning or dangerous behaviors. Even fathers who deny paternity may still be required to submit to DNA testing to refute or confirm their paternity.

IV. MONITORING AGENCY ACTIONS

The court cannot assume that the child welfare agency is doing all that it can to identify, locate, give notice to, and support the father in child protection proceedings. The Adoption Assistance and Child Welfare Act of 1980 and the Adoption and Safe Families Act of 1997⁴¹ require court oversight of agency actions regarding many aspects of child protection cases. Furthermore the Child and Family Service Reviews (CFSRs) assess each state's child welfare agency on a number of measures including: (1) whether the agency made concerted efforts to involve *parents* in the case planning process in an ongoing process; (2) whether the caseworker had frequent and high quality meetings with the *parents*; and (3) whether the caseworker demonstrated concerted efforts to provide visits of sufficient quantity and quality to promote continuity in the child's relationship with the *parents* and siblings.⁴² The CFSR assessments make it clear that the social worker is expected to work with both parents while a child's case is before the court. These federal laws and guidelines make it clear what the agency is mandated to do and that the court is expected to monitor agency compliance. Within the context of each case, the court can specify what it expects of the agency and then hold the agency accountable.⁴³

*At the shelter care hearing,*⁴⁴ the court should ask what actions the social worker has taken to identify and locate the father. Has the social worker:

- asked the mother about the identity and location of the father?
- used any search technology such as the child support locator to locate the father?

Pickett v Brown, 462 U.S. 1, 7 (1983); *See, also* Gomez v Perez, 409 U.S. 535, 538 (1973) ("a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally.").

⁴¹ PL 96-272, THE ADOPTION ASSISTANCE AND CHILD WELFARE ACT OF 1980, 42 U.S.C. section 670 *et. seq.*; PL 105-89, THE ADOPTION AND SAFE FAMILIES ACT OF 1997.

⁴² Items 13, 18 and 20, Child and Family Service Review. The CFSR results from almost every state have been disappointing in all of these measures.

⁴³ "The court must ensure that the efforts of the child welfare agency are thorough and diligent in locating and involving all legal and putative fathers." ADOPTION GUIDELINES, *op.cit.*, note 11 at 10.

⁴⁴ There are numerous terms used for the first hearing in a child protection case. They include shelter care hearing, initial hearing, probable cause hearing, and detention hearing. This paper will refer to it as the shelter care hearing.

- asked mother's relatives about the father and his relatives?
- asked the mother about the identity and location of any of father's relatives?
- used family finding technology to identify the father's relatives?⁴⁵
- contacted any of father's relatives concerning his location?
- checked with local jail or state prison representatives to determine whether the father is incarcerated?
- checked with probation or parole authorities to determine if the father is on probation or parole?
- talked with the child or the child's siblings about contact with the father or father's relatives?

These and other questions will inform the caseworker about the thoroughness of the inquiry the court expects concerning the father's identity and location.⁴⁶

Monitoring the social worker's efforts to identify and locate the father. The court should both support and monitor the social worker's efforts to identify and locate the father. This can be accomplished through interim review hearings where the court addresses specified issues and through reports to the court. The social worker's failure to follow through could result in the court making a finding of "no reasonable efforts" since the father's identity can lead to preventing foster care placement.⁴⁷

Giving notice to the father. Contacting and giving the father notice that legal proceedings have commenced is another critical stage in child protection cases. State statutes differ on the type of notice that is required before the court can proceed. Some states do not require the state (agency) to give an unmarried father notice of child protection proceedings or require notice only when that person has taken specific steps such as entering his name in a paternity registry to establish his paternity.⁴⁸ Illinois, on the other hand, includes unmarried fathers in the definition of a parent and requires personal service at the outset of the case.⁴⁹ Notifying the father is so important that Illinois law gives the father the right to demand a shelter care re-hearing when he finally appears.⁵⁰

45 Family finding is a philosophy that emphasizes the importance of family members as a solution to the problems facing abused and neglected children. See *Group Decision Making, op.cit.*, note 16 at 8 and *Finding Family Connections, op.cit.*, note 16.

46 This is not a trivial inquiry. In some states, failure to conduct a thorough investigation asking questions similar to those in the text can result in reversal of a termination of parental rights decision. See *In re S.P. and K.P.*, 672 N.W.2d 842 (Iowa Supreme Court, 2003); "For example, the investigator did not talk to the children or their caretaker, Scott, or to the children's mother." 672 N.W.2d. at 848.

47 On the use of the "no reasonable efforts" finding, see L. Edwards, *Improving Implementation of the Adoption and Child Welfare Act of 1980*, 45 JUVENILE AND FAMILY COURT JOURNAL, 1994, at 19-23, and L. Edwards, *Reasonable Efforts: A Judicial Perspective*, THE JUDGE'S PAGE, National CASA Association, July 2008.

48 *State v Corrigan*, 600 S.W.2d. 87, (Missouri App., 1980); Minnesota Statutes Annot., Chapter 259, section 259.49, subdivision 1; Iowa Code Section 232.91(1). But this restrictive statute has not prevented the Iowa judges from taking a much more proactive attitude toward the identification, notice, and engagement of non-resident fathers in child protection cases. See the discussion *infra* at 26-27.

49 705 ICLS 405 1-3 (11); 405 1-5(1); 405 1-5(1.5); 405 2-10(3). On the inadequacies of parental registries to inform non-resident fathers of their rights, see L. Nolan, *Preventing Fatherlessness Through Adoption While Protecting the Parental Rights of Unwed Fathers: How Effective Are Paternity Registries?*, 4 WHITTIER JOURNAL OF CHILD AND FAMILY ADVOCACY, Spring 2005, at 289-322, noting that fathers do not know about the registry and that registries are ineffective in interstate adoptions (at 321-322).

50 705 ICLS 405 2-10(4).

Only after extensive efforts can the agency use substituted service, usually publication in a legal newspaper, to provide the father with notice.⁵¹ The Illinois Legislature's commitment to engaging the father is a best practice that other state legislatures should emulate.

Ordering DNA testing to establish paternity. When the court orders DNA or other testing to determine paternity, the court should let its expectations be known regarding who is responsible for payment for the test, the Title IVD agency or the child welfare agency, depending on which can accomplish the DNA testing more quickly or at the lowest cost. These are issues that impact the child's best interests as well as the timeliness of the court process, already under strict ASFA guidelines. If there is any question about the agency's follow-through, the court should hold an interim review to check on the progress of the testing.

Ensuring that visits begin promptly once paternity is established. Once paternity has been established, visitation should begin immediately unless there is reason to believe such contact would harm the child.⁵² The agency should not wait for weeks or months to return to court to start that visitation. The agency should also consider permitting the father's relatives to participate with the father in visits. His relatives may be important in helping the father develop a positive relationship with his child. The court can assist the prompt beginning of visitation by making an order for visitation contingent upon the paternity finding without necessitating a return to court.

Ensuring that the agency provides services to the father. Additionally, the court should make it clear that it expects the agency to offer the father services once paternity is established. Since some fathers ask for service referrals before paternity is determined, the court should encourage the agency to permit this to occur.

V. ENGAGING FATHERS IN THE CHILD PROTECTION PROCESS

A. Court Involvement in the Engagement Process

Treating fathers with respect. When the father appears in court, the judge must treat him with respect, acknowledging his importance to the legal proceedings and to the child.⁵³ Simple courtesies can make the difference between a positive and negative court experience for the father.

Judge: Good morning Mr. Smith. How are you today?

Mr. Smith: Fine, thanks, Judge. Say, just why am I here today?

Judge: Mr. Smith, Miss Francis says that you are the father of her baby boy, Ricky. There are currently legal proceedings in this court involving Ricky, and, if you are the father,

⁵¹ 705 ICLS 405 2-15, 2-16.

⁵² It is the social worker's responsibility to bring to the attention of the court facts that might lead the court to conclude that visits would be harmful to the child.

⁵³ ". . . what I am saying is that what is very very important is treat the man with dignity and respect. The goal is for him to feel that he is being treated fairly and that he can be a part of his child's life and we will take him seriously." E-mail to the author from Commissioner Marilyn Kading Martinez, June 12, 2008 (on file with author).

you have a right to participate in those proceedings. I have a number of important questions to ask you today. Please stand and raise your right hand so that my clerk can administer the oath. Thank you.

Is it possible you are the father of little Ricky?

Mr. Smith: Well, I don't know, Judge. Miss Francis has a lot of boyfriends, and I'm not married to her, you know.

Judge: Well she seems pretty sure that you are the father. That's great news, isn't it!

Mr. Smith: I don't really know, Judge.

Judge: Being a father is a wonderful event. I want to offer my congratulations.

Mr. Smith: Thanks, Judge, but I'd like to be sure. Could I get some testing done to make certain that I'm the father?

Judge: Certainly, Mr. Smith. The social worker will arrange for DNA testing this week. Will you go to the testing center when she tells you the date?

Mr. Smith: I guess so.

Judge: Have you told your parents about Ricky?

Mr. Smith: I did mention it to my mother.

Judge: And was she happy with the news?

Mr. Smith: Yea, she was pretty excited.

Judge: As soon as the testing is completed, would you like to have visits with Ricky?

Mr. Smith: Sure, I guess.

Judge: Would you like it if your mother were also able to visit?

Mr. Smith: Sure, I guess. I know she would like it.

Judge: The social worker can refer you to a class for new fathers where you could meet with other young men to discuss what it means to be a father and how to care for your child. Would you like to participate in that class?

Mr. Smith: Sure, if I'm the father, I'll do it.

Judge: If we determine that you are the father, I may be ordering you to participate in services to show that you can be a safe and supportive parent. It makes sense to start these classes as soon as possible.

Judge: Would you like a picture of Ricky?

Mr. Smith: Yes, that would be nice.

Judge: Once the testing is complete, the social worker will provide you with one. I want you to return to court in ten days. I will appoint you an attorney once the paternity testing is complete and you are proven to be the father. Then there will be an adjudication hearing in two weeks. You have a right to appear at that hearing and all hearings thereafter. Also, it is my duty to caution you now that these legal proceedings have been brought on behalf of Ricky. He needs to have a permanent home as soon as possible. The law prefers to have him placed with a parent, but if the parents are unable to provide a safe, permanent home, it will be my task to find Ricky another permanent home. If you are the father, you will be given a fair chance to show that you can provide that permanent home, but you will only have a year or even less to do so. Do you understand?

Mr. Smith: Yes, Judge, I understand.

Engaging fathers in the child protection process involves strategic thinking and planning. For the father who enthusiastically comes to court asking to engage fully in all aspect of his child's life, participate in services, and attend all court hearings, there is little the court needs to do. The enthusiastic father, however, is the exception. More often the father is ambivalent about participating in the case, his relationship to the mother, and coming to court. Moreover, he may worry about getting involved in legal proceedings because he is an undocumented immigrant or has outstanding arrest warrants. He

may be worried about support and the obligations that accompany paternity. He also may not have a good relationship with the social worker or with the court-appointed attorney.

Identifying and removing barriers to the father's participation. The court can increase the likelihood that the father will show an interest in his child by identifying and removing barriers to his participation and by encouraging him to become involved with his child. The barriers include anything that makes it more difficult for the father to play a role in his child's life. For example, the court should inquire whether the father has transportation to and from the facility that will perform the DNA testing, to the courthouse, to the site for visitation, and to the location of services. The court must know how the father can be contacted. Staying in contact with homeless fathers presents unique challenges. Identifying a telephone or a mailing address to which the father has access is important. The court should ensure that language interpreters for non-English-speaking fathers are available at all critical events in the case. The court should determine whether the father's relatives are able to help the father address these barriers by providing transportation or receiving mail. The court should also find out whether the father can read the legal documents that he is given throughout the court process. This may embarrass the father (or mother), but the father's inability to read can present a significant barrier to his full participation in the case.

Appointing qualified counsel for father early in the case. Appointing counsel for the father is critical to his involvement in the court process. Counsel can help identify and locate the father. Counsel can take the time to explain in detail the father's rights, the consequences of the proceedings, and the urgency of taking timely action with regard to services. Counsel can inform the court about problems the father is experiencing that otherwise would escape the court's notice. Counsel can facilitate communication between the father and the caseworker, and ensure that the father's rights are upheld. The earlier the court makes the appointment, the more valuable counsel's contributions will be to the father and to the court process.⁵⁴

There is no constitutional right to counsel for indigent parents in child protection cases.⁵⁵ State laws and practices vary with regard to the appointment of counsel for indigent parents. In a 1998 survey, the authors found that:

- 39 states provide that counsel be appointed for indigent parents;
- 6 states include provisions that counsel be appointed for parents in all child protection proceedings;
- 3 states provide only for the appointment of counsel for parents in termination of parental rights cases;

⁵⁴ NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, CHILD ABUSE AND NEGLECT: REPRESENTATION AS A CRITICAL COMPONENT OF EFFECTIVE PRACTICE, March 1998, Reno, at 85 (hereinafter NCJFCJ SURVEY).

⁵⁵ In 1981, in the case *Lassiter v Department of Social Services*, 452 U.S. 18, the United States Supreme Court ruled that due process does not always require the appointment of counsel in termination of parental rights cases. Since child protection proceedings are less intrusive than termination of parental rights, it is logical to conclude that there is no constitutional right to counsel in child protection proceedings.

- 3 states do not provide explicitly for the appointment of counsel in statute.⁵⁶

The same survey revealed that counsel is appointed at some point during a child protection case and that 11 states reported that counsel for parents is generally not appointed.⁵⁷ Finally, the survey concluded that appointment of counsel much of the time is inadequate to provide effective assistance for three reasons:

1. Parents' attorneys are not appointed in time to adequately prepare;
2. Parents' attorneys are not given the time, resources, and compensation to adequately represent their clients; and
3. Parents' attorneys often face a tension between zealously representing their clients and "core concepts" of morality [that] dictate care and concern for the abused child.⁵⁸

The survey demonstrates that representation for indigent parents is not provided in all states, and often appointed counsel does not provide adequate representation. Appointment for non-resident fathers occurs less frequently than for mothers and putative fathers. For adequate counsel to represent non-resident fathers, standards of representation must be raised. Fortunately, some jurisdictions have set high standards for the appointment of counsel for all fathers. In the District of Columbia, the Family Court appoints counsel for all fathers (acknowledged or alleged, present or absent) at the initial court hearing in every child protection case.⁵⁹ Attorney names are submitted to the judge before the initial hearing, and the judge appoints counsel who are then notified of the hearing date. All this is done even before financial eligibility is addressed. Only after the father appears is financial eligibility determined. Additionally, D.C. attorney standards require the attorney to try to locate the father, and the attorneys can use court approved investigators to try to find their clients. Furthermore, if there are paternity issues, the court can order paternity testing which can be done at the court or, if the father is incarcerated, in prison or jail.⁶⁰

The court should also require counsel to participate in training with a specific focus on representing fathers.⁶¹ Some courts require all appointed attorneys to complete

⁵⁶ NCJFCJ SURVEY, *op.cit.*, note 54. States that do not have statutes requiring appointment of counsel for indigent parents include Delaware, Idaho, Kentucky, Indiana, Minnesota, and Mississippi. However, just because there is statutory law requiring appointment of counsel for indigent parents does not mean that it will be implemented by the trial courts. Nevada, for example, is currently being sued for failing to appoint counsel for indigent parents (and for children as well).

⁵⁷ *Id.*

⁵⁸ *Id.*; See also S. Garcia, & R. Batey, *Parents, Children, and the Courts: Article: The Roles of Counsel for the Parent in Child Dependency Proceedings*, 22 GEORGIA L.REV., 1079 at 1093-94.

⁵⁹ D.C. Code section 16-2304.

⁶⁰ The author secured this information from Wilma A. Brier, Esq, an attorney working with the District of Columbia Family Court, thanks to the assistance of Presiding Judge Lee Satterfield. (E-mail and references on file with the author.)

⁶¹ The role of the court in overseeing the provision of legal services to indigent parents is an important one. One state has written a Standard of Judicial Administration that addresses this issue. See California Standard of Judicial Administration 5.40(c), (West, 2008) which states in part: "The presiding

training as well as observe and participate in court proceedings before becoming eligible for court appointment.⁶² Such requirements ensure the availability of an experienced panel of attorneys for representation of parents, and particularly fathers, in child protection cases.⁶³

Encouraging the father to take pride in his status as father. As the above scenario shows, the court can encourage the father to take pride in his new status as father. The court can identify and make possible some of the positive aspects of being a father, including visits, sharing with other family members, exchanging photos, and participation in doctor visits. The court can congratulate the father—pointing out that this is a major societal and family event—and the father needs to be reminded of it. This encouragement can come from any male in the courtroom:

Judge: Mr. Jones, I have just made a finding that you are Sally's father. I want to congratulate you. This is an important day for you, for your family, and most of all, for your daughter.

Mr. Jones: Oh?

Judge: Yes, having a son/daughter is one of the most wonderful events in our lives. You will be a very important person in your daughter's life, someone she will love, respect, and look up to. And she will be very special in your life.

Mr. Jones: I've never been a father before, and my father was never part of my life.

Judge: You don't want your daughter to have the same experience that you did, do you?

Mr. Jones: No, I don't.

Judge: You can change that by participating in this case and in your daughter's life.

Mr. Jones: Oh?

Judge: Yes, I am a father also and I can tell you that it has changed my life in many positive ways. There are so many things that we do together. You have a great deal to look forward to as a father.⁶⁴

Unfortunately, the court can also present barriers to engagement. By failing to identify the barriers the father may face, the court can make it difficult for the father to visit, to come to court, or to engage in services. Judicial indifference can give the father

judge of the juvenile court should: . . . (3) Establish minimum standards of practice to which all court-appointed and public office attorneys will be expected to conform. These standards should delineate the responsibilities of attorneys relative to investigation and evaluation of the case, preparation for and conduct of hearings, and advocacy for their respective clients."

⁶² *Id.*

⁶³ The San Francisco Superior Court has developed an elaborate system for identifying qualified attorneys and ensuring that they have both training and experience before they are appointed to represent parents in child protection cases. See San Francisco Superior Court, *Local Rules of Court*, Rule 12.6-12.18.

⁶⁴ The suggestion for this type of courtroom exchange came from Judge Carolyn Kirkwood, Presiding Judge of the Orange County (California) Juvenile Court. Judge Kirkwood reports that one of the male attorneys in her courtroom talks to fathers about his experience as a father. Additionally, Judge Kirkwood asks fathers if they work. If they do, she compliments them on their work, on the fact that they are able to support their child, and how important their economic support is to the child's well-being. An additional suggestion is to ask the father if he had a relationship with his own father. Depending on the answer, the court can follow up with "Would you like to have a good relationship with your child?" "Yes." "I think we can help with that." Additionally, research supports the notion that connections with families can refocus a parent's attitude toward life, even after living a life of crime. Desistance (refraining) from crime is one of the byproducts. See S. FARRALL, *RETHINKING WHAT WORKS WITH OFFENDERS*, (Willan Publishing, Portland, 2002), at 8, 146, 152, 159.

the message that the court is not interested in his participation in the case.⁶⁵ Some courts show a bias toward alleged fathers, which harms the father and child.⁶⁶ Without appellate court oversight, some trial courts will continue to provide only minimal due process or support for fathers.

B. Identify and Engage the Extended Family

Extended family can be important to engaging fathers with their children. The young father may not understand the importance of a new family member to other members of the family and to the family as a unit. However, other family members—grandparents, aunts, uncles, and siblings—understand how important a new family member is, particularly a baby. They will want to be a part of the baby’s care. They will want the baby to remain in the family. Moreover, they will likely have more influence over the father than any professional in the child protection system has.⁶⁷ Parents, siblings, and other relatives may be in the best position to hold the father accountable for his behavior and to ensure that he participates in the legal proceedings.

Young fathers can be uncomfortable with infants. Typically they do not know how to play with or comfort them. They have other interests—sports, employment, dating—and can’t be bothered with caring for a baby. Extended family members can help the father learn how to relate to his child, teach him how to feel more comfortable with the child, and make him understand how important this new addition to the family is to everyone. A father visiting with an infant by himself may have a bad experience and give up on his efforts to be involved in his child’s life. A father visiting with a relative can see the child in the hands of a more skilled family member and can learn from them how to be a better father to the child.

The judge can play an important role in making the extended family a part of the child protection case. The judge can insist that the extended family be told of the legal proceedings, invited to come to court, and included in visitation arrangements. The judge knows that these relatives can help engage the father in his child’s life.

Identifying and engaging relatives is sound policy. It also is the law in many states and has received emphasis in recent federal legislation.⁶⁸ More than 23 “relative preference” states have statutes providing that relatives are preferred to nonrelatives when a child is removed from parental care and placed out of home. Relative preference is also the

65 L. Edwards, *The Impact of Judicial Behavior in Juvenile Court Proceedings*, 17 JUVENILE AND FAMILY JUSTICE TODAY, Winter 2008, at 29. As this article demonstrates, judicial indifference sends the message that the court has no interest in the person appearing before it and will not take the time to make the court appearance meaningful.

66 See *In re Baby Boy V.*, 140 Cal.App.4th 1108; 45 Cal.Rptr.3d 198, (2006).

67 “. . . as a general rule most of the literature on desistance [reduction in criminal behavior] supports the idea that marriage and family formation is associated with desistance.” S. FARRALL, & A. CALVERLEY, *UNDERSTANDING DESISTANCE FROM CRIME*, (Open University Press, New York, 2006), at 72; and see FARRALL, *op.cit.*, note 64.

68 See, for example, California Welfare and Institutions Code section 361.3(a) (West, 2008) which states, in part, “In any case in which a child is removed from the physical custody of his or her parents pursuant to Section 361, preferential consideration shall be given to a request by a relative of the child for placement of the child with the relative.” The recent federal legislation places great emphasis on the identification and engagement of relatives. See note 19 *supra*.

practice even in some states without relative preference statutes. It is good social worker practice to identify and work with extended family members. Often the child knows these relatives, which makes placement with them less traumatic to the child. They also share DNA with the child, thus making it likely that they will treat the child with love and will extend efforts to make the child's environment more family-like. Some research indicates that relative placements are safer than non-relatives.⁶⁹ Statistics indicate that relatives provide a significant percentage of care for children placed out of home.⁷⁰ However, the court must ensure that any relative placement is safe, and that the relatives will not permit the child to have unauthorized contact with either parent.⁷¹

C. Use Group Decision-Making Processes

An additional strategy for engaging fathers is to use group decision-making processes throughout the life of a child protection case. In a group decision-making process, family members, family friends, and professionals are convened to address issues relating to the child. Examples in the child protection process include Family Group Decision Making, Family Group Conferencing, Team Decision Making, Family Team Meetings, and court-based mediation. All are described in greater detail in other publications.⁷²

These processes enable family members to work together to plan for their children's future. Resources within the family and among close friends are identified, family members offer opportunities for the child to remain with a family member, and fathers can see that they are part of a greater family that wants to raise its children. The father can also see that he has a part to play in the family, and that by working together with other family members, he can be an important person to his child.

Recent studies demonstrate that fathers often participate in group decision-making meetings more frequently than they appear in court. "Family Group Conferences increase the involvement of fathers and paternal relatives."⁷³ In North San Diego County, California, for example, the agency deputy director of social services reports that their staff will not convene a Team Decision Making (TDM) meeting without the presence of the father. The agency finds that father's participation and the involvement

69 *Group Decision Making, op.cit.*, note 16 at 8-9.

70 The AFCARs data indicate approximately 24% of children in out-of-home care reside with relatives.

71 NCJFCJ, EFFECTIVE INTERVENTION IN DOMESTIC VIOLENCE & CHILD MALTREATMENT CASES: GUIDELINES FOR POLICY AND PRACTICE, (NCJFCJ, Reno, NV, 1999), Recommendation 24, at 67.

72 See *Group Decision Making, op.cit.*, note 16; for a description of Family Team Meetings, see *Achieving Timely Permanency, op.cit.*, note 26 at 13-14; A. MACRAE, & H. ZEHR, THE LITTLE BOOK OF FAMILY GROUP CONFERENCES: NEW ZEALAND STYLE, (The Little Books of Justice & Peacebuilding, Good Books, 2004); FAMILY GROUP CONFERENCING (G. Burford, & J. Hudson, eds., Aldine Transaction, 2005).

73 L. Merkel-Holguin, P. Nixon, & G. Burford, *Learning with Families: A Synopsis of FGDM Research and Evaluation in Child Welfare*, in PROMISING RESULTS, POTENTIAL NEW DIRECTIONS; INTERNATIONAL FGDM RESEARCH AND EVALUATION IN CHILD WELFARE, (National Center on Family Group Decision Making, American Humane, Denver, CO, 2003), at 8. In the same publication, high rates of paternal participation were noted in Washington (at 44), Colorado (at 75), Minnesota (at 85), and England (at 127). "More than a third of the FTM's on average have had fathers present." G. Burford, & J. Pennell, *Family Team Meeting (FTM), Process, Outcome, and Impact Evaluation, Phase II Report: Autumn 2006*, American Humane Association, 2006, at 1, 20.

of his family will almost always benefit the child.⁷⁴ The use of any group decision-making process must be safe for all parties, using domestic violence protocols where necessary.

D. The Adversarial Process

The adversarial process can be harmful to families.⁷⁵ It does not build relationships, strengthen families, or encourage participation by fathers or other family members. Fathers (and most family members) are intimidated by the adversarial process, feel rushed by the court's attention to time constraints, and intimidated by the atmosphere. They do not believe they can speak freely in court, they feel attacked when questioned by the attorneys, and they often leave the proceedings frustrated. As a result, many fathers either do not attend or sit silently in court.

The adversarial process does not build lasting family relationships. One study indicates that in child custody cases in which resolution is reached through the traditional adversarial court process, the father will have significantly less contact with his child over the remainder of the child's life as compared to cases resolved through mediation.⁷⁶ Thus, an important strategy for the child protection system is to offer opportunities outside of the courtroom to resolve matters, preferably in a confidential setting where family members can work with others to address the needs of their child.⁷⁷

These considerations have led one state legislature to declare that child protection proceedings should be conducted in a non-adversarial atmosphere, resorting to the traditional legal process only when necessary. This same legislature recommends that all child protection courts within the state establish mediation programs to resolve cases outside of the courtroom.⁷⁸

Judges can encourage the agency to use group decision-making practices. Judges can also encourage court administration to initiate a child protection mediation program. Many child protection courts across the country have instituted mediation programs with

⁷⁴ E-mail from Donna Hand, Deputy Director, to Judge Susan Huguenor, Presiding Judge of the San Diego County Juvenile Court, (July 31, 2008; on file with the author). Ms. Hand also reports that social workers "tend to look toward the mother first to engage and receive services, yet sometimes the reason the father has not been involved is that he feels the child(ren) should be with their mother, while at the same time, he has not been able to tolerate the mother's behavior as relates to drugs, mental illness and/or criminal behavior."

⁷⁵ For further discussion on the negative impact that the adversarial process has upon families, see L. Edwards, *Comments on the Miller Commission Report: A California Perspective*, 27 *Pace Law Review*, Summer 2007, at 635-639.

⁷⁶ R. Emory, D. Sbarra, & T. Grover, *Divorce Mediation: Research and Reflections*, 43 *FAMILY COURT REVIEW*, January 2005; R. EMORY, R. MNOOKIN, & E. MACCOBY, *DIVIDING THE CHILD: SOCIAL & LEGAL DILEMMAS OF CUSTODY* (1992), at 197-198.

⁷⁷ The California Legislature has acknowledged the importance of non-adversarial resolution of family matters. Legislation stresses that child protection cases should be resolved by non-adversarial means where possible. (see California Welfare and Institutions Code section 350) as well as mandating mediation in all child custody cases (see California Family Code section 3170(a)). Using non-adversarial processes is also a recommendation from the California Blue Ribbon Commission on Foster Care, Recommendation 2E, <http://www.courtinfo.ca.gov/jc/tflists/bluerib.htm>

⁷⁸ California Welfare and Institutions Code section 350(a)(1) and (a)(2), West, 2008.

great success.⁷⁹ Family members prefer mediation to the court process. They feel as though they are listened to (for the first time) and that they can work with others to fashion a result with which everyone is in agreement.⁸⁰

E. Ensure Quality Father-Child Visits

Fatherhood can be an abstraction, somewhat meaningless to a man unless the father sees, touches, holds, and identifies a specific child as his own. In child protection cases, the reality of fatherhood usually occurs in the context of visitation. Visitation is fundamental to engagement.⁸¹ The father needs to see the infant he has fathered. Perhaps he will see some family traits. Perhaps the baby will smile at him. Such small things can make the difference between engagement and disengagement. The presence of one or more family members can make a difference in visitation because they can share the infant with the father, bring more excitement and energy to the visit, as well as point out family resemblances to him.

Judges need to pay special attention to visitation between children and their parents and particularly to fathers. Frequency, duration, location, and environment (including who else is present) can make the difference between effective visitation that builds a relationship and visitation that is discouraging to the father.⁸² Visitation once a month or once a week is not sufficient time together to build a relationship. Nor is 30 minutes sufficient to engage father and child. Meeting in a room by oneself is also not conducive to strengthening a relationship. Judges must insist that visitation take place frequently, that it last at least an hour (longer is preferable), that it occur in a family-like setting, and that others (such as relatives or supportive foster parents) be permitted to attend with the father.⁸³

Some fathers will benefit from support or coaching before or during visits. Sophisticated supports and techniques for visiting help enhance parenting skills during visitation. The agency and the judge should consider referring fathers to visitation coaching to make visits as positive as possible.⁸⁴ These coaching services have served fathers well—preparing them to meet children they have not had much contact with or may not have seen at all. Coaching has been particularly useful for incarcerated fathers.⁸⁵

79 See L. Edwards, *Mediation in Child Protection Cases*, 5 JOURNAL OF THE CENTER FOR FAMILIES, CHILDREN & THE COURTS, 2004, at 57-69; Louis Trosch, et al., *Child Abuse, Neglect, and Dependency Mediation Pilot Project*, 53 JUVENILE AND FAMILY COURT JOURNAL, Fall 2002, at 57-67; and the citations in *Achieving Timely Permanency*, *op.cit.*, note 26 at 12-13. If you are interested in starting a child protection mediation program, contact the author for a free DVD concerning this service.

80 L. Edwards et al., *Mediation in Juvenile Dependency Court: Multiple Perspectives*, 53 JUVENILE AND FAMILY COURT JOURNAL, Fall 2002, at 49-65.

81 L. Edwards, *Judicial Oversight of Parental Visitation in Family Reunification Cases*, 54 JUVENILE AND FAMILY COURT JOURNAL, Summer 2003, at 1-24.

82 *Id.*

83 Any visiting relatives must not pose a threat of harm to the child. See EFFECTIVE INTERVENTION, *op.cit.*, note 71.

84 M. Beyer, *Visit Coaching: Building on Family Strengths to Meet Children's Needs*, 59 JUVENILE AND FAMILY COURT JOURNAL, Winter 2008, at 47-60.

85 E-mail from Marty Beyer, dated Oct. 18, 2008 (on file with the author).

The concept of visitation should be expanded to include other locations and events rather than just time at a visitation center.⁸⁶ For example, judges should make orders that permit fathers to get notice of and to participate in all well-baby visits to the doctor as well as other appointments the child may have with professionals. For the school-age child, this would include parent-teacher conferences at school and sporting or cultural events in which the child participates. Church-based events such as baptisms, Sunday school, and other occasions should also be considered opportunities for meaningful father-child contact.

F. Ensure Fathers Receive Parenting Services

Most fathers need help learning how to be a father. This is particularly true for young fathers. The judge should be prepared to refer the father to services that will provide basic information about child development and skill development for parents.⁸⁷ Most jurisdictions offer parenting classes, and some offer parenting classes that focus on the needs of infants. The most useful of these classes bring together fathers and their children so that the father can work and play with the child in the context of the parenting class.⁸⁸ Also of great use are programs that bring new fathers together to address their unique needs.⁸⁹ Some communities have developed mentoring programs that match experienced fathers with new fathers so that one can learn from the other.⁹⁰ Judges need to know what is available in the community and, if nothing appropriate is available, how such a service might be developed. Community-based organizations such as the YMCA often provide such a service. Excellent models for such services exist around the country.⁹¹

If no services specific to fathers exist, the judge can ask the agency to develop one. At some point the judge may decide that a parenting class for fathers is a reasonable service for the community to provide and insist that the agency create one. Failure to do so would result in a “no reasonable efforts” finding.⁹²

⁸⁶ Edwards, *op.cit.*, note 81 at 10.

⁸⁷ “Getting them into court is the first essential step, and then having high quality community fathers’ programs available is certainly helpful.” E-mail from Joe Spaeth, Marin County Public Defender, Sept. 30, 2008. Mr. Spaeth’s office represents parents in child protection proceedings (on file with author).

⁸⁸ For an outstanding example of such parenting programs, see <http://www.celebratingfamilies.net/>

⁸⁹ Communities in Colorado have developed creative and effective programs for fathers including B.A.M. (Be A Man) Fatherhood Program in the Greeley/Evans area (<http://www.realdads.net/>); Got Fatherhood? Program in South Weld County (Longmont/Boulder) (<http://www.gotfatherhood.com/>), and Colorado Dads—Be There For Your Kids, a state program (<http://www.coloradodads.com/>); For some advice about maximizing the effectiveness of father’s programs, see Rosenberg & Wilcox, *The Importance of Fathers in the Healthy Development of Children*, (CD-ROM) User Manual Series (2006), Section II, Fatherhood Programs. Office on Child Abuse and Neglect.

⁹⁰ *Id.*

⁹¹ E. Brandon, *Dudley Morgan Speaks about Marin City Fatherhood Program*, THE CENTER VIEW, (a publication of the Marin City Community Services District), Vol. X, Issue 20, Oct-Nov, 2008, at 4.

⁹² For a discussion on how a “no reasonable efforts” finding can result in changes to the services available in the community see Edwards, *Improving Implementation*, *op.cit.*, note 47 at 3, and Appendix C, found in RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE & NEGLECT CASES, (NCJFCJ, Reno, NV, 1995), at 167-168, and Edwards, *Reasonable Efforts: A Judicial Perspective*, *op.cit.*, note 47.

There is a related problem when the judge orders services for a father. Some fathers will balk at the idea that they should participate in any services. The father may say something like “[s]he was the one who neglected my child. Why should I have to do anything?”⁹³ The judge must be prepared to discuss the importance and value of the service being offered. One judicial colleague put it this way when speaking to a father about services: “You are a father. Now you need to learn how to be a daddy.”⁹⁴

The father who appears and asks for custody raises complex issues. Assuming that he does not present a danger to the child, should the court place the child with him and dismiss the case? That would be the result had the mother died since he would be the child’s surviving parent. Should the court give no preference to the father at all and simply use a “best interests” test to determine custody? Should the court place the child with the father, maintain the child under court supervision, and thus give the mother an opportunity to use services to reunify with her child? States have responded to these issues in different ways both through statutes and appellate decisions.⁹⁵

G. Working with the Incarcerated Father

Many foster children have parents in jail or prison. Of this population there are far more incarcerated fathers than mothers.⁹⁶ Some of these fathers are “alleged,” that is, they are not married to the mother and have not established paternity. All of the issues discussed in earlier sections regarding identifying, locating, notifying, and engaging fathers are relevant to incarcerated fathers. The mother may finally reveal the father’s identity, but she may not know if he is incarcerated. With a name, birth date, and possibly other information, the social worker should be able to locate an incarcerated father quickly.

The court should insist that the caseworker contact the alleged father, inform him of the legal proceedings, and determine his desires about the child protection proceedings. The fact that he is in jail should not stop the inquiry—after all, we have seen that

⁹³ V. Sankaran, *But I Didn't Do Anything Wrong*, 85 MICHIGAN BAR JOURNAL, March 2006, at 1-6; and see Harris, *op.cit.*, note 5.

⁹⁴ E-mail from Child Support Commissioner John Schroeder, Santa Clara County (California) to the author June 4, 2008 (on file with the author).

⁹⁵ Pennsylvania and Maryland take the first position that the court has no jurisdiction where there is a fit parent. In re M.L., 757 A.2d 849, 853-4 (Pa.2000); *In re Russell G.*, 672 A.2d 109 (Md. Ct. Spec. App. 1996); Ohio, Michigan, Maine, and North Carolina take the second position, permitting the court to take jurisdiction over a child even if there is a fit/non-offending parent prepared to take custody. In re C.R., 843 N.E.2d 1188, 1190 (Ohio 2006); In re C.R., 646 N.W.2d 506; 518-19 (Mich. Ct. App. 2002); ME Rev. Stat. Ann. tit. 22 sections 4034-6 (2006); N.C. Gen Stat. Ann. section 7B-506(h)(2). Kansas, New Hampshire, Florida, and California take the position that the father is a preferred placement, but that the court will maintain jurisdiction. In re T.S., 74 P.3d 1009 (Kan. 2003); In re Bill F., 761 A.2d 470 (N.H. 2000); N.H. Rev. Stat. Ann., section 169-C: 19e (2006); Fla. Stat. Ann. section 39.521(3)(West 2006); L.P. v Department of Children & Families, 871 So.2d 306, 308, (Fla. Dist. Ct. App. 2004); California Welfare and Institutions Code section 361.2(b)(c); In re Patricia T., 109 Cal.Rptr.2d 904, 907, 909 (Cal. Ct. App. 2001). For a discussion of these issues, cases and statutes, see Harris, *op.cit.*, note 5 at 301-307.

⁹⁶ COMMITTEE ON LAW AND JUSTICE, PAROLE, DESISTANCE FROM CRIME, AND COMMUNITY INTEGRATION (National Research Council, Washington, DC, 2007).

the father's identification and participation will benefit the child in many ways.⁹⁷ Yet, it seems that in some jurisdictions, the imprisoned father may not even receive notice.

The best practice is to bring the incarcerated father to court, appoint counsel, have paternity established, and proceed with the case. Just because he is not married to the mother or is currently incarcerated is not enough reason to ignore him. Remember, his presence benefits the proceedings and, most importantly, the child. Hundreds, if not thousands, of foster children might have been placed with relatives had their fathers and their families been included in the child protection process. The criminal legal system requires defendants accused of petty crimes to appear in court even if they are in jail—the legal system should mandate that alleged fathers be notified and brought to court when their permanent relationship to their child is at risk.⁹⁸

In some states, incarcerated fathers who indicate an interest in reunifying with their children are offered services, including visitation, to improve their parenting abilities.⁹⁹ Even if some of those services are unavailable in prison (counseling, parenting classes, etc.), the court may still insist that the caseworker assist the father and will examine caseworker conduct regarding the reasonable efforts requirement.¹⁰⁰ In some states, incarcerated fathers participate in the National Fatherhood Initiative InsideOut Dad, an effective program for engaging incarcerated fathers in their children's lives.¹⁰¹ Judges have creatively involved incarcerated fathers. In one New Hampshire judicial district, the court has approved a computer hook-up in the jail so that incarcerated fathers can talk with their children while they are in jail. The judge reports that this contact “. . . instills much greater connections between parents and kids due to the conversation and frequency of it, rather than sending letters or a monthly jailhouse visit.”¹⁰²

H. Comments from Judicial Officers

1. General

Little has been written about engaging fathers from a judicial perspective, but juvenile and family court judges, child support commissioners, and other judicial officers

⁹⁷ Additionally, we have seen that connecting with family can change the direction of a prisoner's life. See FARRALL, *op.cit.*, note 64.

⁹⁸ A powerful dramatization of this scenario is found in the book *Finding Fish* by Antwone Fisher (William Morrow, 2001), later made into a motion picture, *Antwone Fisher*. Significantly, fathers who have contact with family members during their incarceration have lower recidivism rates. FARRALL, *Id.*

⁹⁹ In California, recent legislation permits the court to extend the reunification period for parents who are incarcerated, institutionalized, or in residential substance abuse treatment up to 24 months from the time the child was removed from the parent under specified circumstances. The statute requires the court to consider the parent's criminal history as well as the parent's ability to care for the child. AB 2070 (Chapter 842, Statutes of 2008). This is a clear legislative determination that the facts surrounding incarceration should be carefully considered before ending the parent-child relationship.

¹⁰⁰ D. Lough, *Incarcerated Father Entitled to Reunification Services*, 21 JOURNAL OF JUVENILE LAW, 2000 at 169-173; See also *In re Robin V.*, 33 Cal.App.4th 1158, 39 Cal.Rptr.2d 743, 1995.

¹⁰¹ An evaluation of the InsideOut Dad program can be found at <http://www.fatherhood.org>.

¹⁰² E-mail from Judge Susan B. Carbon, Grafton County, New Hampshire, dated Oct. 12, 2008 (on file with the author).

who deal with family problems have thought a great deal about this issue. Interviews with more than 15 judicial officers revealed several themes, a few of which appear below.

Judges must insist that social workers take seriously the job of questioning the mother about the identity and location of the father. This leadership role was made clear by Judge J. Dean Lewis, a retired judge from Virginia, when she first took the juvenile court bench:

When I first came on the bench in 1986, the intake officers would put “unknown” in a large number of petitions as to the “name of father” or unknown as to location for service of process. That was because the social worker was the one filing the petition and at the time of removal, either did not ask for the father’s information or was not able to secure it. So the first thing I did was to address that problem with the intake officer. I informed the intake officer to require this information to be on the petition and the social worker was responsible for securing this information so it could be contained in the petition.¹⁰³

At the earliest possible opportunity, the children’s social worker and the judge must make it clear and must give the father the impression that he is an important person, that he is to be considered for placement, if not immediately, then sometime soon, and that we encourage and will facilitate visits as well as placement.¹⁰⁴

I also tell men that anyone can be a father, but it takes dedication to be a Daddy. I also tell them that all studies show that children fare better if both parents are involved in their lives. Sometimes it works, other times not. It is especially difficult when the parties are non-relational.¹⁰⁵

I think the first thing a judge needs to do from the bench is make inquiry at all times about the father. The court also has to meaningfully engage fathers when they do appear and hold the agency accountable both for not looking hard enough and for not offering appropriate reunification services to dads. This is particularly true when a mom is working the case plan. We also have to try to educate the agency that just because a father may be non-custodial that does not mean he is unfit.¹⁰⁶

What can bench officers do? 1) Communicate their expectations to fathers that they can and should take on the nurturer role (that they can and should reunify); 2) Validate a father’s desire to parent; 3) Demand accountability from fathers in the parenting/visitation role through frequent court reviews . . . perhaps even a Dad’s Court similar to Drug Court—do not allow “excuse Court.” For example, we do not allow women to place their employment obligations ahead of reunification with their children. We should expect the same from men. 4) Expect and demand that fathers regularly and frequently visit their child.¹⁰⁷

103 E-mail from Judge J. Dean Lewis (ret.) to the author dated Sept. 26, 2008 (on file with the author). Judge Lewis went on to state that the intake worker was also required to inform the court of her efforts to identify and locate the father in her report at the first hearing. If there was missing information at the time of the hearing, the judge knew what she had to do to get more information. “What happened was that very quickly both the social workers and the DSS attorney would know I was going to address this as the first issue in the case . . .” *Id.*

104 E-mail to the author from Commissioner Marilyn Kading Martinez of the Los Angeles County Juvenile Court, June 12, 2008 (on file with the author).

105 E-mail from Commissioner John Schroeder, *op.cit.*, note 94.

106 E-mail from Judge Stephen Rubin, Pima County (Arizona) Juvenile Court to the author dated Aug. 25, 2008 (on file with the author).

107 E-mail from Commissioner Nancy Williamson, Stanislaus County (California) Superior Court, Sept. 2008 (on file with the author).

Training has been an effective tool for educating the entire court system about the importance of engaging fathers and strategies to accomplish that goal. In her role as Chief Judge of the County of Caroline Juvenile and Domestic Relations Court in Spotsylvania, Virginia, Judge J. Dean Lewis (ret.) organized monthly trainings inviting “everyone.” According to Judge Lewis:

One topic we repeatedly address was identification of fathers, not only in child protection cases, but all cases as this was a big problem in delinquency cases as well. Child support enforcement had a parent locator resource and spoke about this resource on several occasions. In a number of our foster care cases we were able to find a father whose address was unknown by social services (child protection workers) turning the case over to child support enforcement.¹⁰⁸

2. Iowa—An Outstanding Approach to Engaging Fathers

Iowa has taken extraordinary steps to engage fathers in the child protection process, and much of the leadership has come from the judiciary. Iowa’s success in engaging fathers comes despite a statutory scheme that treats non-custodial fathers as little more than intervenors.¹⁰⁹ According to Judge Constance Cohen, the judiciary does its best to provide notice, counsel, and services to fathers as soon as possible.¹¹⁰

Engagement efforts cut across the entire dependency process in Iowa. The Public Defender’s Office has agreed to appoint counsel subject to the filing of a financial affidavit so that all identified parents have legal representation at the first hearing. At the expanded preliminary hearings held within five days of removal,¹¹¹ the court orders paternity testing if necessary, offers evaluations, family contact, treatment, transportation assistance, and “anything else we can do frontload.”¹¹² Fathers have a full voice in the proceedings from the first hearing on.

Additionally, parent handbooks are provided to all parents at the first hearing to help them understand the nature of the proceedings. The court has developed a Parent Partners program with parents who have successfully navigated the system mentoring parents new to the system.¹¹³ The court and community have participated in the National Fatherhood Initiative, run through the YMCA, to support fathers and has assisted in developing educational tools for them. The Zero to Three Project has also made special efforts to motivate fathers to participate in all aspects of a case. They are involved in attachment assessments, dyadic therapy, family contact, and other front-loaded services.

108 E-mail from Judge Lewis, *op.cit.*, note 103.

109 “A parent without custody may petition the court to be made a party to proceedings under this division. Iowa Code Section 232.91(1).”

110 This posture has been taken because of the expedited timelines. E-mail dated Aug. 18, 2008 from Judge Constance Cohen, Juvenile Court, Des Moines, Iowa (on file with the author). Judge Cohen reports that many of the best practices she describes started in Polk County (Des Moines), but that many have spread to other parts of the state.

111 The local rule mandates the hearing take place within 10 days, but local practice is for the hearing to take place in 5 days, again because of the expedited nature of the proceedings.

112 E-mail from Judge Cohen, *op.cit.*, note 110.

113 Judge Cohen writes that fathers, in particular, are benefiting from these relationships.

The project also counsels parents on their joint responsibility to parent their child, often resolving parental conflicts and refocusing parents on the needs of their child.¹¹⁴ Fathers are expected to participate in Part C evaluations of their young children's developmental progress, Early Access, doctor and dental appointments, family team meetings, and similar activities.

Judge Cohen writes that from the bench, the judges make it clear that the expectations are full involvement as it is a "Now or Never" proposition. Fathers are emphatically informed that if they wait for the mother to fail before getting ready to assume custody, it may be too late. Even though Judge Cohen admits the local telephone service is not perfect, the court permits telephonic appearances to accommodate work schedules, transportation problems, incarceration, or other barriers to personal presence at court hearings. If a parent does not appear, the judge will ask for a phone number and try to connect with him or her by calling from the bench.

If the court finds that the mother has purposefully frustrated the father's efforts to locate the child and actively participate in her life, the court may find compelling reasons to maintain legal rights beyond 15 months to enable the relationship to grow. All parents are expected to participate fully in family team meetings and are encouraged from the beginning to identify appropriate relatives to assume temporary custody or, if needed, for concurrent planning. If the ICPC may be involved, it is ordered at the earliest possible time. Where there may be siblings with different fathers and the mother is not a possible placement, but one father is able to take custody of some or all of the children, there is an exploration of expedited foster care licensing to enable the siblings to reside together.

Judge Cohen reports that while their court does not have jurisdiction over child support matters, Iowa has developed a statewide protocol whereby the payor's obligation can be suspended if he has custody under a juvenile court order. Thus, a father also has an economic incentive to ask for custody of a child.¹¹⁵

VI. SAFETY CONSIDERATIONS FOR THE MOTHER AND CHILD

It cannot be assumed that the father in the child protection case is a harmless person or a positive influence in the child's life. He may be dangerous, violent, a substance abuser, or have sexual or mental health problems. His conduct may be the reason that the child's case is before the court. The judge will need good information about the father to make decisions about his contact with the child and with the mother. The judge should be prepared to restrict contact, if necessary, and should have in place domestic violence

¹¹⁴ Telephone conversations with Judge Cohen and Judy Norris, Director of the Zero to Three Project.

¹¹⁵ This is not the first issue on which Iowa (and Polk County) have been national leaders. In child protection visitation cases, Iowa has one of the nation's model programs. *See* Edwards, *op.cit.*, note 81 at 7.

protocols and practices should mediation or other group decision-making processes be used.¹¹⁶

On the other hand, just because the father is violent or dangerous does not mean his entire family is to be avoided. Some people subscribe to the maxim that “the apple does not fall from the tree” and similar statements, meaning that if the father is dangerous, the entire family must be dangerous. Experience with group decision-making practices has taught professionals that a family always has some solid, stable members, no matter how violent or dangerous one or more members may be.

Assuming the father is a danger, the question that arises when a family member steps forward to receive a child into their home is whether the family member understands what the father has done and is willing to protect the child from that person in the future. This issue is challenging for family members because they often love the father and have a difficult time accepting that he has been or may be abusive toward the child. The judge must weigh these considerations in making a placement decision.

VII. CONCLUSION

Our court traditions and practices must change to embrace fathers, and judges must take the lead. Recent developments are encouraging. Law and practice are changing. Increasingly, legislatures are passing laws that grant fathers the same rights as mothers as soon as their paternity is established. Additionally, the extended family has become a placement of choice if children must be removed from their parents.

Now it is up to the court to ensure that fathers receive their legal rights, attorneys speak forcefully for them, and caseworkers fulfill their roles in identifying, locating, noticing, and working with them. There is potential for great benefits in these changes. The potential is for the father to become engaged in the court process and with his child, and for the father and his family to be a resource to the child and to the decision makers in the court system. Additionally, the child may be able to remain with family.

The judge plays a critical role in the engagement process. Starting with identifying, locating, and notifying the father, insisting on agency dedication to working with the father, using the court’s skills to attract and inspire the father to become involved with his child, using the court’s powers to ensure that extended family members are identified and participate in the court process, using the court’s powers to make father-child contact meaningful, ensuring that appropriate services are available, and insisting that non-adversarial processes are available for the family, the judge can maximize the possibility that a father will become involved in the court process, and, more importantly, in his child’s life to the child’s benefit, emotionally, socially, and financially.

¹¹⁶ Such protocols are standard practice in some jurisdictions. *See* California Rule of Court 5.215. For a discussion for the best practices regarding mediation when domestic violence issues are present, see *Achieving Timely Permanency, op.cit.*, note 26 at 12-13.

APPENDIX A

JUDICIAL CHECKLIST REGARDING ENGAGING FATHERS

1. Identify all possible fathers as soon as possible.
2. Question the mother under oath regarding the identity of the father.
3. Determine where the father or potential fathers can be located.
4. Order the caseworker to follow-up on information gained from the court hearing.
5. Order the caseworker to personally serve each possible father with notice of the legal proceedings.
6. Insist that caseworkers use good faith efforts to identify, locate, and support the father throughout the child protection process. Use the “reasonable efforts” finding if necessary and appropriate.
7. Revisit the question of identity and location of the father at all subsequent court hearings.
8. When a potential father comes to court, let him know that the court is pleased that he has appeared because he is an important person in the child’s life. Let him know that once his paternity is established, he will be treated as a parent in all subsequent court proceedings.
9. Complete the testing for paternity as soon as possible at state expense unless the father has the means to pay for the testing.
10. Appoint counsel for the father at least as soon as paternity has been established, with the possibility of reimbursement considering his financial means.
11. Make it clear that the father may be a placement possibility for the child.
12. Identify the father’s extended family and ensure that they know about the legal proceedings and know that they will be considered as possible placements if placement is necessary.
13. Permit the extended family to participate in group decision-making processes, visitation, and court hearings.
14. Determine if the father is a danger to the mother or to the child and make appropriate protective orders.
15. Encourage the development in the community of services that will meet the needs of fathers. These could include parenting classes for fathers, parent coaching, fathers mentoring fathers, and other gender-based programs.