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LEGAL INTERSECTIONS

Foster Children Awaiting Adoption Under the Adoption and Safe Families Act of 1997

Catherine J. Ross, JD

Approximately 119,000 of the 523,000 in foster care in the United States are currently awaiting adoption (U.S. Dept HHS, *AFCARS*, 2005 pp. 1, 4). Back in 1997, when the widely touted Adoption and Safe Families Act (ASFA) became law, its express goal was to reduce the number of children lingering in foster care by placing many of them in adoptive homes. This paper discusses the contemporary foster care system and

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ASFA as they relate to the availability of adoptive children and the legal rights of biological parents whose children enter foster care.

In a profound policy shift, adults seeking to adopt children in state custody are now favored as pre-adoptive foster parents; in the past, interest in adoption disqualified many people from serving as foster parents. Today, adults who become foster parents with the hope of adopting must be prepared to accept so-called hard-to-place children. Moreover, pre-adoptive foster parents must recognize that child welfare agencies are working on two fronts simultaneously: planning for the child to return to his or her biological parents and, at the same time, seeking an alternative permanent placement in case the child cannot safely return home. This article explains the constraints that constitutional law and federal statutes place on efforts to move children from foster care to adoption, and discusses the competing interests at stake.

ASFA

The pendulum of child welfare reform has repeatedly swung between efforts to preserve troubled families at virtually any cost and a passion to rescue every child in need. At the height of a prevailing but oversimplified interpretation of family preservation in the mid-1990s, about half-a-million children were in foster care because they had been "rescued" and were waiting for their parents to be rehabilitated so that they could return home. In many of these situations, it was clear that the children were unlikely ever to rejoin their biological parents. Although foster care was designed as a temporary expedient and was administered as if it were in fact temporary, increasing number of children were spending three years or more in foster care, many of them in a series of homes. This phenomenon became known as "foster care drift" (H. R., 1997, p. 2740). About one-third of the children in foster care would never return home (Duquette & Hardin, 1999). Instead, many of these children grew up in a series of foster homes and institutions, languishing for years in the child welfare system (Gordon, 1999, p. 649).

The increasingly widespread perception that the foster care system was out of control and hurting children led to a congressional search for uniform solutions based on the child's need for safety, nurturance and permanency (Gendell, 2001). ASFA, enacted with overwhelming bipartisan support, proclaimed "two basic goals: [p]reventing children from being returned to unsafe homes, and finding safe and loving and

permanent homes for children who cannot be reunited with their families" (143 Cong. Rec. H2017, 1997).

Above all, the leading interpreters of ASFA called on those charged with applying the law to look at the foster care system "through the eyes of the child" (Duquette & Hardin, 1999, pp. 1-7). This effort implements child development principles set forth in the influential work of Joseph Goldstein, Albert Solnit, and Anna Freud (Goldstein et al. 1996). These principles include consideration of (1) the child's need for parental continuity—an adult who serves as the child's "psychological parent"; (2) the importance of instilling in the child the feeling of being safe, protected and loved; and (3) the child's compressed sense of time and the concomitant urgency of resolution.

ASFA's proponents urged careful consideration of the child's perspective because they were aware that the interests of parents and children do not always mesh. Congress made clear that where it was not possible to be equally "fair" to children and their parents, ASFA requires courts to elevate the interests of the child over those of the parent (Gordon, 1999).

The effort to focus on children's needs was embodied in the Act's key provision, which provides that in order to retain federal funding, the state "shall" move to terminate parental rights with the goal of adoption or another form of permanent placement in two categories of cases: (1) cases where it is apparent early on that the child cannot safely return home because of "aggravated circumstances," such as torture or a felony assault; and (2) all cases involving children who "have been in foster care under the responsibility of the State for 15 of the most recent 22 months" (the 15/22 months rule). In legal parlance, "shall" means that the directive is mandatory. The statute provides only three exceptions to the requirement that the state initiate termination proceedings. The 15-month deadline does not apply when: (1) the child is in kinship foster care; (2) the state can demonstrate to the court a "compelling reason" why such a petition would not serve the child's best interests; or (3) the state has failed to provide the services which its own case plan "deems necessary for the safe return of the child to the child's home." With the passage of time, termination becomes more and more likely, and the needs all children have for stability and permanence are pitted directly against the claims of their parents. ASFA establishes a presumption that, after 15 months have passed, all children are better off if their parental rights are terminated. In addition to enunciating the "15/22 months" legal rule, the Act imposes specific accelerated time lines for court proceedings designed to guarantee the child a permanent placement, whether with the biological parents or somewhere else. ASFA

thus requires that a court conduct a permanency hearing "no later than 12 months after the date the child is considered to have entered foster care."

In most cases, ASFA's reforms serve individual children well. Unfortunately, child welfare cases are not always simple. ASFA serves its express purpose only if the state moves cautiously before placing children into foster care, and provides the legally required services to biological families to avoid removing children in the first place and to promote speedy return of children who have been placed in foster homes. Current federal law retains the prevention and reunification provisions that were enacted as part of the Child Welfare Act of 1980 which requires the state to make "reasonable efforts" to preserve the family of origin (Adoption Assistance and Child Welfare Act of 1980). ASFA modifies the "reasonable efforts" provisions of the 1980 Act by recognizing that some small proportion of children have been hurt so badly, and some parents are so clearly incapable of transformation, that in those cases, time and resources should not be wasted on fruitless efforts that disserve children who will never go home. For all other children, ASFA as integrated with pre-existing laws requires that "reasonable efforts shall be made to preserve and reunify families."

ASFA also requires that the state child welfare officials engage in what it calls "concurrent planning." This requires that at the same time the agency makes reasonable efforts to return children to their families of origin, it must also develop a permanency plan for each child who has entered foster care in the eventuality that the child cannot return home within 15 of 21 months.

Under the conditions envisioned by the act, which are not always met (Pelton, 1998; Ramsey, 2003; Ross, 2004), children and their families receive services designed to help them avoid out-of-home placement or to return home from foster care, and only after those efforts fail can children become available for adoption. As an added benefit, prospective adoptive parents may serve as pre-adoptive foster parents with an expectation that they and the children they care for will not suffer prolonged uncertainty about the nature of the relationship.

The remaining sections of this paper consider the relationship between the ASFA time line and the respective rights of parents and children as they affect the availability of foster children for adoption.

The Mere Passage of Time

ASFA creates an implicit presumption that a parent who allows a child to linger in foster care for 15 months is unfit. By virtue of this as-

sumption, in an effort to place the child's presumptive interests front and center, the Act sidestepped the essential legal question of how the state would establish legally sustainable grounds for termination in light of the court's obligation to consider the rights of the parent in their child. The 15/22 month rule imposed by ASFA squarely raises a left unanswered by the Supreme Court for decades: Is the passage of time sufficient to establish a level of parental "fault" that satisfies the due process clause for the purposes of irrevocably terminating a mother's right to her child?

The constitutional rights of parents frequently subsume the legal rights of their children. The Supreme Court has found a substantive liberty interest in parenting. The substantive due process jurisprudence that governs claims involving a parent's liberty interest in his or her child protects parents from government intervention absent a high threshold (*Troxel v. Granville*, 2000). In short, any infringement on the parent's rights must be narrowly tailored to serve a compelling state interest (*In re H. G.*, 2001).

The liberty interest of parents in their children also mandates procedural protections before a parent's rights may be terminated. In *Stanley v. Illinois* (1972) the Supreme Court held that a state may not deprive a parent of his or her parental rights without an individualized determination of the parent's fitness. Speed and efficiency, the Court declared, may not be allowed to run "roughshod over the important interests of both parent and child" (p. 657). In subsequent cases the Supreme Court examined three procedural issues that arise in termination cases: the right to appointed counsel, the standard of proof, and the right to an appeal.

In *Lassiter v. Department of Social Services* (1981), where the Court held that appointing counsel is not constitutionally required in all termination cases, the majority noted that a "wise public policy" would require appointing counsel for parents who cannot afford attorneys at all stages of dependency proceedings. Today, all but a few states provide counsel for parents in termination cases (*Brown v. Division of Family Services*, 2002).

The Supreme Court has ruminated on the high personal stakes that make termination of parental rights something more than an "ordinary civil action" resulting in mere loss of money" (*Santosky v. Kramer*, 1982. pp. 747, 756). In *Santosky v. Kramer* (1982), the Supreme Court held that in light of the stakes in termination proceedings, due process requires that the state support its allegations by an elevated evidentiary standard—"at least clear and convincing evidence"—before it may "sever

completely and irrevocably the rights of parents in their natural child" (pp. 747-748).

In *M. L. B. v. S. L. J.* (1996), the last case in which it addressed the issue, the Supreme Court held that the due process and equal protection clauses mandate that a state may not deny appellate review to a person whose parental rights have been terminated.

The cases from *Lassiter* through *M. L. B.* establish the parameters of the rights and presumptions that parents bring to termination proceedings. These constitutional protections for parents are essential if we are to prevent grave injustice. Moreover, scrupulous respect for the procedural and substantive rights of biological parents helps to ensure that families created by judicial intervention (whether adoptive or so-called permanent foster families) will not be disrupted following appellate proceedings.

The fact-finding stage of a termination proceeding "pits the state directly against the parents" (*Santosky v. Kramer*, 1982, p. 759). At this stage, the trial court's task is limited to determining whether "the natural parents are at fault." This finding of "fault" is understood to be a prerequisite for the conclusion that these particular "parents are unfit to raise their own children." Because it is assumed that children are generally best served by remaining with their parents, and a finding of fault could lead to their permanent removal from their parents' care, courts presume that the interests of children converge with the interests of parents at legal proceedings. This presumption remains, even where the facts appear to clearly rebut it (Ross, 1996). In *Santosky*, for example, the parents' interests were viewed as converging with their children's despite the fact that one boy, who had been removed from his parents when he was only three days old, was seven when the case was argued and had never lived with his parents. Yet even on those facts, the Court preserved the legal fiction that parents and child speak with one voice, insisting "until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship"; only after the State proves parental unfitness, are the interests of parent and child deemed to "diverge" (*Santosky v. Kramer*, 1982, p. 760).

The Supreme Court has expressed doubts about whether "the State constitutionally could terminate a parent's rights *without* showing parental unfitness," although it has never directly confronted the question (*Santosky*, 1982, p. 760).

Notwithstanding the due process protections accorded the liberty interest of biological parents in their children, once a child enters foster

care the parental rights and responsibilities for that child are apportioned among biological parent, foster parent and the state. No matter how long a child remains in foster care, he or she continues to "belong" to the biological parent in some respects. That parent—although stripped of custody and day-to-day decision making once a child enters foster care—retains the sole ability to make decisions regarding surgery and the right to marry or enlist in the armed forces as a minor, among other decisions, and is presumed to represent the child's legal interests, retaining what amounts to a future interest in the child (*Smith v. Organization of Foster Families for Equality and Reform (OFFER)*, 1977).

The Supreme Court made it clear in *Santosky* that there is no room at the fact-finding stage of a termination proceeding to weigh either the child's independent interest or the child's relationship with a foster family against the rights of the biological parents in the care, custody and nurture of their child. The focus during fact finding at a termination proceeding is "emphatically" not on the child, or the other opportunities open to the child, but only on whether "the natural parents are at fault" as the state alleges (*Smith v. OFFER*, 1977, p. 759). Even when the child demonstrates disinterest in the biological parents or positive attachment to current caregivers such as foster parents there is no room for the child's perspective until the court turns to disposition. Some commentators have criticized this legal regime for blocking a judge's ability to consider the child's need for protection and safety outside the context of parental fault (Bartholet, 1999; Gelles & Schwartz, 1999).

Similarly, lower courts have expressly held that while the best interests of the child should be paramount in all proceedings to terminate parental rights, "a court may not base termination of parental rights *solely* on the best interests of a child" (*In re Welfare of M. H.*, 1999, p. 228; Meyer, 1999). In order to terminate parental rights, a court must first find that at least one statutory ground for termination exists. Consistent with the discussion in *Santosky*, state laws governing termination provide for a bifurcated analysis. First, the court must ask whether sufficient statutory grounds have been shown for terminating the parent's rights (with due consideration to the parent's constitutional rights). Only then may the court reach the second question: whether termination of parental rights, in fact, serves the child's best interest (e.g., Minn. Stat., 2003). If the statutory grounds for termination have been well framed and the evidence that those grounds have been met is clear and convincing, the child's best interests will normally be served by termination, particularly if the state has already identified a permanent or adoptive home for the child.

In a hypothetical regime in which the child's rights were weighed heavily, fewer children would be needlessly separated from their parents either temporarily or permanently. Fewer would be removed because of conditions attributable to poverty or from borderline domestic situations, and fewer of those removed would spend fifteen months or more in foster care or fail to ever find a new permanent home. In that hypothetical regime, children's attachments would also weigh in the decision to terminate parental rights. But in the real world, things are not so simple.

By the end of 1999, every state and the District of Columbia had amended local statutes in an effort to comply generally with ASFA (U.S. Gen. Accounting Office (G.A.O.), 1999). Illinois, for example, reconciled the standard of "unfitness" with the 15/22 months rule by revising its statutes to provide, in part, that a parent may be found unfit if, pursuant to a court order, "a child has been in foster care for 15 months out of any 22 month period" (750 Ill. Comp. Stat., 1998). In *In re H. G.* (2001), the first case to consider the due process implications of the 15/22 months rule, the Illinois Supreme Court overturned the section of the state's Adoption Act creating this new ground of parental unfitness based on the length of time a child has remained in foster care. The court held that because there will be many cases in which children remain in foster care for the statutory period even when their parents can properly care for them, "the presumption contained in [the statute] is not a narrowly tailored means of identifying parents who pose a danger to their children's health or safety." (p. 873) In summary, the court stated, "we decline to recognize that the State has a compelling interest in removing children from foster care in an expeditious fashion when that removal is achieved in an unconstitutional manner" (p. 874).

In order for ASFA's 15/22 month provision to survive wider appellate scrutiny, the state (including both the child welfare and court systems) bears the onus of keeping each case on schedule in accordance with the statute's time lines and of insuring that parents receive the services they need. If the state were to accomplish these goals, any efforts to terminate parental rights in neglect cases would necessarily be based on allegations of persistent unfitness despite opportunities to change and not merely the passage of time. The burden on the state promotes the child's legal and developmental interests as well as the parent's rights because the child may not be well served by an unnecessary permanent separation from a parent whom the child regards as his or her primary caretaker.

Preliminary reports suggest that many states are failing to move to terminate when a child has been in foster care for 15 out of the last 22 months (G.A.O., 2002). Even when states seek termination on the ground that too much time has passed, courts may refuse to grant the state's petition because the state has failed to set forth legally cognizable grounds. The extent of noncompliance is unknown, in large part because the federal government does not collect data on how often states use the 15/22 month rule to trigger a termination proceeding. Sparse data from a handful of states suggest that the rule focuses state agencies on the passage of time, but that it has not changed agency protocol. Officials report that they fail to seek termination after 15 months as required under ASFA for a variety of reasons, including a shortage of viable permanent homes for the children. Evidence suggests that state agencies simply fail to file for termination rather than triggering one of the statutory exemptions by demonstrating to a court that "compelling reasons" exist not to seek termination. (*Jeannie B. v. McCallum*, 2001).

If states are to comply with both ASFA and the Constitution, they will need to draft statutes that offer judges constitutionally sound rationales for terminating a parent's rights after 15 months. Other reforms would also help to move eligible children from foster care into adoptive homes. For example, prior to ASFA, courts were reluctant to terminate parental rights until the child welfare agency had identified an adoptive home, but social workers hesitated to look for adoptive homes until the children were legally available for adoption. But ASFA does not require any ongoing judicial review of a child's case file after a court has terminated parental rights. The resulting lack of oversight may leave children lingering without benefit of adoption even after their parents' rights have been terminated. This is exactly the predicament ASFA sought to avoid by requiring concurrent planning and termination of parental rights after a child had remained in foster care for 15 months. Advocates for children and other concerned citizens, including those in the adoption community, would increase the chance of adoption for the 119,000 pre-adoptive children in foster care by working for reform that would provide legally sustainable grounds for termination and continuing judicial oversight until each child freed for adoption is actually adopted.

If we lived in a world where no child was ever removed unnecessarily, every child who was removed returned home as soon as basic safety could be assured, and well-designed services were available to all who needed them, then a sound legal ground for termination would generally exist after the passage of 15 months. In such a hypothetical world, one whose existence ASFA presumes, the state would be able to demon-

strate the grounds for termination by clear and convincing evidence without relying on the mere passage of time. In this hypothetical universe, by the time the state filed for termination of parental rights, the claims of mother and child would usually be at odds just as ASFA presumes them to be. In the messier world that mothers and children actually inhabit, cases at the margins elude easy solutions. Reforms in both areas that would require courts to follow the child's progress toward permanency after termination would promote the goal of achieving legal adoption for nearly all of the children in foster care who will not be returning home.

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