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# The Impact of the Adoption and Safe Families Act on Children of Incarcerated Parents

Arlene F. Lee, Philip M. Genty, and Mimi Laver  
Child Welfare League of America

## INTRODUCTION

On November 9, 1997, President Clinton signed the Adoption and Safe Families Act of 1997 (ASFA) to improve the safety of children, to promote adoption and other permanent homes for children, and to support families. The changes in ASFA are important to ensure the safety of children and increase their likelihood of placement in permanent homes. The change that requires close examination is the timeline for initiating termination of parental rights (TPR) proceedings. Under ASFA, TPR proceedings must be brought if:

- the child has been in foster care for fifteen of the most recent twenty-two months, or
- the court has determined that the child is “an abandoned infant.”

Exceptions can be made to these requirements if a child is being cared for by a relative, the state agency documents a compelling reason why filing is not in the best interest of the child, or the state agency has not provided the child’s family with the services deemed necessary to return the child to a safe home.

Many people have questioned whether these changes, if applied in their strictest terms, have had a detrimental effect on children of prisoners, because a large percentage of incarcerated parents are sentenced to longer than two years in prison. This section examines the potential effect of ASFA’s TPR requirements on children of prisoners. It considers four questions:

- At what rate are children of incarcerated parents becoming the subjects of TPR hearings?

- Are these hearings triggered by the timelines delineated in ASFA?
- Has there been an increase in the rate of TPR for children of prisoners since ASFA's inception?
- Are children of prisoners becoming the subjects of TPR at a higher rate than other children in foster care, despite the potential for reunification, as an unintended consequence of ASFA?

To answer these questions, the Child Welfare League of America's (CWLA's) Federal Resource Center for Children of Prisoners, the American Bar Association's (ABA's) Center on Children and the Law, and Columbia University's School of Law joined forces to examine available information. Data collection involved gathering information about both state laws regarding TPR and the frequency of TPR of incarcerated parents and conducting a case review of sample cases.

As a result of parental incarceration—and the criminal behaviors that prompt it—thousands of children have endured traumatic and often lengthy separations from their parents.

ASFA was the first major legislation addressing the issues of permanence since the Adoption Assistance and Child Welfare Act (Public Law [P.L.] 96–272) in 1980. P.L. 96–272 was the first law to focus attention on the large number of children in out-of-home care and the importance of stability, continuity, and family connectedness to a child's healthy growth and development. To assist the states in achieving more timely permanence for children, P.L. 96–272 introduced new requirements for judicial oversight and clear timetables for decision making in child welfare cases.

Between 1979 and 1985, the number of children in out-of-home care significantly decreased, from about 500,000 to 270,000 (U.S. House of Representatives 2004). Due to family stressors such as HIV/AIDS, drug addiction, poverty, and violence, however, the number of children in out-of-home placements increased by 74 percent between 1986 and 1995 (U.S. House of Representatives 2004). The system struggled to provide the level of service each case needed to be successfully resolved. Large caseloads created an erosion in the capacity of child welfare agencies to achieve permanence for children in foster care.

The incarceration of women has important implications for child welfare agencies because most female inmates are mothers of minor children, and many are single parents. The question has been raised many times, and is supported by anecdotal evidence, although some have contended that incarcerated mothers have historically been neglected by the child welfare system:

The ideology of family reunifications . . . never has been applied with enthusiasm to prisoner mothers. This is in part due to the distance foster care workers must travel to provide visits for children with mothers in prison, and caseworkers' unfamiliar-

ity with prison regulations, resources, programming and staff. It is also due in large part to a widespread bias against reuniting children with a mother in prison. . . . ASFA has exacerbated the plight of women prisoners and their children. (Smith 2000)

In December 2001, the ABA's Center on Children and the Law published an article in its *Child Law Practice* examining some of the early ASFA cases focusing on incarcerated parents and providing practice tips for judges and lawyers who represent parents, children, and the child welfare agency in abuse and neglect cases. The article discussed several topics, including the right of the parent to participate in hearings, reasonable efforts, the decision to not provide a parent with reasonable efforts toward reunification, and TPR. The case law and practice tips all point to the need for courts, attorneys, and other child welfare practitioners to seek a balance between protecting the incarcerated parent's rights and ensuring that agencies meet ASFA's permanency timelines and goals (including reunification, adoption, and guardianship, or placement with kin) for the child (Laver 2001).

The importance of maintaining family relationships while parents are incarcerated and the difficulties of doing so have been documented in numerous articles and studies (see, e.g., Genty 2003, and sources cited therein). Despite all of the research that practitioners have done on these issues, public policy aimed at preserving family relationships during and after incarceration is still severely lacking.

One reason for this is the absence of meaningful coordination between criminal justice and child welfare agencies. These two systems make decisions that, with respect to family relationships, may conflict.

It is, therefore, essential that the criminal justice and child welfare systems work together to develop coordinated policies for incarcerated parents and their families. It is impossible to do this, however, without reliable data. The importance of determining what portion of the child welfare caseload involves parental incarceration seems obvious, but state agencies do not track this information. The assessment of the needs of the children of incarcerated parents (as well as children whose parents were previously incarcerated) and the development of sound policies to address these needs require that agencies develop ways of collecting these data.

As a result of the questions raised and the lack of empirical evidence, the Vera Institute conducted one of the first large-scale studies of this issue, examining cases in New York City involving incarcerated women and children in foster care. Ehrensaft, Khashu, Ross, and Wamsley (2003) found that:

Most of the incarcerations occurred in the year after the child's placement, a pattern similar to that found for arrests leading to incarceration. . . . The timing of arrest, con-

viction and placement suggests that children are removed in the midst of a downward spiral in the mother's life that continues after the removal. (p. 2)

Although Ehrensaft et al.'s work identified the link between foster care placement and maternal substance abuse preceding incarceration, it did not reach the question of how parental rights are ultimately affected . . .

The researchers' theory was that by identifying several different but related data points, they could begin to construct a picture of how children of incarcerated parents are affected by the changes in child welfare laws. What emerged was a picture of how children are affected by the intersection of three different trends: shorter timelines under ASFA, extended sentencing timelines, and the increase in the number of parents incarcerated for drug-related criminal offenses.

## FINDINGS

ASFA was enacted in 1997, and all states enacted conforming legislation in the following years. At present thirty-six states have TPR statutes that deal explicitly with parental incarceration. Of these, twenty-five have statutes that are primarily time driven, such as permitting rights to be terminated based on the length of incarceration.

In reviewing reported TPR cases, the significant overall increase in the number of termination cases involving incarcerated parents that were filed from 1997 to 2002 suggests that ASFA has had an important effect. The results from the surveys of judges, attorneys, and child welfare representatives were:

- judges, attorneys, and to some extent, child welfare agency representatives believe that ASFA affects children of incarcerated parents differently than other children;
- most child welfare agency representatives feel that incarceration does not affect the likelihood of TPR or change the manner in which the agency handles children since ADFA was enacted;
- a high percentage of judges believe that parental rights are more likely to be terminated as a result of incarceration of parents in child abuse and neglect cases compared with those who are not incarcerated;
- judges believe incarceration expedites TPRs in cases of children of incarcerated parents, whereas child welfare agency representatives feel timeliness is not affected; and
- disagreement exists among judges and attorneys with regard to whether incarceration may be grounds for TPR, with a high percentage of attorneys responding positively to this but only a very small number of judges agreeing.

The results obtained in the case file reviews highlight the following:

- TPR was granted in 81.5 percent of the cases involving parents incarcerated due to drug-related offenses.
- The most common reason for incarceration was a drug-related charge.
- TPR was granted in 92.9 percent of the cases in which the mother was incarcerated.
- TPR was granted for 91.4 percent of the incarcerated fathers.
- When both parents were incarcerated, TPR was granted in 100 percent of the cases.
- The parental rights were terminated 94.4 percent of the cases with custodial parents and 100 percent of the cases with noncustodial parents.

It is urgent to develop improved programs, policies, and practices for children of incarcerated parents. The field should pay particular attention to the need for family-based and community-based substance abuse treatment programs, the lack of which appears to influence the frequency of TPR in cases involving incarcerated parents and their children. Another recommendation is the basic application of the principles and elements of good child welfare practice to the children and families affected by parental incarceration.

. . . This work provides structure and direction for future research, most particularly examining the intersection of ASFA, mandated sentencing policies for drug-related crimes, and the lack of available community-based substance abuse treatment programs.

. . . The current study generates several questions that researchers could use to expand the current research agenda on children of incarcerated parents. A few possible research questions are:

- What is the relationship between the lack of community-based substance abuse treatment programs, drug sentencing policies, and ASFA?
- Is the lack of available treatment and enhanced sentences resulting in higher rates of TPR for parents incarcerated for drug-related offenses?
- Does ASFA affect the rate of TPR and adoption for children of incarcerated parents in more recent case filings?

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