

Dodging ASFA's Hammer

A proposed law would help parents in prison and residential treatment centers keep their kids.

BY KEACH HAGEY

BRINIA ROJAS WAS JUST A FEW months away from getting out of prison when she received a letter informing her that the government was planning to take her kids away forever.

She had arranged for her four girls, ages 6 through 13, to live with a friend while she served four years on federal conspiracy charges related to her children's father's drug business. But two years into her prison sentence, one of her daughters wrote to complain that she and her sisters weren't getting enough to eat, among other problems. Alarmed, Rojas wrote her federal criminal court judge. The judge handed the case over to the city's Administration for Children's Services (ACS), and her children were placed in foster care.

Rojas hadn't stopped trying to be a parent. She called the girls every night, occasionally chiding them when their foster mother mentioned they had skipped school. The girls visited her regularly in Brooklyn's Metropolitan Detention Center, just a subway ride away from their Queens home.

So the girls were as shocked as Rojas when their foster mother mentioned it was time for her to begin the adoption process. "I said, 'I don't want to be adopted, I want to stay with my mother,'" remembers Idalmin Santana, the eldest. "But the agency was pressuring my foster mother."

Even before New York's 1999 implementation of the 1997 federal Adoption and Safe Families Act (ASFA), foster care agencies and ACS were striving to speed the pace of adoptions and move children out of foster care more quickly. The new law required the state to move to terminate the rights of parents whose children had been in foster care for 15 months out of any 22-month period.

Despite significant exceptions to that rule, cases like Rojas' highlight the law's sometimes brutal consequences for incarcerated parents. New York's ASFA law has no special exception for parents in prison, even parents who have no record of abusing or neglecting their children and are serving relatively short sentences. Nor is there an assured exception

for parents who sober up in court-ordered residential treatment programs. Often parents fail to get out quickly enough to meet ASFA's deadlines.

Legislation introduced in the state Assembly last spring would deal with some of these problems. The bill, written by Assemblyman Jeffrion Aubry, who represents a district in Queens, would allow foster care agency caseworkers to cite incarceration or drug rehabilitation as a reason to delay filing for termination of parental rights if they believe it is in the best interest of the child. Aubry modeled the bill on a statute in Colorado, one of a handful of states that make exceptions to ASFA's time frame for parents in prison.

With the proposed legislation, says Tamar Kraft-Stolar, director of the Correctional Association of New York's Women in Prison Project, "The hammer that the 15-month deadline represents is removed."

However, the bill currently has no sponsor in the state Senate, and observers say it is unlikely to see action anytime soon.

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While it's hard to determine exactly how many parents the new law would affect, estimates show there are likely thousands.

The state's Department of Correctional Services does not report how many of its inmates' children are in foster care, and city and state child welfare administrators do not track how many foster children have parents in prison or treatment. However, the Women in Prison Project estimated in 2006 that almost 2,000 children in foster care statewide had a mother in prison. The state's median minimum sentence for women is 36 months, far exceeding ASFA's 15-month timeline.

Another recent study found that termination proceedings against incarcerated parents increased by an estimated 108 percent nationwide from ASFA's federal enactment in 1997 to 2002. Philip Genty, a clinical law professor at Columbia University who co-authored the study, estimates that somewhere between 10 and 20 percent of incarcerated women have children in foster care. "I would guess that more than half of them are faced with the termination of parental rights. And that number has gone up significantly since the pre-ASFA days," he says.

The state's Office of Alcoholism and Substance Abuse Services reports that during the year ending in March 2007, 117 parents with children in foster care were in court-ordered residential treatment.

New York's ASFA law already has exceptions that allow parents to dodge ASFA's timeline, such as when a foster care agency determines that there's a "compelling reason" to keep the family together or the state has failed to make "reasonable efforts" to give families the support they need to reunify. But the law defines the latter clause so vaguely that it is "unenforceable," according to a 2006 study by the Brennan Center for Justice at New York University. So most incarcerated parents with children in foster care place their hopes on the "compelling reason" exception.

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But for a mother to use that exception, she needs the backing of caseworkers—and some lawyers say that if caseworkers don't have personal contact with parents, they are hesitant to find those compelling reasons for delaying the clock.

Child welfare agencies are required by law to arrange for, at minimum, monthly visits between foster children and incarcerated parents. They are also legally obliged to consult with parents in planning for the child's future, and they must inform parents about their children's progress and health. But advocates say that too often this does not happen when a parent is in prison or residential drug treatment.

"Agencies now see the deadline of 15 months as a reason in and of itself to begin termination proceedings," says Martha Raimon, former director of the Incarcerated Mothers Law Project at the Women's Prison Association in New York. "We see it all the time."

One big obstacle is that parents in residential treatment frequently face visiting restrictions, particularly at the beginning of their stay. "Often you have an initial induction period, and that period is a time when people get used to the program, get centered and focus on why they are in treatment and get used to the rules," says Naomi Weinstein, director of Phoenix House's Center on Addiction and the Family.

In prison, parents often face the daunting distance between Albion Correctional Facility, the state's largest women's prison near the Canadian border, and New York City, where most of their children live.

Eight years ago, ACS began to provide rides to Albion and other prisons for foster children through its Children of Incarcerated Parents Program. Today, 275 children participate in the program.

But ACS leaders say many foster care agencies still aren't taking advantage of the service. "It used to be like pulling teeth to get a worker to make visits" with children, says Arnold Elman, a supervisor at ACS's Office of Advocacy. "It has gotten slightly better, but we still have pockets of resistance."



Not everyone thinks New York's ASFA law poses a serious threat for parents in prison or drug treatment. Weinstein says she has not heard of many parents in residential treatment losing their parental rights, so long as they are actively moving forward with treatment. "If it was happening more, I'd

hear more screaming about it," she says.

Brian Zimmerman, who represents parents in Brooklyn Family Court, works with many incarcerated parents with children in foster care and finds that most of them are able to get extra time through ASFA's current built-in exceptions, so long as they demonstrate an interest in their child.

Nonetheless, Zimmerman still thinks the legislation proposing a new exception to New York's ASFA law is a good idea. "The law doesn't recognize that a three-year sentence is not that long, and a kid may choose to wait that long," he says. "Right now, there's pressure on the agencies to file in a way that's ASFA-compliant." Changing the law would remove the pressure, and give caseworkers more time and more incentive to help protect the rights of parents in prison and residential drug treatment centers.

Aubry's legislation would also allow parents who are incarcerated or in residential treatment to conduct their family service plan conferences with caseworkers through video-conferencing. And it would ensure that parents receive information about services that could help them develop a stronger relationship with their child.

Aubry is looking for a Republican state Senate sponsor for the bill and trying to get the governor on board, and says that he's encountered no direct resistance so far. "The greatest enemy that we have here is apathy."

For now, parents in prison still find themselves vulnerable to ASFA's time limits.

When Laura Fernandez, director of the Incarcerated Mothers Program at Edwin Gould Services for Children and Families, learned that ASFA's clock had set Rojas' termination in motion, she convened a meeting with ACS lawyers to convince them to hold off a little longer. Rojas was so close to getting out of prison that her daughters' caseworkers were ultimately convinced to switch their permanency goal back to reunification—and the breakup of the family was averted. "She just got really lucky with the timing," Fernandez says.

Today, Santana, 16, lives with her mother, but the memory of nearly losing her is still fresh. And she has doubts about the fairness of people who passed the ASFA law—and now have the power to change it.

"They should consider how it would feel to a kid," she says. "You know your mother is alive, you see her, but you are not able to do anything." ❀