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Dismantling the United Front in Child Abuse Cases: Reevaluating Delaware’s Serious Injury Statute After Fifteen Years of ASFA

Eliza M. Hirst, Esq. and Harper S. Seldin***

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I. Introduction

Congress enacted the Adoption and Safe Families Act of 1997¹ (“ASFA”) in response to growing concerns that state agencies were keeping children in foster care for too long and returning them to unsafe homes.² ASFA clarified, among other issues, that family reunification after a child's removal is favored. To effectuate reunification, ASFA requires child protective service agencies to make reasonable efforts by providing services such as parenting classes, substance abuse treatment, or therapy for the family.³ However, ASFA also requires courts to consider the safety of the child as the paramount concern in all child welfare cases.⁴ As a result, under ASFA, reasonable efforts may not be required if there are “aggravated circumstances,” such as the parent subjecting the child to

1. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115.

2. Katherine S. Bean, *Aggravated Circumstances, Reasonable Efforts, and ASFA*, 29 B.C. THIRD WORLD L.J. 223, 239 (2009) (citing *The Adoption Promotion Act of 1997: Hearing on H.R. 867 Before the Subcomm. on Human Resources of the H. Comm. on Ways and Means*, 105th Cong. 48, 48-49 (1997)).

3. 42 U.S.C. § 671 (2010) (clarifying the Reasonable Efforts Requirement: “[R]easonable efforts shall not be required to be made with respect to a parent of a child if a court of competent jurisdiction has determined that –

(i) the parent has subjected the child to aggravated circumstances (as defined in State law, which definition may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse);

(ii) the parent has – (I) committed murder . . . of another child of the parent; (II) committed voluntary manslaughter . . . of another child of the parent; (III) aided or abetted, attempted, conspired, or solicited to commit such a murder or (ii) such a voluntary manslaughter; (IV) committed a felony assault that results in serious bodily injury to the child or another child of the parent; or

(iii) the parental rights of the parent to a sibling have been terminated involuntarily.”).

4. *Id.*

abandonment, torture, unexplained serious injuries, chronic abuse, or sexual abuse.⁵ States generally interpret this provision to mean that where there are aggravating circumstances,⁶ child protective service agencies may be excused from providing reunification services, but may also choose to make services available even when they are not required.⁷ Significantly, excusing the child protective services agency from providing reunification services to parents is often a substantial step toward terminating parental rights.⁸

The discretion to deny reunification services has often led to inconsistencies in how and when courts order such services for parents.⁹ Historically, cases of unexplained child abuse and neglect involving two parent caregivers have been extremely difficult to prosecute in both civil and criminal courts. Because the child welfare system cannot always rely on the criminal justice system to protect children, it must rely on civil statutes to protect and address the needs of abused children and their families; however, current child welfare protections often do not extend far enough in cases where there are two caregivers with no plausible explanation for a child's serious injury.

This Article addresses how Delaware has adopted ASFA's aggravated circumstances provisions, both statutorily and as applied by the Delaware Family Court. Delaware, like many other states, grapples with unexplained, serious child injuries. This Article will also address specific cases in Delaware that rose and fell on the basis of aggravated circumstances. This Article places Delaware in the national context of statutory and judicial approaches to aggravated circumstances by suggesting a legislative path forward to provide even greater protections to children in the state.

Part II of this Article will review two recent cases in Delaware and provide the historical context for aggravated circumstances in that state. Part III reviews the Adoption and Safe Families Act (ASFA) guidelines for child protection systems' responsibilities as they relate to cases involving serious injuries. Part IV reviews how the fifty states have responded

5. *Id.*

6. The federal statute uses the term "aggravated circumstances," but states have variously adopted "aggravated" or "aggravating" circumstances in their statutes. The alternate usage of "aggravated" or "aggravating" throughout this article mirrors those differences.

7. Bean, *supra* note 2, at 251.

8. *See, e.g., In re Jac'Quez N.*, 669 N.W.2d 429, 437 (Neb. 2003) (holding that clear and convincing evidence supported a finding that the mother subjected the child to aggravating circumstances, and thus reasonable efforts at reunification were not required).

9. We recognize inconsistencies will naturally exist because of factual differences, case complexity, and judicial discretion.

statutorily to ASFA's aggravated circumstances clause. Part V will address how various jurisdictions handle serious injury cases. Finally, Part VI will propose strengthened protections in aggravated circumstance cases specifically to address the problem of children with unexplained injuries involving two parent caregivers.

II. Delaware

A. Recent Cases

In Delaware, dependency and neglect cases involving two parent caregivers and a child with serious injuries may be problematic when those parent caregivers¹⁰ act as a united front to protect each other and the evidence cannot pinpoint who perpetrated the life-threatening injuries upon the child. Two recent serious injury cases are emblematic of the inherent complexity in Delaware's current child welfare system. This complexity manifests when two parent caregivers either present a united front of denial or are both the potential perpetrators of abuse.

The first case involves baby Matt,¹¹ who came into the foster care system at five months old with serious inflicted¹² injuries.¹³ Matt was admitted to the emergency room with skull fractures, bruising on his leg, a bruised ear, and multiple fractures all over his body in various stages of healing. The multiple injuries signified at least two, if not more, incidents of inflicted abuse.¹⁴

Matt's mother and stepfather were his primary caregivers. The maternal grandmother occasionally cared for him as well. Both the mother and the stepfather were interviewed by the police and criminally investigated, but neither explained what, or who, caused the injuries. The

10. The term "caregiver" refers to parents or others who live with the child and are actively caring for the child.

11. The child has been given a pseudonym to protect his identity.

12. "Inflicted injuries" is used to describe injuries that were caused by an actor, though that actor may not be identified. "Inflicted" is used rather than "non-accidental" because injuries could, theoretically, be both inflicted and accidental. The determination of whether injuries are accidental or non-accidental has legal consequences. Therefore, at the initial stages of a case, it may be more appropriate to refer to injuries caused by an unknown human actor as "inflicted." "Inflicted injury" is also a medical opinion.

13. Div. of Family Servs. v. A.A., Del Fam. Ct., FN:12-02-10T (Jan. 8, 2013) (describing Matt's injuries).

14. *Id.*

mother admitted that Matt suffered severe injuries while in her care, but did not explain or identify the source of those injuries.¹⁵ Nearly a year and a half after Matt came into foster care, the mother pled guilty to misdemeanor offensive touching stemming from some of Matt's injuries, with a sentence of suspended Level V for 30 days and an order to enroll in an anger management program.¹⁶

Although the Division of Family Services ("DFS") requested to be excused from case planning on the grounds of serious unexplained injury,¹⁷ the court felt legally bound to require DFS to case plan with the mother.¹⁸ Under Delaware's termination of parental rights serious injury statute, the court could not determine that Matt's injuries "resulted from" the mother's intentional conduct, reckless disregard, or willful neglect and therefore DFS was required to case plan with the mother.¹⁹ The court determined that her failure to seek medical attention did not rise to the statutory ground for aggravated circumstances.²⁰ The stepfather was not a party to the civil action because he had no legal ties to the child. Matt's mother's rights were eventually terminated for failure to plan.²¹ The natural father ultimately voluntarily consented to a termination. Despite efforts by DFS to provide reunification services to the mother, she did not participate in any case planning and had no contact with Matt after he entered foster care.²²

Baby Jill²³ was also five months old when she entered foster care after enduring twenty-seven fractures all over her body, including a broken clavicle and injuries to her extremities caused by yanking, squeezing, and shaking.²⁴ Prior to entering care, Jill's mother called the pediatrician to

15. *Id.*

16. *Id.*

17. DEL. CODE tit. 13, § 1103(a)(8) (2009). DFS is excused from making reasonable efforts at reunification where "[a] child has suffered unexplained serious physical injury, near death, or death under such circumstances as would indicate that such injuries, near death or death resulted from the intentional or reckless conduct or wilful [sic] neglect of the parent."

18. Matt's mother did not complete any element on her case plan and never visited with Matt after his entry into the foster care system.

19. *Div. of Family Servs. v. A.A.*, 11-22215 (Del. Fam. Ct. Oct. 10, 2011). It is important to note that there were other complicating factors in this case, which led the Court to order DFS to case plan with the mother.

20. *Id.*

21. *Id.*

22. *Id.*

23. The child has been given a pseudonym to protect her identity.

24. *Div. of Family Servs. v. A.L.*, No. 11-08-09TN, 2012 WL 4861426 (Del. Fam. Ct. 2012), *aff'd* Long v. Div. of Family Servs., 2012 WL 6525082 (Del. 2013, decided Dec.

report clicking and popping sounds in Jill's chest when she breathed. Jill's mother had heard these clicking and popping sounds for about a week before her initial call to Jill's pediatrician. The pediatrician sent Jill to the hospital for suspected fractures and ordered x-rays. Jill was sent home shortly thereafter. Jill's mother returned to the hospital the next morning because the clicking and popping sounds had not abated while awaiting the x-ray results.²⁵ A pediatric child abuse expert examined Jill and determined that the injuries were in various stages of healing: some of the fractures had occurred within the previous five days and others were at least two to three weeks old.²⁶

Jill's mother and father were her primary caregivers.²⁷ Neither parent reported any accidents or events that might have caused the clicking and popping sounds to occur.²⁸ Neither parent provided a plausible explanation as to the cause of the injuries at any point during the criminal investigation or the dependency proceedings.²⁹ Both parents admitted they were her primary caregivers and that only one other individual watched Jill alone for a few hours at least six weeks prior to Jill's hospital admission, which did not align with the dates or ages of her injuries.³⁰ Additionally, the father had a previous criminal charge of third-degree assault for abusing another of his children ten years prior when the child was three months old. Not surprisingly, Jill did not incur any additional fractures after she was removed from her parents' custody and placed in a foster home.³¹

Unlike its decision in Matt's case, soon after Jill came into foster care, the Family Court determined that the DFS decision to forgo case planning was neither arbitrary nor capricious.³² In a subsequent proceeding, the court terminated parental rights on the grounds of unexplained serious injury.³³ Although the parents appealed, the Delaware Supreme Court

13, 2012).

25. A Delaware Child Abuse Neglect Panel reviewed pursuant to the Child Death, Near Death and Still Birth Commission. DEL. CODE tit. 31, § 302 (2011).

26. Div. of Family Servs. v. A.L., No.11-08-09TN, 2012 WL 4861426 (Del. Fam. Ct. May 23, 2012).

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. Div. of Family Servs. v. A.L., No.11-08-09TN, 2012 WL 4861426 (Del. Fam. Ct. May 23, 2012).

32. *Id.*

33. Long v. Div. of Family Servs., No. 341 (Del. Fam. Ct. 2012), *appeal docketed*, No. 341, 2012 (Del. 2012).

affirmed the decision.³⁴ Still, without conclusive evidence, neither Jill's mother nor father has been arrested or charged with abuse or neglect.

Even before Matt and Jill's cases, Delaware had a variable history of serious child injury cases, which shaped the Family Court's consideration of such cases. Before Delaware codified ASFA's aggravated circumstances into its termination of parental rights statute, the Division of Family Services first sought permission to be excused from exerting reasonable efforts in 1999, involving a case where a child with a history of abuse came into state custody for a second time with bruises, a skull fracture, and subdural hematomas, which were likely the result of violent shaking.³⁵ Because of these grave injuries, the court excused DFS from case planning with the mother when she provided no plausible explanation. The court concluded that the child's health and safety would be placed in jeopardy if she were to return home.³⁶ It further determined that "either Mother inflicted the abuse; Mother and someone else inflicted the abuse; or Mother knowingly failed to protect her child by allowing someone else to inflict abuse onto the child."³⁷ In 1997, 2000, and 2001, Delaware codified the federal ASFA requirements within its termination of parental rights statute and expanded aggravated circumstances to include abandonment, felony convictions where the victim is a child, prior involuntary terminations, torture, and chronic, life threatening and near death child abuse cases.³⁸

Since that time, when aggravated circumstances exist in a case, the Delaware Family Court proceedings have resulted in divergent outcomes. In a 2002 case, DFS case planned with the parents of a seven week-old child who came into care for significant, unexplained injuries while the father was the primary caregiver. The parents had a significant history of domestic violence and substance abuse. The court ultimately terminated the father's parental rights because the father pled guilty to felony endangering the welfare of a child, and for unexplained injuries that resulted from the father's intentional conduct or willful neglect. Although the court terminated mother's parental rights on failure to plan grounds, the court was unable to conclude that a finding of unexplained serious physical

34. Long v. Div. of Family Servs., 2012 WL 6525082 (Del. Fam. Ct. 2012).

35. Div. of Family Servs v. J.K., 1999 WL 33208262 (Del. Fam. Ct. 1999) (holding that due to the mother's minimal steps to protect the child and the mother's disinterest in the child's welfare, DFS did not have to undertake reasonable efforts before commencing termination proceedings with the mother).

36. *Id.*

37. *Id.* at 5.

38. 73 Del. Laws 171 (2001).

injury resulted from mother's intentional conduct or willful neglect because the mother was unaware of the father's state of mind the night that the child sustained life threatening injuries.³⁹

In 2004, the Family Court found termination grounds as to both a mother and father for unexplained physical injuries when an infant miraculously survived after being thrown into a marsh. In that case, the mother left her infant with the child's father, who twenty-four hours prior had beaten and raped her. The court was satisfied that grounds to terminate mother's parental rights existed because, notwithstanding mother's knowledge of the father's violent behavior, she still left the infant in his care.⁴⁰

Yet, in 2006, the court declined to terminate the parental rights of a mother after her child entered foster care for severe unexplained injuries while in the father's care. DFS sought a finding of aggravated circumstances because the mother delayed seeking medical treatment for the child. However, the court held that it could not conclusively find that the mother caused any of the child's injuries, and that since the mother did not unreasonably delay in seeking medical treatment, her parental rights could not be terminated.⁴¹

Then, in 2009, the court determined that aggravated circumstances were present when an infant came into care with serious, unexplained injuries from at least two incidents of abuse resulting in skull fractures. Although the parents were not criminally charged for their child's injuries, the court conclusively determined that aggravated circumstances existed because the parents were the child's primary caregivers and neither had an explanation as to how the child sustained such severe injuries.⁴² In that case, the child transitioned to a permanent guardianship arrangement with relatives.

Many of the cases highlighted above, including Matt and Jill's cases, demonstrate that not all incidents of child abuse are criminally prosecuted to the fullest extent possible because there often is a nonverbal child or

39. Div. of Family Servs. v. L.M., No. 01-06-09TN, 2002 WL 32101227, at 1, 11 (Del. Fam. Ct. Dec. 10, 2002).

40. *In re* of J.G.W. III., No. 03-12-1TK, 2004 WL 3245804, at 1, 6 (Del. Fam. Ct. Nov. 10, 2004).

41. Div. of Family Servs. v. A.B., No. 04-10-03TN, 2006 WL 1389860, at 1, 17 (Del. Fam. Ct. Jan. 4, 2006).

42. Div. of Family Servs. v. A.W, No. CK08-01363 & CK08-01639, Nicholas, J. (Del. Fam. Ct. June 19, 2009).

insufficient evidence to implicate a perpetrator.⁴³ As such, Delaware's termination of parental rights statute has been amended to ensure the safety of children when parent caregivers cannot be criminally convicted of child abuse.

“[I]n the American system of criminal justice, the offender is not always identified in a manner permitting a criminal prosecution. In order to ensure that children are protected even when their abusers cannot be held criminally liable, Del. Code Tit. 13, section 1103 (a)(8) allows termination of parental rights of parents whose children sustain serious physical injuries “under such circumstances as would indicate that such injuries . . . resulted from the intentional or reckless conduct or willful neglect of the parent.”⁴⁴

Yet, in many serious child injury cases, the two parent caregivers prioritize their relationship over the child's safety.⁴⁵ One parent may inflict serious physical abuse while the other, either unwilling or unable to protect the child, stands by and continues to protect the abusive parent, or both parents jointly perpetrate the abuse.⁴⁶ Instead of acting in the child's best interest, which would include identifying the perpetrator to protect the child from future harm, two parent caregivers may present a united front of ignorance or denial regarding how a child sustains serious injuries.⁴⁷ Consequently, the child or children at issue in such cases may never truly be safe without either an acknowledgement of abuse by the caregivers or a corrective safety plan to protect the child because there is no way to remedy a grave danger to a child when no explanation exists as to what, or whom, that danger is.⁴⁸

The Delaware Family Court, like similar courts in other states, may struggle with such blanket denials by parents who assert a Fifth

43. U.S. Dep't of Health and Human Servs., *Working with the Courts in Child Protection* 41 (2006), <http://www.childwelfare.gov/pubs/usermanuals/courts/courts.pdf>.

44. Div. of Family Servs. v. A.L., 2012 WL 4861426 (Del. Fam. Ct. 2012), *aff'd*, Long v. DFS, 2012 WL 6525082 (Del. 2013).

45. Numerous reasons exist as to why parents may prioritize their relationship over the child's safety, including intimate partner violence, substance abuse, mental health or developmental disabilities. See generally Diane J. English, *The Extent and Consequences of Child Maltreatment*, in 8 PROTECTING CHILDREN FROM ABUSE AND NEGLECT 1 (1998).

46. See *infra* notes 204–205 and accompanying text.

47. See, e.g., Child Protection Inc., *Oregon Safety Threats Guide*, app. 2.4, http://www.dhs.state.or.us/caf/safety_model/procedure_manual/appendices/ch2-app/2-4.pdf.

48. Action for Child Protection, Inc., *Unexplained Injuries*, <http://www.actionchildprotection.org/documents/2003/pdf/May2003UnexplainedInjuries2-27.pdf> (May 2003) (on file with author).

Amendment right in conjunction with a pending, or anticipated, criminal trial related to their child's injuries. When parents fail to discuss or disclose their role in the abuse, it interferes with case planning for reunification, and parents may not be able to assert a Fifth Amendment right sufficient to trump their child's best interests in a speedy and appropriate placement.⁴⁹ Nonetheless, where the circumstances compelling disclosure constitute a penalty situation, parents can prevail on their Fifth Amendment rights.⁵⁰ Courts can avoid reversal on Fifth Amendment grounds by structuring their opinions to reflect that the parent's failure to disclose impeded the therapy or other services offered to the parent under their reunification plan, as without successful completion, there can be no reunification and termination is warranted.⁵¹ This fine line, however, as well as uncertainty as to the status of related criminal charges, may force courts to label certain injuries as "unexplained" when parents, invoking the Fifth Amendment, refuse to discuss what happened.⁵² As such, it should be kept in mind that "unexplained" may be more of a legal conclusion that no one perpetrator has been identified, rather than an accurate portrayal of the uncertainty of

49. *In re A.C.*, 97 P.3d 960, 968 (Mont. 2001). *See also In re P.M.C.*, 902 N.E.2d 197, 203 (Ill. App. Ct. 2009) (finding a fine but important distinction between terminating parental rights on refusal to admit to crime, and terminating parental rights based upon failure to comply with an order to undergo meaningful therapy where refusal to admit precludes rehabilitation); *Robert S. v. Arizona Dep't. of Econ. Sec.*, No. CA-JV-2010-0063, 2010 WL 4296659, at 1-3 (Ariz. Ct. App. Oct. 28, 2010) (affirming father's termination of parental rights after he refused to participate in treatment under the assumption that he was a sex offender and finding no Fifth Amendment violation).

50. *Garrity v. New Jersey*, 385 U.S. 494, 496 (1967) (prohibiting courts from penalizing parties who choose not to testify or otherwise incriminate themselves). *See also State v. Brown*, 182 P.3d 1205, 1212-14 (Kan. 2008) (holding that where a parent is compelled to admit to criminal acts or face the loss of parental rights, the incriminating statement will be excluded from evidence once the parent becomes a defendant in a criminal proceeding); *In re D.P.*, 763 N.E.2d 351, 356 (Ill. App. Ct. 2001) (holding that forcing a parent to choose between losing parental rights and waiving right to self-incrimination is unconstitutional).

51. *People ex rel. E.W.*, 780 P.2d 32, 33 (Colo. Ct. App. 1989).

52. Some courts resolve this problem by granting parents immunity for the statements. *See, e.g., id.* at 33 (holding that once father had been granted immunity and still failed to comply with his treatment plan, his Fifth Amendment privilege did not prevent termination of parental rights). *Cf. In re Gladys H.*, 235 A.D.2d 841, 843 (N.Y. App. Div. 1997) (finding no error in placing father in dilemma of either testifying about the sexual abuse of his daughters and possibly facing later criminal charges or remaining silent in family court and risk that his parental rights be terminated); *In re Samantha C.*, 847 A.3d 883, 907-08 (Conn. 2004) (establishing based on the civil, remedial nature of the proceeding and the best interests of the child standard that the legislature did not intend to insulate parents from inferences drawn from their failure to testify at termination proceedings).

causation. Because the criminal system does not always produce criminal charges or convictions for child abuse and neglect, the civil system often provides a more effective framework for ensuring the safety of children like Matt and Jill. However, not all jurisdictions are equally equipped with the statutory tools to provide permanency expeditiously for children who cannot be reunited with their parents because of “unexplained” serious physical injuries.

III. State Adoption of Federal Guidelines

Under ASFA, each state is free to define “aggravated circumstances.”⁵³ ASFA suggests that aggravated circumstance may include, but need not be limited to: abandonment, torture, chronic abuse, and sexual abuse.⁵⁴ Where there are aggravated circumstances, reasonable efforts toward reunification are not required.⁵⁵

A. Aggravated Circumstances

There is little consensus among states when incorporating “aggravated circumstances” into their reasonable efforts calculus. Eleven states use “aggravated circumstances” as an umbrella under which they enumerate all the circumstances where reasonable efforts are not required. Ten states include the ASFA definition of aggravated circumstances, with its core four situations—abandonment, torture, chronic abuse, and sexual abuse—without further elaboration. Four states include the core four situations as circumstances that excuse reasonable efforts, but do not use the term “aggravated circumstances.” Six states use the term “aggravated circumstances” but define the term vaguely or not at all. Nine states incorporate “aggravated circumstances” into their statutes by including the core four situations and elaborating on other types of cases that are considered aggravated. Finally, ten states neither use the term “aggravated circumstances” nor include a recognizable enumeration of the ASFA core four situations in their statutes.⁵⁶

53. *See* 42 U.S.C. § 671 (2010) (allowing the states to define aggravating circumstances as they see fit).

54. *See id.* (listing possible scenarios resulting in aggravated circumstances).

55. *See id.* (stating reasonable efforts towards reunification are not required when aggravating circumstances are present).

56. *See supra* notes 43–48.

Jurisprudence regarding aggravated circumstances also varies widely. Many states' courts interpret ASFA such that even when reunification efforts are not required, they still may be permitted. Rather than barring services, an aggravated circumstance instead excuses the requirement that services be provided and renders the decision discretionary. Just over half of the states have no appellate-level jurisprudence specifically defining or elaborating upon what constitutes aggravated circumstances, especially in serious injury cases. Of the remaining twenty-three states, only six have significant jurisprudence on serious bodily injury and aggravated circumstances. New Jersey has a judicial methodology for determining whether there are aggravating circumstances, and if so, whether to provide services.⁵⁷ Nebraska has a contextual definition of aggravated circumstances, determined on a case-by-case basis.⁵⁸ Michigan defines a cluster of circumstances, not listed in the statute, that provide a basis for finding aggravated circumstances.⁵⁹ Arkansas defines both specific instances where aggravated circumstances can be found and a general character of aggravated circumstances.⁶⁰ Oregon focuses on the elements of indirect causation that can still lead to a finding of aggravated circumstances.⁶¹ New York uses a community standard of heinousness to judge which cases are aggravated.⁶²

Currently, Delaware permits its Division of Family Services to be excused from case planning on the grounds of abandonment; certain felony offenses; prior involuntary termination; where a parent has subjected a child to torture, chronic abuse, sexual abuse, and/or life-threatening abuse; and where a child has suffered unexplained serious physical injury, near death or death under such circumstances as would indicate that such injuries, near death or death resulted from the intentional or reckless conduct or "wilful" [sic] neglect of the parent.⁶³ However, Delaware has several opportunities to strengthen DEL. CODE tit. 13, § 1103(a)(7)-(8) to further children's best interests in cases where they have been seriously injured or subjected to aggravated circumstances while in the care of two parent caregivers acting as a united front. First, Delaware can amend the causation elements for

57. See *infra* notes 126-127 and accompanying text.

58. See *infra* notes 128-130 and accompanying text.

59. See *infra* notes 147-150 and accompanying text.

60. See *infra* notes 154-157 and accompanying text.

61. See *infra* note 108 and accompanying text.

62. See *infra* note 112 and accompanying text.

63. DEL. CODE tit. 13, § 1103 (a)(2), (4), (6)-(8) (2009).

these termination grounds to streamline cases involving acts or omissions by two parent caregivers steadfast in their united front of denial or ignorance by defining the term “subjected to.” Second, Delaware can explicitly include “chronic neglect” as an excusing condition under the termination of parental rights statute. Third, Delaware can simplify its current termination of parental rights statute to incorporate all aggravated circumstances under one statutory ground.

B. Reasonable Efforts

The term “reasonable efforts” refers to state social services agencies helping families to remain intact or reunify.⁶⁴ While such services and their providers differ by state, these efforts may include family therapy, parenting classes, addiction treatment, respite care, and in-home services.⁶⁵ In addition to “aggravated circumstances,” ASFA provides that reasonable efforts are not required when a parent murders, commits voluntary manslaughter, aids, abets, attempts, conspires, or solicits such murder or manslaughter, or commits a felony assault resulting in serious bodily injury to the child or another child of the parent, or the parent’s rights to a child’s sibling have been involuntarily terminated.⁶⁶ Some states have additional statutory grounds excusing social services from making reasonable preservation or reunification efforts, such as a parent’s refusal or failure in treatment for chronic alcohol or drug abuse or failure to comply with the terms of a reunification plan.⁶⁷ When reasonable efforts are required, the social service agency’s attempts to reunify may last upwards of fifteen months. However, once the social service agency is absolved of making reasonable efforts to reunify a family in cases of serious injury or aggravated circumstances, the case may proceed in an expedited fashion to

64. Child Welfare Information Gateway, *Reasonable Efforts to Preserve or Reunify Families and Achieve Permanency for Children: Summary of State Laws* (Oct. 2012), www.childwelfare.gov/systemwide/laws_policies/statutes/reunify.cfm.

65. *Id.* at 1–2.

66. *See* 42 U.S.C.A. § 671 (West 2010) (describing when reasonable efforts are not required under the ASFA).

67. *See* Child Welfare Information Gateway, *supra* note 65, at 3–4. Alabama, California, Florida, Kentucky, North Dakota, Ohio, South Dakota, and Puerto Rico list chronic abuse and refusal or failed treatment as excusing grounds. Alaska, Florida, Kansas, Maine, Utah, Washington, and Puerto Rico consider failure to comply with a reunification plan’s terms as excusing grounds.

provide permanency for the child, including terminating parental rights to free the child for adoption.⁶⁸

IV. State Statutes on Aggravated Circumstances

Just as states have different kinds and numbers of additional excusing grounds, states also define “aggravated circumstances” differently. Georgia uses the exact language of ASFA without elaboration, and most states include some version of the federal provision’s examples.⁶⁹ Aggravated circumstances, textually or substantively, appear in state statutes excusing reasonable efforts in the following six ways: (1) as an umbrella encompassing all grounds for no reasonable efforts;⁷⁰ (2) as one ground without definition beyond the four examples in ASFA;⁷¹ (3) as one ground mirroring ASFA but not expressly using the term “aggravated circumstances;”⁷² (4) as an undefined or vague term;⁷³ (5) as an expansion on the ASFA core four of abandonment, torture, chronic abuse, and sexual abuse;⁷⁴ and (6) not at all.⁷⁵

68. See Adoption and Safe Families Act of 1997, 42 U.S.C.A. § 671(a)(15)(E) (“[I]f reasonable efforts of the type described in subparagraph (B) are not made with respect to a child as a result of a determination made by a court of competent jurisdiction in accordance with subparagraph (D) – (i) a permanency hearing . . . which considers in-State and out-of-State placement options for the child, shall be held within 30 days after the determination; and (ii) reasonable efforts shall be made to place the child in a timely manner in accordance with the permanency plan, and to complete whatever steps are necessarily to finalize the permanent placement of the child; and (F) reasonable efforts to place a child for adoption or with a legal guardian, including identifying appropriate in-State and out-of-State placements may be made concurrently with reasonable efforts of the type described in subparagraph (B) . . .”).

69. See Bean, *supra* note 2, at 229 (listing the states that include some portion of the ASFA in their respective statutes).

70. Eleven states: Arizona, Hawaii, Idaho, Iowa, Maine, New Mexico, North Dakota, Pennsylvania, Texas, Vermont, and Washington.

71. Ten states: Georgia, Mississippi, Montana, Nebraska, New Jersey, North Carolina, Rhode Island, South Carolina, West Virginia, and Wisconsin.

72. Four states and the District of Columbia: Alaska, Delaware, Maryland, and South Dakota.

73. Six states: Colorado, Connecticut, Kansas, Louisiana, New York, and Oklahoma.

74. Nine states: Alabama, Arkansas, Kentucky, Massachusetts, Michigan, Oregon, Tennessee, Virginia, and Wyoming.

75. Ten states: California, Florida, Illinois, Indiana, Minnesota, Missouri, Nevada, New Hampshire, Ohio, and Utah.

A. The Umbrella

Several states structure their statutes so that all grounds excusing reasonable efforts are included under the umbrella of “aggravated circumstances.” In such cases, the other ASFA provisions excusing reasonable efforts, such as parents’ murder convictions where the victim was one of their children, are included as well. This statutory structure is technically duplicative, since ASFA already provides that such circumstances are grounds to excuse reunification efforts. For example, Vermont defines aggravated circumstances to include situations where the parent has subjected a child to abandonment, torture, chronic abuse, or sexual abuse; has been convicted of murder or manslaughter of a child; has been convicted of a felony crime that results in serious bodily injury to the child or another child of the parent; and the parental rights with respect to a sibling have been terminated.⁷⁶ Idaho’s statute is similarly duplicative; however, aggravated circumstances are not limited to those enumerated and serious bodily injury to a child is also included.⁷⁷

Other states include grounds not mentioned in ASFA under “aggravated circumstances.” Hawaii requires no service plan if the court finds that there are aggravated circumstances, which are then defined to include six circumstances, none of which exactly mirror ASFA’s core four.⁷⁸ Iowa similarly includes all grounds for waiving reasonable efforts under the umbrella of aggravated circumstances.⁷⁹ Pennsylvania uses

76. VT. STAT. ANN. tit. 33, § 5102 (West 2010).

77. IDAHO CODE ANN. § 16-1619(6)(d) (West 2010) (stating that aggravated circumstances include, but are not limited to: abandonment, torture, chronic abuse, or sexual abuse; the parent committed murder or voluntary manslaughter or aided, abetted, attempted, conspired, or solicited such crimes against another child; the parent committed a battery resulting in serious bodily injury to the child; and prior involuntary termination of parental rights to a sibling).

78. HAW. REV. STAT. ANN. §§ 587A-2, 587A-71 (West 2012). Two of the six circumstances include child torture and infant abandonment. Three are grounds separate from aggravated circumstances, but also found in ASFA, including murder or voluntary manslaughter of another child of the parent, felony assault resulting in serious bodily injury to the child or another child of the parent, and previous judicial termination of parental rights to the child’s sibling. The sixth circumstance is a prior court determination as to a sibling that “the parent is not willing and able to provide a safe family home.”

79. IOWA CODE ANN. § 232.102 (West 2012). Two of the five are akin to ASFA – the parent has abandoned the child or the court finds physical or sexual abuse or neglect. Two mirror the other ASFA grounds, including murder or voluntary manslaughter and felony assault. The fifth is conjunctive and requires both a prior termination of parental rights as well as clear and convincing evidence that services are unlikely within a reasonable time to correct the conditions leading to the child’s removal from the home.

aggravated circumstances as one part of a two-part conjunctive determination: there must be both aggravated circumstances and no new or additional efforts are required.⁸⁰ Pennsylvania's grounds include the ASFA list of crimes, prior involuntary termination, abandonment, and that the child or another child of the parent "has been the victim of serious physical abuse, sexual violence, or aggravated physical neglect by the parent."⁸¹

State statutes using the umbrella structure do not always mirror ASFA. Washington uses the umbrella structure more restrictively: four of the seven provisions require criminal convictions for violent or sexual offenses, while the other three are abandonment of an infant less than three years old, a finding by a court that a parent is a sexually violent predator, and failure to complete a treatment plan resulting in a prior parental rights termination with no significant changes in the interim.⁸² By contrast, Texas uses the umbrella structure, but its description of "aggravated circumstances" is quite expansive.⁸³ Texas includes two forms of abandonment, serious bodily injury or sexual abuse, both commission or conviction of murder or manslaughter, a variety of sex crimes and child pornography offenses, a prior termination of parental rights with a finding of child endangerment, prior termination of parental rights to two other children (without any stipulation of a certain finding), and felony assault.⁸⁴ Arizona similarly uses "aggravated circumstances" as an umbrella, but deviates from ASFA both in structure and content.⁸⁵

Other states use aggravated circumstances as an umbrella for most, but not all, of the circumstances excusing reasonable efforts. Maine does not require reunification efforts where there is an aggravating factor or where

80. 42 PA. CONS. STAT. ANN. §§ 6351, 6302 (West 2012).

81. *Id.*

82. WASH. REV. CODE § 13.34.132 (West 2012).

83. TEX. FAM. CODE ANN. § 262.2015 (West 2011).

84. *Id.*

85. ARIZ. REV. STAT. ANN. § 8-846 (West 2012). Aggravated circumstances, which must be found by clear and convincing evidence, exist where: the parent cannot be identified or located, or suffers from a mental illness that will likely prevent him or her from resuming the child's care within twelve months; the parent has a prior termination of parental rights and the conditions leading to the termination were not remedied; parent was convicted of murder, manslaughter, sexual abuse, sexual assault, molestation, or sexual exploitation of a child, or aiding or abetting such crimes; the child was previously adjudicated dependent due to physical or sexual abuse, returned to the parent, and then removed within eighteen months due to additional physical or sexual abuse; the child has suffered severe physical or emotional injury by the parent or a person known to the parent; or the child was removed from the parent on at least two previous occasions, reunification services were offered or provided, and the parent is unable to discharge parental duties.

continuing reunification efforts is inconsistent with the child's permanency plan, and either condition is sufficient by itself to excuse reasonable efforts.⁸⁶ Under the Maine framework, aggravated circumstances are then used as an umbrella for five separate circumstances regarding the parent, including the ASFA provisions, failure to plan, and subjecting a child to "any other treatment that is heinous or abhorrent to society."⁸⁷ New Mexico uses a similar disjunctive structure, not requiring reasonable efforts where "[t]he efforts would be futile" or where there are aggravated circumstances, and then continuing to define aggravated circumstances in keeping with ASFA.⁸⁸ North Dakota also uses a disjunctive structure, but the two independently sufficient excusing prongs are aggravated circumstances and prior involuntary termination of parental rights.⁸⁹ North Dakota's statute is more similar to the other umbrella statutes in Hawaii, Iowa, and Pennsylvania than it is to the disjunctive statutes in Maine or New Mexico. North Dakota also defines aggravated circumstances quite broadly beyond ASFA, much like Texas.⁹⁰

86. ME. REV. STAT. ANN. tit. 22, §§ 4041(A-2), 4002(1-B) (West 2011).

87. *Id.* The first aggravated circumstance is that the parent "has subjected a child for whom the parent was responsible to rape, gross sexual misconduct, gross sexual assault, sexual abuse, incest, aggravated assault, kidnapping, promotion of prostitution, abandonment, torture, chronic abuse or any other treatment that is heinous or abhorrent to society."

88. N.M. STAT. ANN. §§ 32A-4-2, 32A-4-22 (West 2012). New Mexico defines aggravated circumstances as attempting to, conspiring to, or causing great bodily harm or death to the child, the child's sibling, or the child's parent; attempting to, conspiring to, or subjecting the child to torture, chronic abuse, or sexual abuse; and prior involuntary termination of parental rights to a sibling.

89. N.D. CENT. CODE ANN. §§ 27-20-02, 27-20-32.2 (West 2011).

90. *Id.* Aggravated circumstances are present where a parent: abandons, tortures, chronically abuses, or sexually abuses a child; fails to make substantial efforts to secure treatment for an addiction, mental illness, or other condition for one year or one-half of the child's lifetime, whichever time period is less; engages in deviant sexual acts, sexual abuse, etc. in which the victim is a child; commits murder, manslaughter, or negligently causes the death of another, or attempts such crimes, where the victim is another child of the parent; commits aggravated assault in which the victim is a child of the parent and suffers serious bodily injury; commits assault, aggravated assault, reckless endangerment or terrorizing in which a child is the victim or intended victim; or has been incarcerated under a sentence for which the release date is after the child's majority when the child is nine years old or older or after the child is twice the child's current age where the child is younger than nine years old.

B. ASFA-Only: The Core Four

Seven states use the term “aggravated circumstances” or “aggravating circumstances” to mean the four core enumerated circumstances in ASFA: abandonment, torture, chronic abuse, or sexual abuse.⁹¹ Georgia,⁹² Mississippi,⁹³ Nebraska,⁹⁴ North Carolina,⁹⁵ Rhode Island,⁹⁶ West Virginia,⁹⁷ and Wisconsin⁹⁸ describe these four circumstances as non-exhaustive situations included in the definition, mirroring the ASFA provision that aggravated circumstances are to be defined by the states and may include but are not limited to those four situations.⁹⁹

Three other states—Montana,¹⁰⁰ South Carolina,¹⁰¹ and New Jersey¹⁰²—have either minor additions to or use variations of the ASFA core four, but are otherwise limited in their definitions.

91. *See supra* note 5. Aggravated circumstances may include but are not limited to the core four of abandonment, torture, chronic abuse, and/or sexual abuse.

92. GA. CODE ANN. § 15-11-58 (West 2012). Aggravated circumstances “may include” the enumerated core four.

93. MISS. CODE ANN. § 43-21-603(7) (West 2011). Aggravated circumstances include but are not limited to the core four.

94. NEB. REV. STAT. ANN. § 43-283.201 (West 2012). Aggravated circumstances “include” the core four.

95. N.C. GEN. STAT. ANN. §§ 7B-1111, 7B-507 (West 2012). Aggravated circumstances “include” the core four.

96. R.I. GEN. LAWS ANN. § 40-11-12.2 (West 2012). Aggravated circumstances include the core four.

97. W. VA. CODE ANN. § 49-6-5 (West 2012). Aggravated circumstances “include, but are not limited to” the core four.

98. WIS. STAT. ANN. § 48.355 (West 2012). Aggravated circumstances include the core four.

99. *See supra* note 6.

100. MONT. CODE ANN. § 41-3-423 (West 2011). While Montana also includes “chronic, severe neglect” alongside the core four, this addition is more the like variation seen *infra* note 59, than the elaborations in subgroup (E), and so is included in subgroup (B).

101. S.C. CODE ANN. § 63-7-1640 (West 2011). Aggravated circumstances include sexual abuse, torture, or abandonment, as well as “severe or repeated abuse or neglect.” While this does not mirror the exact ASFA language of “chronic abuse,” it is substantially similar to be included in this list, especially given Bean’s analysis that “chronic abuse,” as used to refer to aggravated circumstances, can include abuse that immediately or irreparably inflicts very serious harm or abuse that is repeated, continuing, intractable, or resistant to change. *See also* Bean, *supra* note 2, at 265-66.

102. N.J. STAT. ANN. §§ 30:4C-11.2, 30:4C-11.3 (West 2012). Reasonable efforts are not required when the parent has subjected the child to aggravated circumstances of abuse, neglect, cruelty, or abandonment. This list appears to be limited to just these four situations, and “torture” has been replaced with “cruelty.” The absence of the intensifier “chronic” may not necessarily influence judicial interpretation of the provision, as “aggravated

C. ASFA by Any Other Name

Four states and the District of Columbia list the core four of abandonment, torture, chronic abuse, and sexual abuse, or a cluster of situations substantially similar to the core four, as conditions excusing reasonable efforts, but do not use the term “aggravated circumstances” in the statute. Delaware lists torture, chronic abuse, sexual abuse, and/or life-threatening abuse together, while abandonment appears earlier in the statute. The District of Columbia lists the core four and adds cruelty to the same provision.¹⁰³ Maryland includes chronic abuse, sexual abuse, and torture, and while abandonment is not explicitly mentioned, “chronic and life-threatening neglect” is included.¹⁰⁴ South Dakota includes torture, sexual abuse, abandonment, and chronic neglect or physical, mental, or emotional injury.¹⁰⁵ Alaska includes abandonment, sexual abuse, torture, chronic mental injury, and chronic physical harm as examples of “circumstances that pose a substantial risk of harm.”¹⁰⁶

D. Undefined, Redirected, or Vague

A few states, conversely to those states in Part IV (C), include the term “aggravated circumstances” but do not define it in the statute. Connecticut¹⁰⁷ and Kansas¹⁰⁸ both excuse reasonable efforts where the parent has subjected the child to aggravated circumstances, without further elaboration as to what that term means. New York¹⁰⁹ and Oklahoma¹¹⁰

circumstances of” suggests that it is particularly severe or egregious instances of those situations that the statute is addressing.

103. D.C. CODE ANN. § 4-1301.09a (West 2012).

104. M.D. CODE ANN., Cts. & Jud. Proc. § 3-812(b) (West 2012). Chronic neglect and abandonment appear to be different situations based on other statutory constructions, and abandonment, as defined in other statutes, is not per se life-threatening neglect. Still, the substantial similarity between the Maryland statute and the ASFA core four warrants inclusion in this grouping.

105. S.D. CODIFIED LAWS § 26-8A-21.1 (West 2012). Chronic neglect or chronic physical, mental, or emotional injury may be reasonably construed to include, more or less, chronic abuse as contemplated in other jurisdictions.

106. ALASKA STAT. ANN. § 47.10.086 (West 2012).

107. CONN. GEN. STAT. ANN. § 17a-111b (West 2012). Reasonable efforts not required if the parent “has subjected the child to aggravated circumstances.”

108. KAN. STAT. ANN. § 38-2255 (West 2012). The Kansas statute also includes subjecting “another child to aggravated circumstances.”

109. N.Y. SOC. SERV. LAW §§ 358-a, 384-b (West 2012). Reasonable efforts are not required when the court determines that the parent has subjected the child to aggravated circumstances, where the child has been either severely or repeatedly abused.

have relatively vague definitions of aggravated circumstances, though they might be interpreted as covering the substantive portions of the ASFA core four.

Colorado does not require reasonable efforts where “the parent has subjected the child to aggravated circumstances to such an extent that grounds exist for termination of the parent’s parental rights” as outlined in another statute.¹¹¹ While Louisiana does not include the term “aggravated circumstances” in its statute, it otherwise closely resembles the Colorado statute as reunification efforts are not required where the “parent has subjected the child to egregious conduct or conditions, including any of the grounds for termination of parental rights pursuant to Article 1015.”¹¹²

110. OKLA. STAT ANN. tit. 10A, § 1-4-809 (West 2012). Aggravated circumstances include but are not limited to heinous and shocking abuse or neglect.

111. COLO. REV. STAT. ANN. § 19-1-115 (West 2012). The statute directs the reader to § 19-3-604(1) for a description of those grounds, which are extensive. Among the many grounds are “an identifiable pattern of sexual abuse” and “torture of or extreme cruelty to the child.” To the extent that abandonment or chronic abuse are implicated, they are in conjunction with other findings of the court, criminal convictions, certain lengths of time, or resulting serious bodily injury or death. As a result of these substantial variations and limitations on the ASFA core four, as well as the redirection to another statute specifically in reference to grounds for termination of parental rights, not just excusing reasonable efforts, Colorado is included in subgroup (D) and not (E).

112. LA. CHILD. CODE ANN. art. 672.1 (2012). Like the Colorado statute, the Louisiana statute redirects the reader to the termination of parental rights statute to elaborate on the excusing grounds. This structural similarity to Colorado’s statute suggests that for analytic purposes, the Louisiana statute should be listed in subgroup (D), not cluster (C) with the other statutes that do not use the term “aggravating circumstances” explicitly. Furthermore, Article 1015, like Colorado’s § 19-3-604(1), includes a scattershot of terms akin to the ASFA core four but insufficiently similar for inclusion in subgroup (E) and insufficiently distinguishable for inclusion in another subgroup. For example, Art. 1015 includes misconduct of the parent toward the child or another child which constitutes “extreme abuse, cruel and inhuman treatment, or grossly negligent behavior below a reasonable standard of human decency, including but not limited to the conviction, commission, aiding or abetting, attempting, conspiring, or soliciting to commit” twelve enumerated crimes, including aggravated incest, rape, sodomy, torture, starvation, a felony resulting in serious bodily injury, sexual abuse, and abuse or neglect which is “chronic, life threatening, or results in grave disabling physical or psychological injury or disfigurement.” Louisiana continues to improve its child welfare laws. As of June 11, 2012, reunification efforts are no longer required where a court of competent jurisdiction determines that the parent has committed murder or manslaughter of another child of the parent *or any other child* or committed a felony resulting in serious bodily injury to the child or another child of the parent *or any other child* (emphasis added to reflect changes). 2012 LA. SESS. LAW. SERV. ACT 730 (S.B. 152) (West).

E. ASFA-Plus: Beyond the Core Four

Multiple states define “aggravated circumstances” as suggested in ASFA. Their definitions may include but are not limited to abandonment, torture, chronic abuse, and sexual abuse, and the overall statutory structure generally treats the aggravated circumstances as separate from the other ASFA excusing conditions.¹¹³

Alabama uses this structure particularly well. In addition to the ASFA core four, the statute lists ten other circumstances included in the definition.¹¹⁴ Arkansas similarly defines aggravated circumstances to include three of the core four expressly, torture implicitly, and two additional circumstances.¹¹⁵ Kentucky does not include the core four expressly, but does list five separate circumstances that are aggravated.¹¹⁶ Michigan,¹¹⁷ Oregon,¹¹⁸ and Tennessee¹¹⁹ also take the enumerated

113. *See supra* note 6.

114. ALA. CODE § 12-15-312(c) (West 2012). An aggravated circumstance may include but is not limited to: rape, sodomy, incest, aggravated stalking, abandonment, torture, chronic abuse, or sexual abuse. An aggravated circumstance may also include: allowing a child to use alcohol or illegal drugs to the point of abuse, neglect, or substantial risk of harm; parental misuse or abuse of substances interfering with the ability to keep the child safe, and parental refusal to participate in or complete treatment or treatment has been unsuccessful; a demonstration of extreme disinterest in the child by not complying with the case plan for six months or repeatedly leaving the child with someone unwilling or incapable of caring for the child and not returning for the child as promised; an infant or young child has been abandoned, identity unknown, and parent is unknown or unable to be found after a diligent search; parent has emotional or mental condition for which there is clearly no treatment that can improve or strengthen the condition enough to allow the child to remain at home or return home safely; and/or the parent is incarcerated and the child is deprived of a safe, stable, and permanent parent-child relationship.

115. ARK. CODE ANN. § 9-27-303 (West 2012). Aggravated circumstances may include that a child “has been abandoned, chronically abused, subjected to extreme or repeated cruelty, or sexually abused,” or a judge determines that there is little likelihood that services to the family will result in successful reunification. Also included is removal of the child from the parent or guardian’s custody and placement in foster care or custody of another person three or more times in the past fifteen months.

116. K.Y. REV. STAT. ANN. §§ 610.127, 600.020 (West 2012). Aggravated circumstances include: no parental contact with the child for more than ninety days; parent is incarcerated for at least one year, parent will be unavailable to care for child, and there is no appropriate relative to care for the child; the parent has sexually abused the child and refused available treatment; the parent has engaged in abuse of the child that required removal two or more times in the last two years; and the parent has caused the child serious physical injury. The statute lists five other provisions that excuse reasonable efforts, but they are not included under aggravating circumstances.

117. MICH. COMP. LAWS §§ 712A.19a, 722.638 (2012). Aggravated circumstances include abandoning a young child; criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate; battering, torture, or other severe physical

expansion approach, mostly covering the ASFA core four along with other circumstances.

Massachusetts defines aggravated circumstances as a relatively limited variation on the ASFA core four,¹²⁰ while Virginia expands on the ASFA core four to include omissions enabling such conduct and resulting injury or death of the child.¹²¹ Although Wyoming only includes one additional provision defining aggravated circumstances beyond the ASFA core four, the language is broad enough to encompass a variety of qualifying situations.¹²²

F. *Missing in Action*

Multiple states neither include the term “aggravated circumstances” nor a readily identifiable recitation of the ASFA core four of abandonment, torture, chronic abuse, or sexual abuse. Missouri, on the briefer end of the spectrum, lists only four excusing conditions, one of which is subjecting “the child to severe or recurrent acts of physical, emotional, or sexual

abuse; loss or serious impairment of an organ or limb; or life-threatening injury.

118. OR. REV. STAT. ANN. § 419B.340 (West 2012). Aggravated circumstances include but are not limited to: causing a child’s death by abuse or neglect; attempting, soliciting, or conspiring to cause a child’s death; causing serious physical injury to a child by abuse or neglect; subjecting a child to rape, sodomy, or sexual abuse; subjecting a child to intentional starvation or torture; abandoning the child; and unlawfully causing the death of the child’s other parent.

119. TENN. CODE ANN. §§ 36-1-102(9), 37-1-166 (West 2012). Aggravated circumstances include: abandonment; aggravated assault; aggravated or especially aggravated kidnapping; aggravated child abuse and neglect; aggravated or especially aggravated sexual exploitation of a minor; aggravated rape, rape of a child, or incest; and severe child abuse, as defined in § 37-1-102.

120. MASS. GEN. LAWS ANN. ch. 119, § 29C (West 2012). Aggravated circumstances may include murdering the child’s parent while the child is present, subjecting the child or other children to sexual abuse or exploitation, or severe or repetitive conduct of physically or emotionally abusive nature.

121. VA. CODE ANN. § 16.1-281 (West 2012). Aggravated circumstances include torture, chronic or severe abuse, or chronic and severe sexual abuse, if the victim was the parent’s child or a child residing with the parent. They also include failure to protect the child from such conduct, if the conduct or failure to protect demonstrates a wanton or depraved indifference to human life, or has resulted in the death of the child or in serious bodily injury to the child.

122. WYO. STAT. ANN. § 14-2-309(c) (West 2012). Excusing provisions include abandonment, chronic abuse, torture, or sexual abuse of the child, as well as “other aggravating circumstances . . . indicating that there is little likelihood that services will result in successful reunification.”

abuse, including an act of incest.”¹²³ More exhaustively, California lists thirteen separate findings excusing reasonable efforts, but the core four are either absent or paired with other conditions or results before they are sufficient grounds to excuse reasonable efforts.¹²⁴ Florida has eight excusing provisions, and like California, they only implicate the ASFA core four in connection with other terms and conditions.¹²⁵ Minnesota includes subjecting the child to “egregious harm” or abandonment as two of the seven excusing conditions.¹²⁶ Nevada describes three different forms of abandonment as excusing conditions and includes where a “parent has caused the abuse or neglect of the child or another child that resulted in substantial bodily harm or was so extreme or repetitious as to result in an unacceptable risk to the health and welfare of the child.”¹²⁷ Utah prefaces its statute that in “cases of obvious sexual abuse, abandonment, or serious physical abuse or neglect,” there is no duty to make reasonable efforts.¹²⁸ Utah further includes, among other very specific and more unusual provisions, that “severe abuse by the parent or by any person known by the

123. MO. ANN. STAT. § 211.183 (West 2012). The three remaining provisions are involuntary termination of parental rights as to a sibling, commission of felony assault resulting in serious bodily injury to the child or another child, and commission of murder or voluntary manslaughter of another child of the parent.

124. CAL. WELFARE & INST. CODE § 361.5 (West 2012). For example, infliction of “severe physical or sexual abuse on the child or a sibling” is included, but the court must also find “that it would not benefit the child to pursue reunification with the offending parent” for reasonable efforts to be excused. Similarly, abandoning a child is not a provision, but “willfully” abandoning a child is.

125. FLA. STAT. ANN. §§ 39.521(1)(f), 39.806(1) (West 2012). Abandonment is only an excusing condition where the child has been adjudicated dependent, a case plan has been filed with the court, and the child continues to be abandoned by the parents. Sexual abuse and chronic abuse appear alongside aggravated child abuse and sexual battery of the child or another child. Torture is not specifically mentioned, though one provision includes the parent(s) engaging in “egregious conduct or [having] the opportunity and capability to prevent and knowingly [failing] to prevent egregious conduct that threatened the life, safety, or physical, mental, or emotional health of the child or the child’s sibling.”

126. MINN. STAT. ANN. § 260.012 (West 2012). Minnesota’s five other excusing conditions include involuntary termination of parental rights, involuntary transfer of custodial rights to another relative, a determination “that additional reasonable efforts would be futile and unreasonable under the circumstances,” or criminal convictions for various violent or assaultive crimes against the child or another child.

127. NEV. REV. STAT. ANN. § 432B.393 (West 2011). The abandonment situations include sixty days of abandonment or failure to make more than token contact for six months; the failure of an unmarried father to visit the child, commence proceedings to establish paternity, or provide support in the first year of the child’s life; and the delivery of a child less than one year old to a provider of emergency services.

128. UTAH CODE ANN. § 78A-6-312 (West 2012).

parent, and the parent knew or reasonably should have known that the person was abusing the child” will also excuse.¹²⁹ Illinois,¹³⁰ Indiana,¹³¹ New Hampshire,¹³² and Ohio¹³³ drift even further away from ASFA, as most if not all of the excusing conditions require criminal convictions before reunification services can end.

V. Case Law Grappling with Statutory Construction

The structural and substantive differences among state statutes do not necessarily correlate with a particular kind of state jurisprudence regarding when reasonable efforts are excused because there are aggravating circumstances. Oregon, with its relatively broad statute, has invited judicial interpretation that aggravated circumstances are “those involving relatively more serious types of harm or detriment to a child” and include both parents’ conduct and the “results of those actions and conditions, including effects, direct and indirect, on [the] child.”¹³⁴ Despite New Jersey’s relatively terse statutory definition of aggravated circumstances, its courts

129. *Id.* One example of the specific and unusual inclusions stated that the “parent permitted the child to reside, permanently or temporarily, where the parent knew or should have known that a clandestine laboratory operation was located.”

130. 20 ILL. COMP. STAT. ANN. 505/5 (West 2012); 705 ILL. COMP. STAT. ANN. 405/2-13.1 (West 2012). The parent must have been convicted of aggravated battery, aggravated battery of a child, or felony domestic battery, “any one of which has resulted in serious bodily injury to the minor or another child of the parent.”

131. IND. CODE ANN. § 31-34-21-5.6 (West 2012). The parent must have been convicted of causing a suicide, involuntary manslaughter, rape, criminally deviant conduct, child molestation, or exploitation of a victim who is the parent’s child or the child’s other parent, or convicted of battery, aggravated battery, criminal recklessness, or neglect against a child. Abandonment is also mentioned.

132. N.H. REV. STAT. ANN. § 169-C:24-a (West 2012). There are six provisions, four of which are convictions for various violent or assaultive crimes against the child, the child’s siblings, or other family members in the home. The remaining two are court determinations of abandonment and out-of-home placement for twelve of the most recent twenty-two months where the placement was due to a finding of child neglect or abuse.

133. OHIO REV. CODE ANN. § 2151.419 (West 2011). There are seven excusing conditions. The parent must have been convicted of assault, endangering children, rape, sexual battery, corruption of a minor, or sexual imposition of the child or another child in the household. Two require convictions for murder or voluntary manslaughter or conspiracy, attempt, or complicity in those substantive crimes. Two are prior involuntary parental rights termination and abandonment. The final two are somewhat unusual in their specificity. The parent must have “repeatedly withheld medical treatment or food from the child” or “placed the child at substantial risk of harm two or more times due to drug or alcohol abuse and have rejected treatment two or more times.”

134. Bean, *supra* note 2, at 705.

have defined “aggravating circumstances”¹³⁵ and developed a methodology to determine whether they excuse reasonable efforts.¹³⁶ Additionally, ASFA gives state courts discretion in individual cases,¹³⁷ and courts appear willing to exercise that discretion while adjudicating when reasonable efforts are not required.¹³⁸ Perhaps because of this state-by-state discretion, similarities among states sharing common statutory structures are not necessarily robust.

A. The Umbrella

Of the eleven states with an umbrella-type structure, four do not have appellate jurisprudence on the meaning of aggravated circumstances.¹³⁹ The remaining seven states only have one or two cases on point.¹⁴⁰ While the Supreme Court of Idaho held that abuse includes where a child is a

135. See *New Jersey Div. of Youth & Family Servs. v. A.R.G.*, 824 A.2d 213, 233–34 (N.J. Super. Ct. App. Div. 2003) (stating that aggravating circumstances embody “the concept that the nature of the abuse or neglect must have been so severe or repetitive that to attempt reunification would jeopardize ... the safety of the child, and would place the child in a position of an unreasonable risk to be [re-abused]. Moreover, any circumstances that increase the severity of the abuse or neglect or add to its injurious consequences, equates to ‘aggravated circumstances.’”).

136. See *New Jersey Div. of Youth & Family Servs. v. A.R.G.*, 179 N.J. 264, 283–84 (2004) (discussing “aggravated circumstances”).

137. See 42 U.S.C.A. § 678 (West 2012) (“Rule of Construction. Nothing in this part shall be construed as precluding State courts from exercising their discretion to protect the health and safety of children in individual cases, including cases other than those described in § 471(a)(15)(D).”).

138. See *In re Marino S.*, 100 N.Y.2d 361, 372 (2003), *cert denied*, 540 U.S. 1059 (2003) (finding no error in terminating parental rights without first making reasonable efforts to reunify family, as reasonable efforts would only be required if in the best interests of the children and not contrary to their health and safety); *J.S. v. State*, 50 P.3d 388, 389 (Alaska 2002) (finding that where there had been devastating sexual abuse, the fundamental right of a child to safety was not trumped by a person’s fundamental right to parent); *In re C.B.*, 611 N.W.2d 489, 489 (Iowa 2000) (interpreting ASFA as eliminating the reasonable efforts requirement for certain types of parental behavior); *People ex rel. J.S.B., Jr.*, 691 N.W.2d 611, 617 (S.D. 2004) (interpreting ASFA to tip the balancing formula for reunification of parents with children in favor of protecting children and not on the side of protecting parents’ rights, where they conflict); *Guardian Ad Litem Program v. T.R.*, 987 So. 2d 1269, 1271 (Fla. Dist. Ct. App. 2008) (excusing case planning where parents committed egregious conduct).

139. Arizona’s appellate record does not flesh out the definition of aggravating circumstances, and those cases that might be on point are designated without legal precedent and are not to be cited. Hawaii and Vermont do not have much jurisprudence at the appellate levels on this topic at all. Texas has an appellate record, but none of the cases deal directly with defining aggravated circumstances.

140. Idaho, Iowa, Maine, New Mexico, North Dakota, Pennsylvania, and Washington.

victim of failure to thrive under its Child Protective Act and that long-term food deprivation constitutes chronic abuse, other states trend toward explaining the types of treatment that constitute aggravated circumstances, not delineating specific circumstances that qualify.¹⁴¹ For example, the Supreme Court of North Dakota found that one child's "shaken baby syndrome" (now more appropriately referred to as "abusive head trauma") was sufficiently aggravating to warrant taking all the siblings into custody, including a baby born after the incident.¹⁴² The court also articulated that a parent's failure to cooperate with social services indicates that the causes and conditions of the children's removal are likely to continue or will not be remedied, and that for children with special needs, parents are given less leeway to meet the minimum community standards of parenting.¹⁴³ The appellate court of New Mexico has taken notice of its statute's redundancy regarding prior termination of parental rights to a sibling: such a prior termination bypasses the reasonable efforts requirement either in its own right or as an aggravating circumstance.¹⁴⁴ Just as New Mexico's consideration of its aggravated circumstances statute has been limited, Pennsylvania's has also been brief. The court has spoken only to reverse a lower court's incorrect retroactive application of the aggravated circumstances amendments to a case from 1998.¹⁴⁵

Among the umbrella states, Maine stands apart in its thorough explanation of the use of the word "subjected" in terms of aggravated circumstances. The Supreme Judicial Court held that the statute's plain

141. *See Doe v. State*, 144 Idaho 420, 420 (2007) (affirming the father's termination of parental rights. . . . [F]ather had subjected. . . children to excessive corporal punishment, denied them food, access to the bathroom, and medical care. A pediatrician found it would take five months of consistent food deprivation to reach that child's emaciated condition).

142. *See In re K.B.*, 801 N.W.2d 416, 425 (N.D. 2011) (holding that there was not a definite and firm conviction that a mistake has been made).

143. *See id* at 421.

144. *See State ex rel. Children, Youth & Families Dept. v. Amy B.*, 61 P.3d 845, 850 (N.M. Ct. App. 2002) (noting that the redundancy does not affect the outcome of the case and defends the use of a prior termination as a trigger for excusing reasonable efforts. The court opines that where the State has a substantial interest in protecting children and the government has a legitimate interest in making the best use of limited resources, a Legislature's determination that a prior termination is a factor to consider is both "reasonable and legitimate").

145. *See In re R.T.*, 778 A.2d 670, 673 (Pa. Super. Ct. 2001) (holding that the retroactive application of aggravated circumstances deprived a parent of his vested right to parent his children and be given a plan for their return since a prior termination of parental rights was given a different legal effect from that which it had under the law in effect when it transpired).

language did not limit its reach only to affirmative or criminal acts, as “subjected to” includes mere exposure to the circumstances meeting the requirements for aggravated circumstances.¹⁴⁶ Importantly, the court also noted that the statute anticipates that certain acts, even when they do not result in criminal prosecutions, can meet the definition for aggravated circumstances: parental behavior need only fall far outside the norm of ordinary, fallible parental behavior, not necessarily into criminally culpable conduct.¹⁴⁷

This broad-sweeping use of the umbrella structure and “subjected to” language contrasts sharply with the limited holdings in the appellate courts of Iowa and Washington. An Iowa appellate court held recently that three older children’s mere presence in the home while one sibling drowned and another was tortured did not support a threshold finding supporting the waiver of reasonable reunification efforts because it was not clear and convincing evidence of aggravated circumstances under the statute.¹⁴⁸ In a similar statutory bind, an appellate court in Washington found that the trial court erred in using the aggravated circumstances statute to excuse reasonable efforts because the parent had not raped the child in the instant proceeding, but rather had raped the child’s older sister.¹⁴⁹ Despite this error, the termination of parental rights was upheld on other grounds.¹⁵⁰ Courts in states with umbrella-type statutes appear to rely more heavily on specific provisions, such as abuse of other siblings or criminal charges,

146. See *In re Ashley S.*, 762 A.2d 941, 947 (Me. 2000) (finding in a case where a two-year-old girl was removed from a home with shockingly dangerous and unsanitary conditions after the death of her two-month-old brother that the father’s failure to even notice his son’s death for most of a day was clear and convincing evidence of deprivation of supervision).

147. See *id.*

148. See *In re T.H. Jr.*, 801 N.W.2d 34 (Iowa Ct. App. 2011) (unpublished table opinion) (revealing that the children’s guardian *ad litem* recommended the father’s rights be terminated, and there was no reasonable belief that the conditions leading to the abuse or neglect could be remedied through services in a reasonable amount of time, but that nevertheless the court reversed the termination of parental rights and waiver of reasonable efforts as to the three older children who had witnessed the death of one younger sibling and torture of another).

149. See *In re Termination of C.L.*, 126 P.3d 1285, 1286 (Wash. Ct. App. 2006) (holding that because subject child was not victim of child rape, father’s conviction was not an aggravating circumstance).

150. See *id.* at 1287 (concluding that services would not have remedied the parental deficiencies in the foreseeable future because the child was within eighteen months of turning eighteen years old, the father was prohibited from having any contact with underage females, and the father was not considered amenable to treatment).

rather than “aggravated circumstances” as a broad class of egregious circumstances.

B. ASFA-Only: The Core Four

ASFA-only states, where there is appellate jurisprudence on aggravated circumstances appear to construe the term more broadly to offer more protection to children in unenumerated but egregious circumstances. Of the ten states defining aggravated circumstances within the limits of the federal statutory examples, five do not have appellate cases addressing further explications of aggravated circumstances.¹⁵¹ The Supreme Court of New Jersey developed a four-prong test to determine whether or not aggravated circumstances excusing reasonable reunification efforts exist.¹⁵² In *A.R.G.*, the Supreme Court of New Jersey considered separate lines of inquiry to determine aggravated circumstances: (1) Did the alleged conduct take place? If not, family reunification efforts are required.¹⁵³ If yes, (2) was the conduct severe or repetitive? If yes, the court must determine (3) whether reunification would jeopardize and compromise the child’s safety and welfare. There are then two additional prongs.¹⁵⁴ First, (4a) asks if the abuse is of such nature that standing alone it compels the conclusion that reunification should not be required, e.g. conduct particularly heinous or abhorrent to society, involving savage, brutal, or repetitive beatings, torture, or sexual abuse?¹⁵⁵ Second, (4b) is this a case of abandonment, corporal punishment not resulting in permanent injury, or serious neglect and mental abuse, etc., which may or may not support the conclusion that reuniting the family will place the child at risk?¹⁵⁶ The court may consider whether to admit expert testimony and the conduct and its relationship to the parent-child bond, along with an assessment of the parents’ remedial efforts as

151. These include Georgia, North Carolina, Rhode Island, South Carolina, and Wisconsin. *See supra* notes 92, 95-96, 98, 101.

152. *See New Jersey Div. of Youth & Family Servs. v. A.R.G.*, 179 N.J. 264, 274 (N.J. 2004) (holding that aggravating circumstances eliminating the requirement of reasonable efforts to reunify the child with the parent embody the concept that the nature of abuse or neglect must be so severe that attempts at reunification would jeopardize and compromise the safety of the child).

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

either sufficient or insufficient to eliminate an unreasonable risk of future harm to the child.¹⁵⁷

The Supreme Court of Nebraska, citing to *A.R.G.*, held that aggravated circumstances are determined on a case-by-case basis and that it is neither possible nor necessary to determine the entire spectrum of aggravated circumstances.¹⁵⁸ Nebraska continues to illuminate the universe of aggravated circumstances, which includes delaying medical attention when a child suffers obvious severe physical injuries; severe physical injury through intentional abuse; starving children; and making false medical reports to obtain unnecessary medical operations on children.¹⁵⁹ Nebraska further relaxes aggravated circumstances' attendant requirements, finding that the extent of a child's injuries are relevant to aggravated circumstances determinations, even though permanent injury is not a prerequisite to a finding, and that abuse of any child by an adult, regardless of whether it is the parent's child, calls the adult's ability to parent into serious question.¹⁶⁰

The Supreme Court of Mississippi, reviving language from a pre-ASFA case, notes that circumstantial evidence excluding every reasonable hypothesis of innocence, although perhaps not every possible doubt or theoretical supposition, is sufficient to find aggravated circumstances.¹⁶¹ The Supreme Court of Montana has explained the meaning of chronic neglect and abuse in the context of aggravating circumstances: when parents' conduct amounts to recurring instances of abuse or neglect over time, there is a clear basis for the trial court to find chronic and severe neglect.¹⁶²

Notably, none of these states have statutorily defined what constitutes torture as it relates to child abuse. Very few cases actually venture into a

157. *Id.*

158. *See In re Jac'Quez N.*, 669 N.W.2d 429, 434–35 (Neb. 2003) (explaining that the court had not . . . [defined] “aggravated circumstances” and scope of “but not limited to” under the state statute, but nevertheless concluding that aggravated circumstances are further determined in the context of whether reunification attempts would jeopardize and compromise the child's safety).

159. *See generally In re Ryder J.*, 809 N.W.2d 555 (Neb. 2012) (detailing the court's previous findings of aggravated circumstances not specifically enumerated in the state statute).

160. *See id.*

161. *See In re D.O.*, 798 So.2d 417, 422 (Miss. 2001) (citing *Aldridge v. State*, 398 So.2d 1308, 1311 (Miss. 1981)) (upholding a father's termination of parental rights where the mother reported the father's sexual abuse of their three-year-old and there was strong medical evidence supporting the allegation).

162. *See In re M.N.*, 261 P.3d 1047, 1051 (Mont. 2011) (noting that children need not be left to “twist in the wind” before neglect can be found to be chronic and severe).

definition of what constitutes torture as well. In Illinois, however, multiple children appealed a lower court ruling that failed to define their emotional abuse as torture.¹⁶³ In *In re A.G.*, three children were forced to hold down their sibling while their mother beat the child into unconsciousness. While the children at issue were not physically abused themselves, they submitted to the court that they were nevertheless tortured and subjected to emotional harm. The Appellate Court referred to the dictionary definition of torture and determined that because the children were subject to mental anguish, the mother's actions constituted torture. In another, older case, also in Illinois, the Court found that a mother's presence while her boyfriend poured lighter fluid and lit her two children on fire was sufficient to constitute torture.¹⁶⁴ The Court held that the mother was an unfit parent because she did not halt the boyfriend's abuse, allowed the children to be deprived of food, and stood by without taking any action during the boyfriend's torturous actions.¹⁶⁵

C. ASFA By Any Other Name

Of the four states with this type of statute, two do not have appellate jurisprudence on point.¹⁶⁶ The Supreme Court of South Dakota has held that the wording of the statute not requiring reunification efforts where the parent has "committed a crime" is distinct from "convicted of a crime," and so no conviction is required to invoke the bypass provision, only clear and convincing evidence of the conduct.¹⁶⁷

Delaware's jurisprudence, all at the Family Court level (except the affirmation of a recent Family Court decision by the Delaware Supreme Court),¹⁶⁸ mostly deals with the ASFA-type provisions in the context of who decides whether or not reunification efforts are required. In addition to cases cited previously in Part II, some earlier cases held that the

163. See *In re A.G.*, 325 Ill. App. 3d 429, 430 (3rd Div. 2001) (reversing a holding that did not consider nonphysical torture and remanding with directions to find whether there was mental torture of three minors).

164. See *In Interest of Lakita B.*, 697 N.E. 2d 830, 832 (1998) (holding that the statute allows removal of the child from the parents' custody if the parent is found to be either unfit, unwilling, or unable to care for the child).

165. See *id.*

166. Alaska and Maryland.

167. See *In re E.L. & R.L.*, 707 N.W.2d 841, 846 (2005) (relating that aggravated circumstances were apparent from the infant's life-threatening injuries, caused by shaking).

168. *DFS. v. A.L.*, No. 11-08-09TN, 2012 WL 4861426, at 21 (Del. Fam. Ct. 2012), *aff'd* Long v. DFS, 2012 WL 6525082 (Del. 2013, decided Dec. 13, 2012).

Department of Services for Children, Youth and Their Families was the “sole arbiter” of the decision whether to provide reunification efforts once the Court determined that the parent had violated a termination of parental rights ground under DEL. CODE. tit. 13, § 1103(a)(4).¹⁶⁹ Other Family Court judges have agreed, with the caveat that the decision is subject to Family Court review for arbitrariness or capriciousness.¹⁷⁰ In Jill’s case, as highlighted above, the Family Court determined that DFS did not act in an arbitrary or capricious fashion in determining that it could be excused from making reasonable efforts to reunify the family pursuant to DEL. CODE. tit. 13, § 1103(d) on the grounds of serious unexplained injury.¹⁷¹

Inconsistencies exist at the trial level, however, as other judges have stated in *dicta* that the court in the first instance, not in review of social services, is required to determine whether to offer or deny reasonable efforts.¹⁷² One trial court judge denied the Division’s motion for no reasonable efforts because the parent’s conduct was not an offense within the statute: the father vaginally penetrating his stepdaughter on three separate occasions.¹⁷³ Delaware’s statute has since been changed from “the child” to “a child,” which captures cases of parent’s abusing children other than their own biological children. These inconsistencies likely arise because of the complexity of cases, factual differences, the various rights at stake, and long-term consideration of whether reunification should be contemplated.

D. Undefined, Redirected, or Vague

Of the six states with undefined or vague definitions of aggravated circumstances, four lack case law on point.¹⁷⁴ The Court of Appeals of New York, while holding that the retroactive application of ASFA did not impair parents’ vested rights because the statute was remedial in nature,¹⁷⁵ also held that “heinous acts and utter disregard for a child’s life” by parents

169. See generally *In re Phillips*, 806 A.2d 616 (Del. Fam. Ct. 2002). See also *In re A.M.P.*, 2002 WL 31445226 (Del. Fam. Ct. July 1, 2002).

170. See *In re Div. of Family Servs. v. B.S.*, 2008 WL 2898228 (Del. Fam. Ct. July 3, 2008) (holding that federal and state laws permit DFS not to plan for reunification with the parents).

171. See generally *Dept. of Servs. for Children, Youth & Their Families v. A.L. & J.M.*, 11-14486 (Del. Fam. Ct. 2011).

172. *Div. of Family Servs. v. James*, 2009 WL 6328182 (Del. Fam. Ct. Dec. 18, 2009).

173. *Div. of Family Servs. v. C.A.*, 2006 WL 4546456 (Del. Fam. Ct. May 17, 2006).

174. Colorado, Kansas, Louisiana, and Oklahoma.

175. But see *supra* note 119.

excused reunification services.¹⁷⁶ Connecticut has a similarly limited jurisprudence. The one Supreme Court case on point, a severe injury case of “shaken baby syndrome” (now more accurately termed “abusive head trauma”), was notable for interpreting the state statute to mean that social services either had to show that it made reasonable efforts or that the parents were unwilling or unable to benefit from reunification efforts, but not both.¹⁷⁷ It appears from the case law that states without clearly defined aggravated circumstances struggle to articulate standards for when reunification services are excused, even in the most egregious cases.

E. ASFA-Plus: Beyond the Core Four

Of the nine states in this subgroup, three do not have cases on point.¹⁷⁸ The appellate court in Tennessee has held that prenatal drug abuse by the mother and the provision of those drugs by the father constituted severe child abuse for purposes of terminating parental rights.¹⁷⁹ Alabama’s appellate courts have broadly held that committing abusive acts against a child’s sibling are aggravated circumstances excusing reasonable efforts.¹⁸⁰ Michigan’s appellate courts have also held specific circumstances to be aggravating and excuse reasonable efforts, including: placing a child at an unreasonable risk of harm by failing to take reasonable steps to intervene to eliminate the risk of abuse,¹⁸¹ a criminal conviction for battering the child,¹⁸² inflicting life-threatening injuries on a child during a psychotic

176. *In re Marino S.*, 100 N.Y.2d 361, 763 N.Y.S.2d 796 (N.Y. 2003). Both parents were convicted of various crimes after the mother, in order to assist the father in concealing his rape of their eight year-old daughter, spent hours cleaning their apartment for evidence before taking the child to a hospital. The mother insisted on a hospital 115 blocks away, despite the presence of several, much closer emergency rooms.

177. *In re Jordan R.*, 293 Conn. 539 (Conn. 2009). In addition to abusive head trauma, resulting in substantial neurological impairment, the five-week-old child appeared to have been severely abused, including blunt force trauma to the head. The mother had allowed the father to be alone with their child even after witnessing aggressive behavior and suspecting that he had been smothering their baby.

178. Massachusetts, Kentucky, and Wyoming.

179. *In re Joshua E.R.*, 2012 WL 1691620 (Tenn. Ct. App. May 15, 2012).

180. *C.J. v. Marion Cty. Dep’t. of Human Resources*, 5 So.3d 1259 (Ala. Civ. App. 2008) (upholding a termination of parental rights as to a newborn child removed from parents’ care at birth, after the parents had previously consented to a termination of parental rights to their two-month-old child, who suffered serious brain injuries from being violently shaken by the father).

181. *In re Coleman*, 2012 WL 1649092 (Mich. Ct. App. May 10, 2012).

break,¹⁸³ and the doctrine of anticipatory neglect based on the treatment of a child's other or older siblings.¹⁸⁴

Virginia's appellate courts have also addressed the intersection of aggravated circumstances and criminal law, holding that the term "felony assault" in the statute means any felonious crime that results in serious bodily injury to a child of the parent, whether committed by act or omission, since the focus is on the effect on the child, not the parent's intent.¹⁸⁵ Virginia has also clarified the different evidentiary burdens for showing abuse or aggravated abuse.¹⁸⁶

Oregon's appellate court has used statutory construction analysis to determine whether an instant case falls within the non-exclusive universe of aggravated circumstances. In Oregon, aggravated circumstances involve: relatively more serious types of harm or detriment to a child; require only circumstances and not actions or conditions of the parent; include the direct and indirect results of actions and condition; and are not limited to intentional conduct.¹⁸⁷ Arkansas has also defined aggravated circumstances at the appellate level to include parents acting in concert to cause injuries to a child's sibling, or failing to prevent the injuries and protect the child while knowing that someone was causing the injuries that resulted in the sibling's death,¹⁸⁸ extensive burns with an inconsistent and implausible

182. *In re Kelly*, 2011 WL 4424315 (Mich. Ct. App. Sept. 2, 2011) (finding it unnecessary to inquire whether the child's injuries constituted severe physical abuse because the conviction for battery itself was an aggravating circumstance).

183. *In re DeHuff*, 2011 WL 2936793 (Mich. Ct. App. July 21, 2011) (rejecting the mother's argument that because she was incompetent to stand trial and found not guilty by reason of insanity in a criminal proceeding after her parental rights were terminated, she had not acted intentionally in stabbing her son in the chest). Instead, the court found that the mother's ability to form intent was irrelevant because the focus of the proceeding was protecting the child, not her criminal guilt).

184. *In re Wilson*, 2010 WL 4649088 (Mich. Ct. App. Oct. 21, 2008).

185. *Brown v. Spotsylvania Dep't. of Social Servs.*, 43 Va. App. 205, 597 S.E.2d 214 (Va. Ct. App. 2004); *see also Kilby v. Culpeper Cty. Dep't. of Social Servs.*, 55 Va. App. 106, 684 S.E.2d 219 (Va. Ct. App. 2009).

186. *Richmond Dep't. of Social Servs. v. Enriquez*, 2004 WL 1555345 (Va. Ct. App. July 13, 2004) (explaining that a quantum of evidence insufficient to support terminating parental rights under an abuse standard is insufficient to support a termination under a more aggravated abuse standard).

187. *State ex rel. Juvenile Dep't. of Benton Cty. v. Risland*, 183 Or.App. 293, 51 P.3d 697 (Or. Ct. App. 2002). The court used the principle of *ejusdem generis*, i.e. that the general category will be comprised of the same characteristics as the specifically enumerated examples, to generate this list.

188. *Fortenberry v. Arkansas Dep't. of Human Servs.*, 2009 Ark. App. 352 (Ark. Ct. App. 2009).

explanation;¹⁸⁹ complicity in a child's blindness and permanent brain damage from failing to protect an eight week old child from being shaken by the other parent;¹⁹⁰ and extreme and repeatedly cruelty from knowingly leaving a child with an abusive boyfriend who later killed the child.¹⁹¹

Case law from these states suggests that where the aggravated circumstances statute is more robust and broadly defined, courts will take their cue and extend the universe of aggravated circumstances to include cases of egregious behavior resulting in severe bodily injury to a child or a child's sibling, even when the actual perpetrator is uncertain.

F. *Missing in Action*

Unsurprisingly, most states that do not mention aggravated circumstances in their statutes do not address them in their jurisprudence.¹⁹² Only one of these ten states touches on the topic. Utah's appellate court has held that some circumstances constitute *prima facie* evidence of parental unfitness, including sexual abuse or exploitation, injury, or death of a sibling or any child due to known or substantiated abuse or neglect by the parent.¹⁹³

VI. *Strengthening Delaware's Aggravated Circumstances Statute*

Delaware has the opportunity to strengthen its statutory language regarding aggravated circumstances in two circumstances. First, Delaware can expand grounds for termination of parental rights. Second, Delaware can enable the Division of Family Services to more consistently forgo providing reasonable efforts at reunification where parents are the primary caregivers and have no plausible explanation for a child's serious physical injuries. Despite the overriding goal of children's best interests in Family

189. *Mason v. Arkansas Dep't. of Health & Human Servs.*, 2010 Ark. App. 251 (Ark. Ct. App. 2010).

190. *Cox v. Arkansas Dep't. of Health & Human Servs.*, 2006 WL 3086187 (Ark. Ct. App. Nov. 1, 2006).

191. *Pfeiffer v. Arkansas Dep't. of Human Servs.*, 2006 WL 290512 (Ark. Ct. App. Feb. 8, 2006).

192. California, Florida, Illinois, Indiana, Minnesota, Missouri, Nevada, New Hampshire, and Ohio.

193. *State ex rel. L.S.*, 2008 UT App. 398 (Utah Ct. App. Oct. 20, 2008).

Court proceedings, amending and enhancing § 1103(a)(7)-(8) would make the statute much more robust in protecting those interests.¹⁹⁴

Delaware has very little child welfare jurisprudence involving serious unexplained injury and torture cases. Several reasons may explain this dearth of jurisprudence. First, child welfare proceedings are confidential, so most written decisions regarding cases of serious child abuse remain sealed from the public.¹⁹⁵ Second, parents in such cases may voluntarily terminate their parental rights rather than inculcate themselves for the serious injury or abuse their child endured.¹⁹⁶ Third, ASFA requires the exploration of family members for placement of dependent, neglected, and abused children when feasible.¹⁹⁷ When an appropriate family member is identified, the child is often placed with them, either temporarily or as one means of achieving “permanency.” As a result, many cases do not proceed to termination of parental rights on the grounds of unexplained serious physical injury or torture because the parents will consent to a permanent guardianship arrangement with a relative.¹⁹⁸ Finally, cases involving serious injury or torture¹⁹⁹ may proceed to termination of parental rights on other grounds, such as failure to plan, felony convictions, or

194. DEL. CODE tit. 13, § 1103(a)(7) (2009) (“The parent has subjected a child to torture, chronic abuse, sexual abuse, and/or life-threatening abuse.”); *see also* DEL. CODE tit. 13, § 1103(a)(8) (2009) (“A child has suffered unexplained serious physical injury, near death or death under such circumstances as would indicate that such injuries, near death or death resulted from the intentional or reckless conduct or willful neglect of the parent.”).

195. DEL. CODE ANN. tit. 13, § 1112(a) (West 2012) (“All court records and dockets pertaining to any termination [of parental rights] shall be confidential . . .”).

196. *See, e.g.*, Div. of Family Servs. v. K.H., 10-15551 (Del. Fam. Ct. Feb. 4, 2012).

197. 42 U.S.C.A. § 671(a) (West 2012). “In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which . . . (19) provides that the State shall consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child, provided that the relative caregiver meets all relevant State child protection standards . . .” Delaware complies with this requirement as embodied by DEL. CODE tit. 31, § 356 (2012), which establishes a kinship care program that “(a) promotes the placement of children with relatives when a child needs out-of-home placement, when such placement is in the best interests of the child, and when the child is not in the custody or care of the state.” Delaware’s preference for family placement once a child is declared dependent or neglected is further implied by DEL. CODE tit. 10, § 1009 (2012): “(b) Following an adjudication by the Court in which it declares a child to be dependent or neglected, the Court may . . . (3) Grant custody of a child to any person or agency where satisfactory arrangements can be made but, in the event the child is placed in a home other than the home of a relative, the Court shall require an evaluation and report” from the Department of Services for Children, Youth and Their Families.

198. *See, e.g.*, Div. of Family Servs. v. A.W., File Nos. CK08-01363 & CK08-01639 (Del. Fam. Ct. June 19, 2009).

199. A persistent problem with “torture.”

abandonment.²⁰⁰ Consequently, broadening the scope of omissions or failure to protect the child would give Family Courts more clarity as to when terminating parental rights is justified and reasonable reunification efforts are not required.

A. Causation vs. Omission in Child Abuse and Neglect

Some Family Court judges may be reluctant to attribute causation to either primary parent caregiver when presented with a united front of denial regarding serious child abuse and neglect. In such cases, the Court is unlikely to be able to determine which parent committed the abuse and which parent stood by, or whether both parents inflicted the abuse. In one of the cases highlighted above, the Court determined by clear and convincing evidence that Jill's injuries were caused by the intentional or reckless conduct or willful neglect by her parents because normal handling of Jill could not have caused multiple fractures, Jill did not suffer from any metabolic or organic disorders, and there was no history of accidental trauma even though the injuries occurred while in the parents' care.²⁰¹ In that case, the Court could not determine causation, but rather determined that termination of parental rights grounds were met based on a constellation of factors that showed the child's injuries occurred while on the parent givers' watch.²⁰² Because neither parent would explain how the child sustained such severe injuries, their harmful actions or inaction, as the case may be, were sufficient to terminate their rights.²⁰³ Nonetheless, under Delaware's current statute, without being able to find that the injuries resulted from a specific parent's actions, courts may not consistently agree that DFS should be excused from planning with that parent or ensure that a seriously injured child has an appropriately quick transition to a permanent placement.²⁰⁴ Although expanding perpetration to include omission might raise due process issues, such an expansion would probably pass

200. Div. of Family Servs. v. A.B., 2006 WL 1389860 (Del. Fam. Ct. Jan. 4, 2006); *In re J.G.W. III*, 2004 WL 3245804 (Del. Fam. Ct. Nov. 10, 2004); Div. of Family Servs. v. L.M. & C.M., 2002 WL 32101227 (Del. Fam. Ct. Dec. 10, 2002); *see also* Div. of Family Servs. v. B.M. & J.K., File No. CS09-03474 (Del. Fam. Ct. Jan 9, 2012).

201. Div. of Family Servs. v. A.L., 11-08-09TN, 2012 WL 4861426 (Del. Fam. Ct. May 23, 2012).

202. *Id.*

203. *Id.*

204. *See e.g.*, Div. of Family Servs. v. A.A., DE Fam. Ct., FN:12-02-10T (Jan. 8, 2013).

constitutional muster.²⁰⁵ For example, Oklahoma allows broad protections for children and codified “enabling child abuse” as a crime, which includes permitting, i.e. authorizing or allowing, for the care of a child by an individual when the person permitting the care knows or reasonably should know that the child will be placed at risk of abuse.²⁰⁶ Under this statute, the Tenth Circuit upheld a murder conviction and death penalty sentence of Donald Lee Gilson under a split theory of child abuse murder.²⁰⁷ Oklahoma asserted that committing and permitting child abuse were merely different means by which child abuse murder could be permitted, while Gilson asserted that they were conceptually distinct crimes.²⁰⁸ The Tenth Circuit found that the Oklahoma Legislature clearly stated its intention to punish as first-degree murder either using unreasonable force or permitting the use of unreasonable force upon a child when the child then dies.²⁰⁹

Further, the Tenth Circuit held that a unanimous jury verdict that Gilson committed the crime satisfied due process and that a “constitutionally unanimous verdict is required only with respect to the ultimate issue of the defendant’s guilt or innocence of the crime charged and not with respect to alternative means by which the crime was committed.”²¹⁰ Gilson was denied federal habeas relief.²¹¹ Based on the

205. Broadening the class of perpetrators to include parents and guardians would clarify that the statute is concerned with protecting children from their adult caretakers, not just those with formal parental rights to them. While expanding the class of perpetrators to include *de facto* parents, primary caretakers or caregivers, other responsible adults residing in the home, or those individuals’ paramours would provide extraordinary protection to children, such an expansion would probably fail. The court cannot terminate parental rights to someone who has no such rights to begin with (so the provision would be moot), and the court might violate a parent’s due process rights if his or her parental rights were terminated based on the actions of another adult. Case law from other states suggests that this may not be a legal barrier. *See supra* notes 142-143. However, the problem of parents allowing abusers access to their children can still be resolved by elaborating on the causation requirements of “subjected,” as discussed below.

206. OKLA. STAT. ANN. tit. 21, § 843.5 (West 2012).

207. *Gilson v. Sirmons*, 520 F.3d 1196, 1203-04 (10th Cir. 2008), *affirming* *Gilson v. Sirmons*, No. CIV-01-1311-C, 2006 WL 2320682, at 1 (W.D. Okla. Aug. 9, 2006). The jury was divided as to the underlying theory of the crime, but unanimously found Gilson guilty of child abuse murder and permitting child abuse murder. The State had alleged two theories of the crime, either that Gilson was directly responsible for willfully or maliciously injuring, torturing, maiming, or using unreasonable force upon eight year old Shane, or that he knowingly permitted Coffman, Shane’s mother, to do so. *Id.* at 1203.

208. *Id.* at 1208.

209. *Id.* at 1209.

210. *Id.* at 1210.

211. *Id.* at 1212.

Tenth Circuit's reading of legislative intent with respect to causation in a criminal statute, a similar civil statute that does not distinguish between permitting and committing child abuse might also withstand a due process challenge.²¹² Civil statutes that treat permitting and committing such abuse identically have already been enacted in Arizona,²¹³ Virginia,²¹⁴ and Florida.²¹⁵ Terminations of parental rights based on similar reasoning of parental inaction or failure to protect have also withstood appellate review in New York²¹⁶ and Connecticut.²¹⁷ These developments further support the constitutional validity of a similar statute in Delaware.

B. Define What It Means to "Subject" A Child To Abuse/Neglect.

In addition, case law from other states suggests that the statutory term "subjected" includes acts of omission or commission and sometimes exposure to conditions or failure to protect children from those conditions or perpetrators.²¹⁸ Rather than relying on judicial interpretation, however, the Delaware statute could define what constitutes "subjecting a child to a condition or circumstance." Such language might include either an express definition of "subjected" or an enumerated list of other verbs in addition to "subjected to." Such a definition could include "has exposed, caused, enabled, allowed, or permitted" and so forth, thus expanding the types of affirmative conduct or omissions that satisfy the causal element. Including wording such as "exposed, enabled, or allowed" would also permit courts to terminate parental rights in cases where the parent was not the actual perpetrator, but rather failed to protect the child from the perpetrator.

212. Criminal courts have reasoned similarly. *See supra* note 131.

213. *See supra* note 85. Aggravated circumstances exist where the child has suffered severe physical or emotional injury by the parent *or a person known to the parent*.

214. *See supra* note 121. Aggravated circumstances include *failure to protect* the child from torture, chronic or severe abuse, or chronic and severe sexual abuse, if the conduct *or failure to protect* demonstrates a wanton or depraved indifference to human life or results in the death or serious bodily injury of the child.

215. *See supra* note 125. Having *the capability and opportunity to prevent and knowingly failing to prevent* egregious conduct threatening the life, safety, or physical, mental, or emotional health of the child is a circumstance excusing reasonable efforts.

216. *See supra* note 176. Mother's parental rights were terminated after she aided father in concealing his rape of their eight year-old daughter.

217. *See supra* note 177. Mother's parental rights were terminated after she left the father alone with their child even after witnessing aggressive behavior and suspecting he had been smothering their child.

218. *See supra* note 151.

For example, in Jill's case, the court concluded that although it could not determine which of the parents abused baby Jill, it nevertheless found clear and convincing evidence that the parents "were her caretakers during the relevant time frames and other explanations provided by the parents were not credible nor the product of sound logic."²¹⁹ But, in Matt's case, the court did not find such that the baby's injuries were the direct result of the mother's action or willful neglect by clear and convincing evidence.²²⁰ Alternatively, Oregon jurisprudence has determined that abuse includes the direct and indirect actions and conditions of a parent caregiver, without limit to intentional conduct.²²¹ In addition, because case law in other jurisdictions strongly supports a finding of aggravated circumstances for conduct that includes where a parent exposed, enabled, or allowed a child to endure abuse or torture, such a statutory revision will likely pass constitutional muster in Delaware. Therefore, adding the term "subjected" to Delaware's aggravated circumstances statute would provide both uniformity and clarity for the Delaware Family Court to find aggravated circumstances exist when parents fail to protect or enable abuse to occur.

C. Simplify the statute

Under Delaware's statute, a child must have "suffered unexplained serious physical injury, death, or near death under such circumstances as would indicate that the injuries, near death or death resulted from the intentional or reckless conduct or wilful [sic] neglect of the parent."²²² This causation requirement may be problematic in cases where two or more primary caregivers are the presumptive perpetrators of abuse or neglect resulting in serious bodily injury, but no one caregiver is identified as the actual perpetrator.

This problem invites comparison to *Summers v. Tice*.²²³ In some ways, such abuse may be "over-determined" when the pool of possible perpetrators is very small, such as two co-primary caregivers, and one or

219. Div. of Family Servs. v. A.L., No. 11-08-09TN, 2012 WL 4861426, at 15 (Del. Fam. Ct. May 23, 2012).

220. See Div. of Family Servs. v. A.A., 11-22215 (Del. Fam. Ct. Oct. 10, 2011).

221. See *ex rel. Juvenile Dep't. of Benton City v. Risland*, 51 P.3d 697, 705 (Or. Ct. App. 2002).

222. DEL. CODE ANN. tit. 13, § 1103(a)(8) (2009).

223. See *Summers v. Tice*, 199 P.2d 1 (Cal. 1948) (holding that under the circumstances presented each defendant is liable for the whole damage, whether they are deemed to be acting in concert or not).

both must have been the perpetrator, but it is not possible to prove by clear and convincing evidence or any higher evidentiary standard which person(s) actually committed the abuse. While criminal guilt cannot be proven beyond a reasonable doubt in such circumstances, the civil tort system has resolved the *Summers v. Tice* problem by holding both parties liable. However, in Family Court proceedings, where the issue is not monetary damages but rather the fundamental right to parent, proceeding to termination of parental rights using this strict rule may raise due process issues. Perhaps, where the issue is just the states' obligation or excusal from case planning or providing reunification services, due process may not be implicated.²²⁴ This suggests that where there is a *Summers v. Tice* causation problem, the state may be equally excused from planning with the possible perpetrators, even in the absence of statutory language regarding abuse by omission or willful blindness.

Take for example Matt's case. There, the court²²⁵ determined that Matt was abused,²²⁶ neglected²²⁷ and dependent.²²⁸ Notwithstanding the court's findings based upon uncontroverted evidence that Matt was seriously injured, and that the mother was a primary caregiver, the court would not excuse DFS from case planning.²²⁹ The court, although deeply troubled by the facts of the case, felt constrained by the wording of the serious unexplained injury statute because it could not determine whether mother actually *caused* Matt's injuries or whether Matt's injuries resulted from her intentional or reckless conduct or willful neglect.²³⁰

In contrast, a Delaware Family Court judge wrestled with whether DFS could be excused from case planning for reunification when two primary caregivers failed to provide a plausible explanation for life-threatening injuries to their nine week-old baby. Kate's²³¹ injuries included

224. See *In re K.R.*, No. 99-2009, 2000 WL 854325 (Iowa Ct. App. June 28, 2000) (determining the statutory directive to employ reasonable services, absent aggravated circumstances, does not give rise to a constitutional right; parents have a fundamental liberty interest in the care, custody, and management of their children, but state-sponsored efforts at reunification are not constitutionally mandated); see also *Suter v. Artist M.*, 503 U.S. 347, 363 (1992).

225. Div. of Family Servs. v. A.A., 11-22215 (Del. Fam. Ct. Nov. 15, 2011).

226. tit. 10, § 901(1) (2012); tit. 16, § 902(1) (2012).

227. tit. 10, § 901 (18) (2012).

228. DEL. CODE ANN. tit. 10, § 901 (8) (2012).

229. Div. of Family Servs. v. A.A., 11-22215 (Del. Fam. Ct. Nov. 15, 2011).

230. *Id.* Note, although the court acknowledged that Matt's injuries were indeed very troubling, there were other factors in play that caused the Court to determine DFS could not be excused from case planning with mother.

231. The child has been given a pseudonym to protect her identity.

thirty-three fractures in various stages of healing and the letters “F” and “U” carved into her left side.²³² The evidence showed that the parents were Kate’s primary caregivers, and they kept the door closed in the room they shared with her ninety percent of the time.²³³ One week prior to Kate’s long-term hospital admission, the parents took her to the hospital with a possible spider bite on her back. At the emergency room, a physician’s assistant determined that the baby had “a soft tissue growth to the back” and recommended follow-up with Kate’s pediatrician. Seven days later, Kate was hospitalized with life-threatening injuries. Baby Kate had extensive fractures and numerous other injuries, including fractured extremities, at least twelve acute rib fractures, pulmonary contusion, pleural effusion, bruising and swelling to various body parts, and other injuries.²³⁴ The pediatric child abuse expert diagnosed Kate with child physical abuse and a life threatening chest injury. The doctors determined that the lump on her back diagnosed during the first emergency room visit was actually bone fragments sticking out from rib fractures. In the intervening period between the two hospital visits, the parents disregarded the emergency room instructions and failed to follow up with the pediatrician.²³⁵

Although the Court was convinced that one or both caregivers perpetrated the abuse, it could not make a legal finding of “abuse”²³⁶ because it was unable to determine who actually inflicted the “horrendous injuries.”²³⁷ The Court, deeply disturbed by the extent and severity of the baby’s injuries, was nonetheless constrained by the language of Delaware’s torture/chronic abuse statute because its current form suggests a causation element. Consequently, the Court could not find by a preponderance of the evidence that the parents had subjected the child to torture, chronic abuse, and life threatening abuse pursuant to § 1103 (a)(7).²³⁸ The statutory changes we propose here, adding “subjected to” (with the definition), would address causation (or the lack thereof) in cases of abuse or torture and would circumvent the problem that courts faced in these cases where the judge was unable to reconcile the egregious facts with the law requiring some form of conduct by the parent. Our recommended statutory change to

232. Div. of Family Servs. v. K.H., 10-15551 (Del. Fam. Ct. Feb. 4, 2012).

233. *Id.*

234. *Id.*

235. *Id.*

236. DEL. CODE ANN. tit. 10, § 901(1) (2012); tit. 16, § 902(1) (2012).

237. Div. of Family Servs. v. K.H., 10-15551 (Del. Fam. Ct. Feb. 4, 2012).

238. *Id.*

Title 13 §1103 (a)(7) defining “subjected to” to include enabling or allowing such treatment of a child would provide the Court with the necessary language to find that the parent subjected the child to torture and chronic abuse in the cases discussed above without the element of causation when caregivers act as a united front.²³⁹

Other states have resolved this causation issue as it relates to being excused from reasonable efforts and termination of parental rights. In cases of egregious abuse where one parent is more suspect than the other, willful blindness will not preserve parental rights²⁴⁰ without specifically finding which parents inflicted injuries.²⁴¹

In contrast to Delaware, other state courts have determined that parental inaction may be tantamount to perpetration of child abuse in unexplained serious injury cases. For example, in a case strikingly similar to baby Jill’s case highlighted above, a seven-month-old baby from Rhode Island, Chester, entered child protective services custody for fractures in various stages of healing on six ribs, his tibia, ulna, and radius bones as well as severe abdominal trauma.²⁴² Chester’s parents testified and repeatedly reiterated that they did not inflict and had no idea what caused Chester’s extensive injuries.²⁴³ The court rejected the mother’s argument that the statute, which included “conduct toward any child of a cruel or abusive nature” as a ground to terminate parental rights, required proof of an affirmative act.²⁴⁴ Rather, the Court found “the quantum and obscene nature of the abuse . . . was so overwhelming that the trial justice could not ignore the reasonable inferences to be drawn from the information.”²⁴⁵ Specifically, the Rhode Island Supreme Court held that “the state is not

239. *Id.* However, the Court in that case nevertheless excused DFS from case planning or reunification because it determined that the child suffered unexplained serious physical injury at the hands of the parents pursuant to §1103 (a)(8). It is important to note that the parents later voluntarily consented to terminate their parental rights.

240. *P.I. v. Dep’t. of Children & Families*, 14 So.3d 1173, 1147 (Fla. Ct. App. 2009) (holding that even a parent who is not present or who does not personally participate in abuse, but who knowingly fails to protect his or her child from egregious abuse, may have his or her parental rights terminated). For a pre-ASFA case, see *In re M.M.*, 906 P.2d 675 (Mont. 1995) (interpreting the phrase “allows to be committed sexual abuse or exploitation” in the statute setting forth termination of parental rights criteria as not requiring actual knowledge by the parent that acts had been committed on the child).

241. See string citations *supra* p. 17.

242. See *In re Chester J.*, 754 A.2d 772, 773-75 (R.I. 2000).

243. *Id.* at 775.

244. *Id.* at 777.

245. *Id.* at 778.

required to prove which parent actually inflicted the abuse” on an infant with unexplained injuries in a termination of parental rights case.²⁴⁶ The Court further held that “[a]llowing parents to ignore or stand by while such abuse and neglect occurs is tantamount to the parents inflicting the abuse themselves.”²⁴⁷

Similarly, in *Nicole B.*, the Supreme Court of Rhode Island found parents’ contention that their toddler Nicole had inflicted multiple skull fractures, brain contusions, fractured ribs, and a broken leg on her two-month-old sister “incredible, lame and implausible.”²⁴⁸ Until the parents provided an explanation of the injuries, no treatment could be offered, and without treatment, the children could not be returned home.²⁴⁹ Since further treatment would not elicit admissions from the parents, the termination of parental rights was upheld.²⁵⁰

The Supreme Court of West Virginia has taken a similar stand in cases where parents are stalwart in their refusal to explain injuries. In *State v. Jessica M.*, seven-week-old Angela died from blunt force head trauma and neither parent offered any medically plausible explanation for her death and other multiple injuries.²⁵¹ Even after the suicide of father, who was presumed to be the abuser based on the surviving children’s testimony, the court would not return them to the mother.²⁵² The court further held that parental rights can be terminated when clear and convincing evidence shows an infant suffered extensive physical abuse while in the custody of his or her parents, and the conditions of the abuse cannot with any reasonable likelihood be corrected because the perpetrator has not been identified and the parents have taken no action to identify the abuser.²⁵³

Other states are also willing to accept circumstantial evidence as proof of abuse in unexplained infant injury with two primary caretakers presenting a united front of denial or ignorance as to the baby’s injuries. A

246. *Chester J.*, 754 A.2d at 778.

247. *Id.*

248. *See In re Nichole B.*, 703 A.2d 612, 615 (R.I. 1997) (holding it was unnecessary for the Department of Children Youth and Families make “reasonable efforts” to reunite the parents with the child).

249. *Id.* at 618.

250. *Id.* at 619.

251. *See State v. Jessica M.*, 445 S.E.2d 243, 249 (W.Va. 1994) (“The father argued that he should be held blameless for his non-action, even though he supported his wife’s explanation....”).

252. The Court remanded for further fact-finding on other grounds. *Id.*

253. *Id.* at 249.

Nebraska Appeals Court held that a finding of abuse or neglect may be supported where the record shows both (1) a parent's control over the child during the period when the abuse or neglect occurred and (2) multiple injuries or other serious impairment of health which ordinarily would not occur. In *Chloe L.*, six-week-old Ethan had 29 fractures throughout his body in various stages of healing.²⁵⁴ There, the court affirmed the termination of parental rights of both parents as to both siblings, notwithstanding that the mother had taken Ethan to the hospital.²⁵⁵ Medical testimony showed that the injuries were from non-accidental trauma that would not have happened during the normal handling of an infant and that could not have been caused by the infant's toddler sister Chloe, as the parents suggested.²⁵⁶

Similarly, a Massachusetts Appeals Court terminated parental rights by clear and convincing evidence for successive injuries to a non-ambulatory infant, parents' changing stories, parents' failure to appreciate the nature and seriousness of the injuries, and ruling out of accidental injury.²⁵⁷

Finally, a New Jersey Appeals Court determined that when a limited number of parents have access to an infant during a period when abuse concededly occurs, the burden shifts to those persons to come forward and provide evidence to establish their non-culpability for that abuse.²⁵⁸ In *A.C.*, one-month old T.W. sustained a bilateral skull fracture while in the exclusive care of his mother and neither parent accepted responsibility nor explained the trauma.²⁵⁹ The *A.C.* court reasoned that the difficulty of obtaining direct evidence of parental abuse in closed environments with victims who have a limited ability to inculcate their abusers justified shifting the burden to a closed set of caretakers when unexplained injuries occur.²⁶⁰ The court further concluded that "[t]he abused child's interest is

254. See *In re Interest of Chloe L.*, 712 N.W.2d 289, 292 (Neb. Ct. App. 2006) (holding that termination of parental rights was in the children's best interest due to neglect because the parents had committed a felony assault that resulted in serious bodily injury to Ethan).

255. *Id.* at 292, 298.

256. *Id.* at 293.

257. See *In re Adoption of Nelson*, 756 N.E.2d 1227, at 2 (Mass. App. Ct. 2001) (unpublished table decision) (affirming the decision that dispensed consent of the father and mother).

258. See *New Jersey Div. of Youth & Family Servs. v. A.C.*, 911 A.2d 104, 111 (N.J. Super. Ct. Ch. Div. 2006) (holding that the child was neglected).

259. *Id.* at 105, 111.

260. *Id.* at 111.

paramount; only when the child can be protected within the family will the parents' interest in the care and custody of their child also be realized.”²⁶¹

The common denominator in all of those cases was a seriously injured child with parents presenting a united front of denial or ignorance.²⁶² None of those jurisdictions required actual proof or a criminal conviction of the perpetrator of each child's horrific injuries.²⁶³ Instead, those courts resolved that it was the parents' highest duty to keep their child safe.²⁶⁴ Because the child was seriously injured on the parents' watch and the parents could not explain how the child sustained such deplorable injuries, these courts terminated parental rights.²⁶⁵

This clause notably focuses on the resultant harm to the child without identifying a particular perpetrator. While this focus on the child's injury rather than parent's conduct protects children in cases of undetermined causation, the use of the term “suffered” instead of “subjected to” invites potentially a different reading of causation in § 1103(a)(8) than in § 1103(a)(7). Therefore, we recommend merging (a)(7) and (a)(8) into one aggravated circumstances statute that incorporates what acts or omissions subjected a child to abuse/neglect: 1103(a)(7) Any child has been subjected to torture, chronic abuse, chronic or severe neglect, sexual abuse, life-threatening injuries, unexplained serious physical injury, near death or death. Such language will refocus Delaware's statute under the ASFA's requirement to hold the child's safety as the paramount concern.²⁶⁶

D. Adding Chronic or Severe Neglect

“Chronic or severe neglect” should also be included under Delaware's aggravated circumstances statute given its current omission from the statute and the difficulty of subsuming chronic or severe neglect into the currently listed categories. Adding “chronic or severe neglect” will have clear advantages to protect children in dangerous situations. Although “chronic or severe neglect” would be a legal finding under the statute, a pediatric child abuse expert may make a medical finding of “chronic neglect.” Crossing over from a medical finding to a legal finding is a much more

261. *Id.* at 109.

262. *See* string citations *supra* p. 24.

263. *See, e.g., In re Chester J.*, 754 A.2d 772 (R.I. 2000).

264. *See, e.g., New Jersey Div. of Youth & Family Servs. v. A.C.*, 911 A.2d 104 (N.J. Super. Ct. Ch. Div. 2006).

265. *See e.g., id.; see, e.g., State v. Jessica M.*, 445 S.E.2d 243 (W. Va 1994).

266. *See* 42 U.S.C. § 671 (2010).

streamlined conclusion than, say, arguing for a finding of “torture” which is left undefined. Because there have been no published Delaware court decisions concluding a parent either directly tortured a child or tortured a child by failing to act or purposely depriving the child of basic necessities, expanding the statute to include chronic or severe neglect will help capture such horrific cases.

For example, recently in Delaware, a twelve year-old child came into care following three months of isolation in his room, food deprivation, and other significant maltreatment.²⁶⁷ He was hospitalized with malnutrition and had some significant bruising all over his body. While the physical injuries and malnourishment may or may not constitute torture, such treatment by the parent would likely constitute chronic or severe neglect. However, without adding “chronic or severe neglect” to (a)(7), such a child welfare case may not be covered by the existing statute since the injuries have a clear explanation by a verbal child and there may be no findings of torture or chronic abuse depending on the facts available in the civil proceeding.²⁶⁸ Equally, the term torture is so politically charged that some judges may avoid making such a finding.²⁶⁹ In addition, “torture” is not a medical finding, but chronic neglect is. Therefore, enhancing the statute with the term “chronic or severe neglect” would enable DFS to deny case planning with parents in such cases of horrific child maltreatment and move toward termination of parental rights. It would also likely capture extreme cases of failure to thrive due to chronic abuse or neglect,²⁷⁰ long-term

267. *Police: Boy Locked in Room 3 Months: Couple Charged*, 2012 WLNR 25484760 (Wilmington, De) (Nov. 30, 2012); see also Michael Walsh, *Delaware boy, 12, escapes after parents locked him in room for 3 months without regular food or medical care: police*, NYDAILYNEWS.COM, <http://www.nydailynews.com/news/crime/parents-locked-boy-12-room-3-months-article-1.1295254> (Mar. 21, 2013).

268. In that case, because criminal charges were pending, some witnesses were prevented from testifying in order to avoid compromising the criminal investigation.

269. Just as “unexplained” may represent a legal conclusion, or lack of legal conclusion, in the context of serious injurious, “torture” has also taken on the tone of a legal conclusion that may discourage judges from making a finding based on facts alone.

270. See *Jacks v. Div. of Family Servs. & Office of the Child Advocate*, 974 A.2d 100 (Del. 2009). Jacks’ three children were removed after continuous reports of neglect and possible abuse. *Id.* at 104. One child was hospitalized due to weight loss and to determine the cause of her failure to thrive. *Id.* at 102. Once hospitalized, the child steadily gained weight for eight days, suggesting to the pediatrician that the child was underfed, not failure to thrive. *Id.* Once placed in foster care, all three children – previously diagnosed as failing to thrive – rapidly gained weight and improved developmentally. *Id.* From 2000-2008, the children were twice removed from their mother’s home, placed in foster care, returned to relatives, given back to their mother by those relatives, and removed again by DFS. *Id.* at 104. Each time the children returned to their mother’s care, they lost weight and

deprivation, and maltreatment. Additionally, it would likely pass constitutional muster as an aggravated circumstance because South Dakota,²⁷¹ Montana,²⁷² and Maryland²⁷³ protect children based on chronic or severe neglect.

E. Anticipating Unintended Consequences

As with any statute, greater complexity and/or enumeration of factors for consideration may lead to unintended consequences. Any revisions to these grounds for terminating parental rights must consider existing case law on parents' due process rights, the institutional and administrative capacities of the court system and the Division of Family Services, and children's best interests in permanent, appropriate placements.

In the interest of simplicity and clarity, the recommended proposed statutory changes to include:

DEL. CODE tit. 13, § 1101

Definition: "Subjected," which should be defined to include: "has exposed, caused, enabled, allowed or permitted." With such a definition, the proposed statutory changes would appear as follows:

DEL. CODE tit. 13, § 1103(a)(7) should read:

(7) Any child has been subjected to torture, chronic abuse, chronic neglect, sexual abuse, life-threatening injuries, unexplained serious physical injury, near death or death.

VII. Conclusion

Most states struggle with both statutory and judicial definitions of aggravated circumstances, especially in the context of serious bodily injury, torture cases, and the requirement of reasonable reunification efforts. While

missed school. Upon return to foster care, they gained seven to twelve pounds. *Id.* During these eight years, the children were not only repeatedly underfed, abused, and neglected, but also deprived of permanency. *Id.* at 105. Jacks' parental rights were not terminated until 2008 and her appeal was not settled (upholding termination of parental rights) until May 2009. *Id.* at 107. A different statute may have enabled greater safety and permanency for these children much earlier in their young lives, as opposed to being left to "twist in the wind." *See supra* note 132.

271. S.D. CODIFIED LAW § 268A 21.1 (West 2012).

272. *In re M.N.*, 362 Mont. 186, 261 P3d 1047 (Mont. 2011).

273. MD. CODE ANN., CTS. & JUD. PROC. §3-812b (West 2012).

ASFA theoretically has provided a national framework for handling such cases, states diverge widely in their adoption and enforcement of those federal provisions.

Matt, Jill, Kate, and countless other cases of seriously physically abused children underscore the need for Delaware to place greater emphasis on child welfare protections when two parent caregivers provide no plausible explanation for serious physical injuries and less on who actually inflicted the injuries. An over-reliance on proving causation of a child's injuries is detrimental to both children and the court system charged with protecting the child's best interest. Consequently, the civil system must address child protection without necessarily waiting for criminal prosecution or proof as to which caregiver injured the child.

There are clear advantages to bolstering protections for abused and neglected children in the civil system when serious unexplained injury cases are concerned.²⁷⁴ The burden of proof is less stringent in the civil system: clear and convincing evidence is the standard under a termination of parental rights proceeding, whereas beyond a reasonable doubt is the legal standard in a criminal case. The effects are longer lasting: a termination of parental rights will likely last for the child's minority, whereas in the criminal system, sentencing, parole, and probation all factor into when parents can have contact with their children again. Criminal proceedings are punitive, whereas civil child welfare proceedings address the best interest of the child.²⁷⁵ While the criminal system can drag out court dates based on a variety of factors, child welfare cases must move more rapidly to ensure the best interest of children to achieve permanency within twelve to fifteen months of entering care.²⁷⁶

Delaware's child welfare system would have an enhanced capacity to protect children's best interests in cases of unexplained serious abuse involving two parent caregivers acting as a united front given the appropriate statutory reform, precedent-setting case litigation, and child-focused advocacy.

274. See *Summers v. Tice*, 199 P.2d 1 (Cal. 1948) (affirming that defendant is liable for the whole damage whether they are acting in concert or independently).

275. See *In re H.J.*, 854 P.2d 381, 383 (Okla. Civ. App. 1993) (holding that it is in best interests of the children to terminate the parents' rights).

276. See, e.g., DEL. CODE tit. 13, § 1103 (a)(5) (2009).