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FOSTER CARE & ADOPTION REFORM LEGISLATION: IMPLEMENTING THE ADOPTION AND SAFE FAMILIES ACT OF 1997

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I actually have the easiest job of any of the panelists here today because I am here to talk for a just few minutes about the New York State ASFA statute, the Adoption and Safe Families Act.¹ As Bernadine said, the federal Adoption and Safe Families Act² went into effect in November of 1997. New York had great incentive to bring its laws in compliance with the federal statute because there was federal funding involved.³ New York State was galvanized to revise the child protective and juvenile justice statutes. This covers a lot of territory within the Family Court jurisdiction.

On February 11, 1999 the New York State Adoption and Safe

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She is currently a Fellow of the ABA's Bar Association, and previously served as Co-Chair of the Juvenile Law and Dependency Committee of the Family Law Section of the American Bar Association (1996-97).

After completing law school, Ms. Rothberg served as a Staff Attorney for the Juvenile Rights Division of The Legal Aid Society of New York (1988-91). She subsequently represented foster care agencies in Family Courts throughout New York City, working to terminate parental rights in order to free children for adoption.

In 1991, Ms. Rothberg received a certificate from the Institute for Not-for-Profit Management at Columbia University Business School. For several years thereafter, she taught the Negotiation Clinic, and served as the Faculty Director for the Middle Management Program (1994-98).

In July 1994, Ms. Rothberg established her private practice. In addition to her adoption practice, she also writes appellate briefs and volunteers as a mediator for the Family Court Custody Mediation Project.

¹ N.Y. Soc. Serv. L. § 358-a (McKinney's 1999) [hereinafter *New York ASFA*].

² *New York ASFA*, *supra* note 1.

³ 42 U.S.C.A. § 679b (entitled "Federal Payments For Foster Care and Adoption Assistance").

Families Act (ASFA)⁴ was signed, and so Family Courts, I can promise you, all over New York State are sort of in a tizzy now. First of all, nobody really knows what the impact of this law is going to be. Right now the courts and people who work in the courts are trying to figure out: what the statute says, how they can implement the statute, and how, if possible, since this statute does not in any way abolish former Family Court practice, does it really add a layer of responsibility in Family Court in New York. Thus, there is also a real attempt to see if current Family Court practice and hearings can somehow be incorporated whenever possible to satisfy the new ASFA statute.

The real focus of this statute in New York and all over the country has been what we can do to help parents plan for the return of their children. For years, few children were returned to parents for a variety of reasons, and children languished in foster care. In response, over a number of years, as Bernadine said about a three-year period, ASFA came into being.

Surprisingly, this statute in some form was supported and lobbied for by a lot of children's advocacy groups because it creates a premise, at least, that the child's health and safety is of paramount importance. Thus, the health and safety of children and finding a permanent plan for a child now takes priority over a parent's right to or their priority in having the child returned to them.⁵ This is really an amazingly different concept. It pressures parents whose children enter the social services system to work diligently to get their children back, because they are at a greater risk now that their children will be placed in another setting, which will become a permanent setting for the child through a variety of mechanisms that are enumerated in the statute.⁶

It is uncertain how the time component will work in Family Court, because time is not the thing that we work best at in Family Court. The statute has changed the time a child is

⁴ *New York ASFA*, *supra* note 1.

⁵ *See New York ASFA*, *supra* note 1, at (a)(1).

⁶ *See id.* at (a)(12) (providing that efforts to reunite are not required "where a child has been either severely or repeatedly abused"); *id.* at (a)(3)(b)(2)-(5) (providing that efforts to reunite are not required where parent has been convicted of certain felony offenses); *id.* at (a)(3)(b)(6) (providing that efforts to reunite are not required where parent has previously had his or her parental rights terminated as to another child).

considered to have entered foster care.⁷ It used to be when the child protective case went to disposition, which could be two months or two years after the child came into care. It is now the date of fact-finding regarding the abuse or neglect, or 60 days after the child is removed from the home. This means there is a maximum, no more than 60 days after a child enters care, before the clock starts running so as to trigger annual reviews of the child's foster care placement. This makes a huge difference because it sets a new clock to be paid attention to or a new calendar. There are phrases which recur over and over again, one of which is "permanency hearing."⁸

"Permanency hearings" are required for all such cases on an annual basis. The outline I have handed out discusses the options in a permanency hearing, but the focus today is that a court must make a finding. The courts must review the permanency plan for children in foster care on an annual basis, and must decide whether this plan is being implemented properly. In other words, it is actually viewed and courts really have to document the outcome of these permanency hearings to indicate whether children are being moved through the system and their permanency plan is implemented and expedited. Once again, this sounds very strange for those of you who have actually been to Family Court. It is going to be interesting.

Another change is that there will be a decrease in the number of parents receiving any services or assistance from foster care agencies. As Bernadine said, there are certain situations in which foster care agencies can move courts for a judicial determination that reasonable efforts to work with certain parents are not required.⁹ As soon as this occurs, the case is on a sort of the fast track toward the termination of parental rights.

There are three major categories where reasonable efforts would not be required. The first is an enumerated criminal history. The statute lists the specific crimes, which serve as

⁷ Laura W. Morgan, *What Constitutes Emancipation to Release a Parent From a Child Support Obligation*, 12 NO. 1 DIVORCE LIT. 1 (2000) (discussing New York's Social Service law).

⁸ *New York ASFA*, *supra* note 1, at (a)(3)(b) (providing that "[i]f the court determines that reasonable efforts are not required . . . a permanency hearing shall be held within 30 days").

⁹ *Id.* at (a)(3)(b)(1)-(6).

grounds for excusing reasonable efforts.¹⁰ One of the problems agencies have encountered is that there is nothing in the statute, which requires a biological parent to be fingerprinted. Therefore, discovering criminal history is difficult. Nevertheless, an individual's criminal history that conforms to the crimes listed in the statute will allow the agency to be excused from working with the parents to plan for the return of the child.

The second category involves repeated or severe abuse.¹¹ This is known as "aggravated circumstances" and in such cases, the court can make a finding that reasonable efforts are not required based upon the aggravated or severe abuse. The third category has always been very difficult for many people to deal with, and which we really struggle to prevent prior involuntary termination of parental rights. That means that a prior termination of parental rights can be brought as grounds for currently excusing the agency from working with the parent for the return of another child.¹²

The good news is that there is judicial discretion. There are grounds for courts to determine that reasonable efforts should be used in spite of one of these three categories being in place.¹³ Therefore, the true meaning of the statute is that once reasonable efforts are excused, then parents are on their own in terms of how they are going to work with the agency. It becomes the parent who has the impetus to work with the agency to plan so that their parental rights to their children are not terminated.

So the theme of this statute is that agencies must move and courts must make findings as to why a child is not leaving placement, and extensions of placements, any placement hearings always discuss the plan for the child. The grounds for the termination of parental rights have not changed as such. However, that is a little misleading because of the newly added "severe and repeated abuse" ground for termination.¹⁴ I believe

¹⁰ *Id.* at (a)(3)(b)(2)-(5).

¹¹ *Id.* at (a)(12) (defining aggravated circumstances as "where a child has been either severely or repeatedly abused").

¹² *Id.* at (a)(3)(b)(6) (providing that efforts to reunite are not required where parent has previously had his or her parental rights terminated as to another child).

¹³ *Id.* at (a)(3)(b) (stating that "unless the court determines that providing reasonable efforts would be in the best interests of the child, not contrary to the health and safety of the child, and would likely result in the reunification of the parent and the child in the foreseeable future").

¹⁴ *Id.* at (a)(12).

this affects a very small portion of cases, only about 20 percent are actually abuses as opposed to neglect. There are only about 20 percent as many abuse petitions filed as neglect petitions, and not many of those will allege severe and repeated abuse. Nevertheless, a finding of severe and repeated abuse made by clear and convincing evidence, will result in the following cycle. It becomes an excuse for not requiring reasonable efforts, which then becomes grounds, for a filing to terminate parental rights. So, frankly you are on the fast track to termination because of such a finding.

The last and most significant immediate impact of this legislation is the fingerprinting requirement. As of February 11, all prospective, current and pre-adoptive foster parents and members of their household ages 18 and over are being fingerprinted. It is going on even as we speak. The statute requires that children be removed from foster homes where there is a certain enumerated criminal history of the foster parents. Again, there is no way to estimate how many families will be effected. Obviously, many feel this is not necessarily in children's best interests. However, we are not quite sure, how serious a problem this is going to be.

As to other possible criminal history in the household or family, the agency is required to perform an assessment of safety to determine whether it is appropriate for the child to remain in this home. The decision, however, is discretionary. The agency does have the capacity to remove the child from the foster home based on a criminal history that is not necessarily serious, but for whatever reason the agency now has the discretion to act on that. The results of the fingerprinting are unclear. It is certainly possible that a child that has been in a home for eight or ten years may be threatened with removal from this home, where the child was about to be adopted, literally within two months or so. This problem will dissipate over time because those currently fingerprinted, will be dealt with, and then since prospective foster parents will be fingerprinted, it will be anticipatory rather than after the fact of placement.

Another concern regarding fingerprinting is its impact on kinship foster care.¹⁵ The obvious thing is that perhaps children

¹⁵ See Elizabeth Killackey, *Kinship Foster Care*, 26 FAM. L.Q. 211, 214 (1992)

will be denied a kinship placement because of criminal history. Concern which was voiced to me by a law guardian, and I believe is also a concern for Legal Aid, is the time consumed during fingerprint checks. It is taking about six weeks to run fingerprint checks on foster parents where children have been removed, therefore agencies will not place children in kinship placements. Whereas they used to be able to do that within 24 hours after a child was removed from a home. Now the agencies must wait for the fingerprint outcome. The children are thus placed in non-kinship homes, among strangers, until the fingerprinting requirement can be met. Hopefully, there will be some kind of mechanisms to remedy this issue.

The rationale for creating these changes was to help children. We really, hope it will succeed. Although we do not know what is going to happen, the changes were well intended. We just do not know exactly what the impact is going to be.

(discussing kinship foster care programs where states recognize importance of placing children with family members or others who know the child, regardless of blood or legal ties).