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# DEMYSTIFYING DUE DILIGENCE

## (FINDING CONNECTIONS FOR YOUTH IN FOSTER CARE)

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Children and youth in foster care or those at risk of entry into foster care are faced with a multitude of trauma and loss experiences. Beginning with being a part of a family unit in which the safety and wellbeing may be jeopardized only to then move from place to place during their tenure in foster care. Each move, including the initial removal, leads to several layers of grief as well as a belief that relationships are temporary. Many who stay in foster care for extended periods of time feel that no one wants them. Too many will age out of foster care and will become homeless, jobless and suffer from severe mental and physical health challenges. There is no opportunity to address these emotional traumas, and many will spend a lifetime trying to manage their feelings of isolation and loneliness.<sup>i</sup> What if we could shift the trajectory of these all too often outcomes? With a purposeful and sincere approach to the Due Diligence mandate, we can.

### *What is it?*

Fostering Connections, notice to relatives, was passed by the federal legislature in 2008 and became mandatory in every state by 2010.<sup>ii</sup> The mandate states:

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*“within 30 days after the removal of a child from the custody of the parent or parents of the child, the **State shall exercise due diligence** to identify and provide notice to all adult grandparents and other adult relatives of the child (including any other adult relatives suggested by the parent(s), subject to the exceptions due to family or domestic violence...” (ref) (emphasis added)*

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The legislation directed each state to define “relatives” “due diligence” and “notice.” It allowed the states the opportunity to enact statutory or other rules to define these three terms and any needed implementation processes. Now almost 16 years later, many continue to struggle with meeting this mandate in a way that the legislature intended or with a clear understanding of what is necessary to constitute a judicial finding of Due Diligence. This struggle stems from a misunderstanding or lack of willingness to employ those activities that would actually lead to connections for children and youth. Others believe that undertaking just one type of outreach is enough. It is not.



NIPFC’s first publication of “[Defining Due Diligence](#)” was written in February of 2014.<sup>iii</sup> That article provided initial guidance to assist states in meeting the federal requirement and included samples a few appellate court case language, initial guidance from the US Department and Health Services and a short list of questions to ask to identify more relatives and important connections for youth who were removed from their home or at risk of removal.

At the time of the 2014 article, there was little information and guidance available. Since that publication, there have been appellate cases (both published and unpublished) which have provided added clarification and guidance. Many states have amended and updated statutory framework to include specific, mandatory activities to meet the Due Diligent requirement. This current article will highlight what could and should be done to meet the Due Diligence requirement including mindsets and beliefs that are needed and most importantly what information a judicial officer should consider before making a finding that the agency/probation has met this requirement.

### *Review of Legislative Intent*

It is important to recall that prior to the passage of Fostering Connections, the federal legislature passed the Relative Preference requirement. This legislation was passed to ensure that relatives of the child or youth are the first to be considered for placement and further to build a network of support for that youth.<sup>iv</sup> The rationale behind this legislation was based upon the research showing that engaging relatives early and often can mitigate additional trauma and loss for youth. Further, youth placed with relatives can lead to early legal and emotional permanency.<sup>v</sup>

Coupled with the Relative Preference mandate, the goal of “Due Diligence” is to require Child Welfare and Probation agencies to do as much as possible to provide *actual* notice to relatives (as well as important connections and fictive kin) and provide them the opportunity to participate as a support or placement for their kin. This includes engaging “family” members so they feel that they are important participants and thus want to be part of a network for this youth. The Relative Preference statute is futile unless Due Diligence is meaningfully exercised. To place a youth directly into a licensed foster care placement is contrary to the spirit of these federal mandates and continues to allow the states to conduct business as usual. This must change.<sup>vi</sup>

The Due Diligence requirement necessitates an initiative-taking approach to identify as many living adult relatives as possible and to provide actual notice to them of the proceedings through written means as well as orally or in person. Upon making a connection with a relative, it is imperative that they be engaged and involved as early as possible and in ways that allow them to support the youth however needed and not merely as a placement option. For those engaging with youth and family members, preparation is necessary prior to conducting Due Diligence. This should include an internal dialogue to ensure that the proposed measure of success is a **network of family support for every youth**.



### *Internal belief needed*

Those who are charged with conducting the Due Diligence legwork and those who communicate with children, youth and family need a specific mindset before beginning this work. These professionals must believe wholeheartedly that children have “family” and that the “family” understands its needs better than any professional, that relatives and loved ones are the support needed for youth rather than merely a myriad of services. A belief that this type of support can be accomplished for every child and youth is necessary, and that this mindset has been adopted by the entire system, not just a specific worker, to have the desired impact. If the spirit of both mandates is followed, done in good faith and with a projected outcome of returning this child/youth to loved ones, “family” can be the outcome. This mindset invites us to begin with the question ‘who, in the life of this youth, could help us figure out, and possibly provide, what is needed for him/her. From this position we don’t just seek out services or placements, we focus on people and enduring relationships as the primary intervention.

### *Good faith required*

Most often those who indicate that they have exercised Due Diligence include in their reports to the court that “family finding” was done and there are no relatives who want placement. Other situations include when an agency or probation department indicates that the parents did not provide any names of relatives or that they ran an internet search and sent letters to those identified relatives. None of these equate to Due Diligence. These assertions fail to understand the legislative intent of Due Diligence and further that a “family finding” internet search is just one component of Due Diligence. Lastly, agencies continue to rule out relatives and connections due to their own beliefs about placement, permanency or feeling about certain relatives. This clearly shows a lack of good faith.<sup>vii</sup>

Due Diligence requires more than just a cursory look, a quick question to a parent, a view of a free internet site, or simply mailing out letters with no additional follow up. It requires all the above efforts and more. It requires workforce action that reflects the commitment that children and youth do have “family.” It requires a mantra of “I will do whatever I can to find “family”” and “I will engage them in a way so that they *know* they matter in this process, and to this youth.” Getting to know people outside of the difficulties they are facing by inquiring about strengths, skills and abilities, traditions, etc. This demonstrates an understanding that these traits exist within those being engaged to counteract the all-too-familiar experience of people being seen, or believing that they are viewed, through the lens of a dysfunctional family. Being clearly focused on building a family network who will be there for this youth throughout his life is essential.

### *Judicial Oversight – What is acceptable?*

What does the exercise of Due Diligence look like to a Judicial Officer? Judges should be acutely aware of their own state statutes and other state guidance, including any published policies and case law, bench cards or other check lists that include many diverse types of search, outreach, and family involvement. The critical point here is that due diligence includes several methods to



be utilized to identify and reach out to relatives. See bold language in the following state statutory requirements (in pertinent part):

**WISCONSIN**<sup>viii</sup>: Diligent Efforts to Search for Relatives “**should include but are not limited to** the following actions” and should be done immediately and in all cases. [See: WI comprehensive list of expected search and engagement activities in policy]

**CALIFORNIA**<sup>ix</sup>: “The social worker shall use due diligence in investigating the names and locations of relatives, **including, but not limited to:**” [See: CA list of mandatory activities and additional proposed activities within the statutes and rules]

**NEVADA**<sup>x</sup> Due Diligence: The child welfare agency must **expeditiously, comprehensively and to the best of its ability**, attempt to identify, locate, and provide notice to maternal and paternal relatives of the child. This is **an ongoing and continuous process** and includes searches for fictive kin, friends, foster parents and committed persons. [See: NV list of Diligent Search Tools and activities.]

**TEXAS**<sup>xi</sup>: Making a Diligent Effort to Locate Relatives. The caseworker must exercise due diligence to locate relatives and must be done at the start and throughout the life of the case. **Due diligence is the effort that would be made by someone who really wants to find a missing person.** It is measured not by quantity, but by quality. While caseworkers need not use all possible or conceivable means of discovery, they must make a reasonable search. [See: TX list of reasonable search inquiry and activities].

Judicial officers should not readily accept the use of only one method of outreach, search, or inquiry (with or without success). Nor should a cursory investigation that might just meet the threshold of a Due Diligence statute be acceptable. Rather scrutinize for the exhaustion of all opportunities available, all efforts that could lead to uncovering and engaging “family” including fathers and paternal relatives who continue to be overlooked and minimized.<sup>xii</sup>

The judicial officer should have all information about all efforts employed by all stakeholders and should trust that those efforts were conducted in a meaningful way and with the intent to engage “family” members as a support for the family. Also making sure that if parent(s) or relatives come to court, that they are or have been asked “How big is your family?” rather than “Who can take placement?”

Ensure that a summary or full report regarding Due Diligence is available and presented at court hearings and if the information is unacceptable, ask follow-up questions (see [Suggested Opportunities and Questions to Gather Additional Information to Build the Network of Support](#)). or set another hearing to receive additional information.

### *It’s a collaborative effort*

Although FCA requires the “state” (i.e., agency or probation) to utilize Due Diligence to identify, locate and notice relatives, the statute does not forbid others from helping to meet the mandate.



All professionals have a stake in the family’s outcome. Each has an opportunity to speak with his/her client and family members and ask questions that would uncover relatives (see [Suggested Opportunities and Questions to Gather Additional Information to Build the Network of Support](#)). Allowing each professional to share information they have obtained will not only assist the judicial officer in making the finding but will help to involve relatives and important connections as early as possible.

It is imperative for all to know your state requirements and your county’s current practice. Does the practice follow the state requirements? If there are published guidelines and policies, ensure that those are followed. If possible, take an opportunity to meet with Child Welfare, Probation, and the Court to discuss if policy or further guidance might be helpful to improve outcomes in your jurisdiction. Discuss where you or your organization can help fill in any gaps. Likewise, ensure that any new stakeholders know what a particular judicial officer considers Due Diligence.

Attorneys have a vital role to ensure this requirement is followed. The child’s attorney may be required or allowed to conduct an independent investigation. Parent’s counsel can discuss with their clients the need to inform the court of all known “family” members. Agency attorneys must ensure that their client is in compliance with these federal and state requirements and their efforts are conducted in good faith.

Working together to meet this mandate can not only help prevent entry into foster care but could be the difference between a child and youth being with “family” or languishing in foster care with the outcomes identified previously.

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<sup>i</sup> From: AFCARS Data, and studies by Courtney, Wulczyn, Hislop, Casey, Child Welfare Information Gateway, 2013; Enhancing Permanency for Youth in Out of Home Care, Fostering Connections.Org; From Place to Place the Movie

<sup>ii</sup> Fostering Connections to Success and Increasing Adoptions Act of 2008; 42 U.S.C.671(a)

<sup>iii</sup> Beck, K., (2014) “Defining Due Diligence: Identifying Relatives for Foster Youth, NIPFC, Seneca Family of Agencies

<sup>iv</sup> 42 U.S.C. §671(a)(19); ACYF-CB-IM-21-01, January 5, 2021

<sup>v</sup> Kinship Care and the Child Welfare System, Factsheets for Families, May 2022, Children’s Bureau, Creating a Kin-first Culture, Miller, 2017, ABA

<sup>vi</sup> “In Era of Family Separation, a Top Administration Official Vows to Fight the Practice in Child Welfare,” April 17, 2019, Chronicle of Social Change; <https://chronicleofsocialchange.org>

<sup>vii</sup> Examples: In re Isabella G, 246 Cal.App.4<sup>th</sup> 708, 2016; In Re R.T.,232 Cal.App.4<sup>th</sup> 1284, 2015; In the Interest of R.B., G.B., and P.B., Minor Children, 832 NW 2<sup>nd</sup> 375, 2013

<sup>viii</sup> Wisconsin Dept of Health and Family Services, 2007 Practice Guide, p.7

<sup>ix</sup> Welfare and Institutions Code §309(e)(3)(A), CRC 5.695(e); 5.637(d)

<sup>x</sup> State of Nevada: DEPARTMENT OF HEALTH AND HUMAN SERVICES DIVISION OF CHILD AND FAMILY SERVICES [Paraphrasing from policy and NRS 126; .051; 126.0210;.610; 128.110; 432B.390; 3905; 425; 470; 457; 520; 550 NAC 432B.290; <http://dcfs.nv.gov/Policies/> Manual Transmission Letter (MTL) Family Programs Office: Statewide Child Welfare Policy Manual MTL # 1001-06262015 06/26/2015

<sup>xi</sup> DFPS Policy handbook 5233.5 Making a Diligent Search for Relatives; CPS March 2018

<sup>xii</sup> In re Mia M., et al., 75 Cal.App.5<sup>th</sup> 792

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