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BARRIERS TO ACHIEVING JUSTICE FOR INCARCERATED PARENTS

*Martha L. Raimon**

INTRODUCTION

Confronting obstacles is a way of life for many parents who have children in the foster care system in New York City. If the parents happen to be incarcerated, the obstacles are magnified and can be insurmountable. Children of incarcerated parents are at especially high risk of losing their parents and finding themselves waiting for adoptive families.

A model of representation proposed in this article, which includes early and continuous legal representation for parents with children in foster care, would support families in accessing services, educate parents about their rights and obligations as to their children, and ultimately, lead to permanency for the children.

I. WHO ARE THE INCARCERATED PARENTS?

Parents involved with both the child welfare and criminal justice systems do not fall within a well-defined cohort within either system. Child welfare issues are not addressed by the criminal justice system, and conversely, the child welfare system does not take into account the particular challenges facing parents involved in the criminal justice system. The information we do have about incarcerated mothers reveals some general characteristics akin to this group of people who simultaneously engage the two systems.

Nearly eighty percent of incarcerated women are mothers who have two or more children and have had the primary responsibility for caring for the children prior to incarceration. Incarcerated mothers are usually non-violent offenders, whose offenses are linked to substance addiction. For the majority of these women, the substance abuse is an unfortunate result of having suffered through sexual or other physical victimization in the past. Substance abuse and the impact of these traumatic experiences are positively correlated with poverty, illiteracy, and unemployment. Not surprisingly, before incarceration these women are often homeless or live in marginal housing.

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II. JOURNEY THROUGH THE CHILD WELFARE AND CRIMINAL JUSTICE SYSTEMS

A. *Arrest*

While sixty-seven percent of mothers in jail are primary caregivers of at least one child, police rarely inquire about children when making an arrest. At the time of arrest, a woman who is responsible for her children is likely to make a placement decision under extreme pressure and without the benefit of legal advice. These hastily made decisions too often result in instability for the children characterized by frequent moves, too many caregivers, and the possibility of permanent separation from the parent.

B. *Maintaining Contact*

A parent must maintain regular contact with the foster care agency responsible for the care of his or her children in order to fulfill a reunification plan. A myriad of obstacles makes it particularly difficult for incarcerated parents to maintain regular contact and visitation with their children. These obstacles, some of which are described below, lead to breakdowns in visitation plans, failures to attend Family Court hearings, and ultimately, unnecessary filing of petitions for termination of parental rights.

1. Access to Telephones

Case planners at foster care agencies generally communicate with parents via telephone, and sometimes by mail. Incarcerated parents have extremely limited access to telephones. In most correctional facilities, inmates may place calls only to approved phone numbers and make only collect phone calls, which are not accepted by many foster care agencies. Inmates cannot receive phone calls, and there is no mechanism that allows them to receive messages. Case planners may understandably become frustrated in their attempts to reach the incarcerated parents to discuss visitation or other concerns. If case planners at the agency change, which is common, the parents have an extremely difficult time trying to reach the new staff.

Communication difficulties are exacerbated when a parent is relocated to a different correctional facility. The case planner may have difficulty locating him or her, or the inmate may lose time while the foster care agency's phone number is in the process of being approved on the inmate's phone list at the new institution.

2. Visitation

New York mandates visitation for the majority of incarcerated parents with their children in foster care. An administrative directive

states that visitation for incarcerated parents "should be at least monthly, if the permanency planning goal is to discharge the child to his parents."¹

New York Social Services Law section 384-b (7)(f)(5) requires that an agency's "diligent efforts" to reunite a family include the following:

[M]aking suitable arrangements with a correctional facility and other appropriate persons for an incarcerated parent to visit the child within the correctional facility, if such visiting is in the best interests of the child. . . . Such arrangements shall include, but shall not be limited to, the transportation of the child to the correctional facility, and providing or suggesting social rehabilitative services to resolve or correct the problems other than incarceration itself which impair the incarcerated parent's ability to maintain contact with the child.²

Despite this clear mandate, there remains a lot of misunderstanding in the child welfare system about visitation for incarcerated parents. Very few incarcerated parents visit their children on any kind of a regular basis. Moreover, if the parents are imprisoned in remote parts of New York State, they are unlikely to see their children at all. Some of the problems stem from a lack of parental training on law and agency policy. Others, however, result from case planners persistently holding the view that visits to a correctional facility are not appropriate for children. New York City's Administration for Children's Services ("ACS") has taken steps to address some of the barriers that have made it difficult for children in foster care to visit their parents. One innovative ACS initiative entails ACS taking children in foster care to the New York City jail at Riker's Island for visits with their parents.

The criminal justice system also does not have the resources to adequately facilitate visits between incarcerated parents and their children in foster care. For example, at the Rose M. Singer Center at Riker's Island, which on any given day houses as many as 1500 women, there are only two counselors responsible for arranging visitation for mothers with their children in foster care in addition to having other duties to perform. Parents who are detained in prisons geographically remote from their children in foster care may never receive any visitation privileges. Although there was one instance where prisons near the Canadian border created children's centers, space limitations did not permit mothers and their young children to be in the same room during the visits.

1. Chapter 911 of the Laws of 1983: Termination of Parental Rights of Incarcerated Parents, Transmittal No. 85 ADM-42, at 4 (N.Y. State Dep't of Soc. Servs., Sept. 3, 1985).

2. N.Y. Soc. Serv. Law § 384-b (7)(f)(5) (McKinney 1992 & Supp. 2001).

3. Getting to Court

Any discussion about access to justice for incarcerated parents must necessarily involve the step of parents getting to court to assert their rights. For incarcerated parents with children in foster care, these rights, which are taken for granted by many, are too often denied. Whether it is a defect in the practice at Family Court or correctional institutions, Orders to Produce do not find their way through the bureaucratic trail of "red tape," resulting in the failure of corrections to produce parents for Family Court hearings even where termination of parental rights is at stake. Family Court judges, unaware of this problem, may determine that the jailed parents have defaulted on the case and, therefore, proceed without the parents, often leading to tragic consequences for the family.

III. THE ADOPTION AND SAFE FAMILIES ACT

The enactment of the Adoption and Safe Families Act ("ASFA")³ exposes incarcerated parents to a very high risk of permanently losing their parental rights. All of the barriers to justice already mentioned are magnified in the current ASFA climate.

Under ASFA, a state must file for a termination of parental rights proceeding, when a child has been in foster care for fifteen of the most recent twenty-two months. Since many incarcerated parents lose their children to foster care due to substance abuse prior to their arrest, the "clock" would have started running with respect to the fifteen-month period even prior to incarceration. Because many parents have prison terms exceeding fifteen months, their only means of reunifying the family rest with the various exceptions to ASFA. A case planner is unlikely to invoke the ASFA exceptions, including the one pertaining to whether the child is living with a relative or the one relating to whether there are "compelling reasons" for not terminating parental rights, unless the child has a close and sustained relationship with the parent.

For all these reasons, the barriers to the kind of relationship needed between the case planner and the parents to make thoughtful case planning decisions may be insurmountable. Working without adequate information about the incarcerated parents and their circumstances or relationships with their children, foster care agencies make vital decisions about the children's future simply based on the number of months spent in foster care and without a meaningful inquiry into what is best for the children. Stated differently, permanency is sacrificed in the name of expediency.

3. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.).

IV. INSTITUTIONAL PARENT REPRESENTATION: AN OVERDUE RESPONSE

At present, with the exception of a few law school clinics and pilot projects, the majority of incarcerated parents with children in foster care have virtually no means of obtaining legal representation, unless their case is in litigation pursuant to which they are produced in court and appointed an attorney. Thus, if an incarcerated parent has not obtained visitation as mandated, or he or she has not been produced in court or received the services needed in order to reunite with his or her children, the parent would have little or no means of asserting his or her legal rights. Even if the parent manages to get to court and is appointed a lawyer, there are no guarantees that the lawyer will be the same advocate he or she had in past court appearances or that the lawyer assigned will be even remotely familiar with the issues in his or her case.

A parent involved in the criminal justice system and the child welfare system ought to be represented from the point of the child's removal or the parent's arrest continuously through each stage of the foster care case. The model that makes the most sense for the parent, the family, and the court, as a whole, is a law office established to represent all parents with children in foster care regardless of whether the parents are incarcerated.

Ideally, an institutional attorney representing an incarcerated parent should have the flexibility to do much of the work out of court, including conducting meetings with the parent at arrest and, subsequently, in jail. Preparation of this sort would assist the court in identifying whether foster care is indeed necessary, or whether there are other more appropriate placement alternatives. The institutional parent representative should also be available to meet with the parent in between court appearances. He or she should have the ability to work with foster care agencies to assist with visitation plans, attend regular case conferences, help access services available in jail and prison, and make sure parents have a full and fair opportunity to be heard in court. Finally, the model should include an interdisciplinary team of social workers, psychologists, and other experts that have the resources, expertise, and time to develop discharge plans with community-based service providers that will help to achieve successful and safe reunification plans.

CONCLUSION

To the extent possible, children deserve to receive decisions about their futures that are made with great care and attention. A law office for parents will add a layer of informed discourse to foster care case planning decisions that has not yet existed on a large scale. By helping to achieve justice for distraught families in this manner, such

an office will raise the level of practice for everyone involved in the child welfare/protective system.