

## USE OF THE ADOPTION AND SAFE FAMILIES ACT AT 15/22 MONTHS FOR INCARCERATED PARENTS‡

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### INTRODUCTION

In the March 2002 Vermont Bar Association Journal, I wrote an article regarding the federal Adoption and Safe Families Act (ASFA)<sup>1</sup> and the “compelling reasons” exception to the 15/22-month timeframe under ASFA for filing termination of parental-rights petitions. The 15/22-month timeframe under ASFA establishes that “in the case of a child who has been in foster care . . . for 15 of the most recent 22 months . . . the state shall file a petition to terminate the parental rights of the child’s parents.”<sup>2</sup> I wrote my first ASFA article five years after ASFA was enacted.<sup>3</sup> Now, a decade later, and after spending more than a year talking to women inmates at the Southeast State Correctional Facility (SESCF) about legal issues impacting their children, I feel it is an opportune time to reflect again on ASFA and its implementation, this time thinking of the timeframes and the issues they raise for incarcerated parents.

Over the past two decades, the number of incarcerated individuals in the United States has climbed exponentially. Based on year-end 1999 statistics compiled by the Bureau of Justice, between 1991 and 1999 the prison population in this country grew by 62% to over one million inmates in state and federal prisons.<sup>4</sup> Of these inmates, an estimated 721,500 prisoners were parents to almost 1.5 million minor children.<sup>5</sup> Two-thirds of female inmates in state prisons are mothers of minor children.<sup>6</sup> Statistics

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1. Adoption and Safe Families Act of 1997, Pub. L. No. 105–89, 111 Stat. 2115 (1997) (codified as amended in scattered sections of 42 U.S.C.), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105\\_cong\\_bills&docid=f:h867enr.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105_cong_bills&docid=f:h867enr.txt.pdf).

2. 42 U.S.C. § 675(5)(E) (2006).

3. Maryann Zavez, *The Adoption and Safe Families Act: Implementation and Case Law With a Focus on 15/22 Month Terminations*, VT. B.J., Mar. 2002, at 37.

4. CHRISTOPHER J. MUMOLA, OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: INCARCERATED PARENTS AND THEIR CHILDREN 2 (2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/iptc.pdf>.

5. *Id.* at 1.

6. THE SENTENCING PROJECT, WOMEN IN THE CRIMINAL JUSTICE SYSTEM BRIEFING SHEETS 5 (2007) [hereinafter SENTENCING PROJECT], available at [http://www.sentencingproject.org/Admin/Documents/news/womenincj\\_total.pdf](http://www.sentencingproject.org/Admin/Documents/news/womenincj_total.pdf).

compiled in 2005 show that the number of women in prison has increased at almost double the rate for men since 1985—a 404% increase.<sup>7</sup> Ten percent of the children of female inmates are estimated to live in foster care or under the auspices of an agency.<sup>8</sup> According to a 2005 Agency of Human Services report, the number of women incarcerated in Vermont grew from 15 in 1985 to over 160 in 2005.<sup>9</sup> The average daily count of incarcerated women in Vermont is expected to exceed 300 within the next six years.<sup>10</sup>

Many of the nation's incarcerated women are in prison for drug-related offenses. Though drug use among women actually declined between 1986 and 1996, the number of women incarcerated in state facilities for drug offenses rose dramatically—888% compared to an increase of 129% for non-drug offenses.<sup>11</sup> Nationally, in 1996, more than one-third of female prisoners were serving time for drug-related offenses.<sup>12</sup>

## I. IMPACT OF ASFA ON THE TERMINATION OF PARENTAL RIGHTS

### A. Overview of State Responses

The Child Welfare League of America (CWLA) recently published an important report (the “Report”) that addresses the impact ASFA has had on the termination of parental rights (TPR) of incarcerated parents.<sup>13</sup> The authors conducted an exhaustive review of case law and statutes and analyzed surveys completed by judges, attorneys, and child welfare professionals.<sup>14</sup> The Report concluded that ASFA has had a major impact on the number of parental-rights terminations of incarcerated parents.<sup>15</sup> The Report found, based on a review of case law, a clear connection between incarceration and TPR in 18% of cases.<sup>16</sup> More significant were the overall numbers of TPR petitions brought post-ASFA when a parent was

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7. *Id.* at 2.

8. *Id.* at 5.

9. VT. AGENCY OF HUMAN SERVS., A CHARGE TO VERMONT COMMUNITIES: BENDING THE CURVE ON THE NUMBER OF WOMEN INCARCERATED IN VERMONT WITHOUT COMPROMISING PUBLIC SAFETY 1 (2005), available at <http://humanservices.vermont.gov/departments/ahs-fs-folder/incarcerated-womens-initiative/incarcerated-womens-initiative-the-charge-to-communities>.

10. *Id.*

11. SENTENCING PROJECT, *supra* note 6, at 4.

12. ARLENE F. LEE ET AL., CHILD WELFARE LEAGUE OF AM., THE IMPACT OF THE ADOPTION AND SAFE FAMILIES ACT ON CHILDREN OF INCARCERATED PARENTS 3 (2005) [hereinafter LEE, IMPACT OF ASFA].

13. *Id.* at 6.

14. *Id.*

15. *Id.* at 7–8.

16. *Id.* at 22.

incarcerated. From 1992 to 2002, the number of TPR proceedings per year increased from 113 to 394.<sup>17</sup>

As of 2005, thirty-six states had expressly included a parent's incarceration as a factor in their respective termination statutes.<sup>18</sup> Twenty-five of these states use the length of the sentence as a determining factor in whether a parent's incarceration may be a ground for termination.<sup>19</sup> These range from a low of one year in Utah (sentence for felony conviction such that child will be deprived of "normal home for more than one year") to an incarceration period of five or more years in Iowa.<sup>20</sup> Louisiana uses a five-year time frame, and creates a presumption that a parent with a minimum sentence of five years is unable to care for a child for an "extended period of time."<sup>21</sup> Some states factor in both the length of incarceration and a child's age. Tennessee law establishes a ground for termination where a parent "has been confined in a correctional or detention facility of any type . . . under a sentence of ten (10) or more years, and the child is under eight (8) years of age at the time the sentence is entered by the court."<sup>22</sup>

In other states, although incarceration can be a ground for termination, the length of sentence is not defined or determinative. Delaware's TPR statute requires that a parent be found unable to plan for a child's needs due to "extended or repeated incarceration."<sup>23</sup> Some states require direct consideration of the impact of incarceration on the parent-child relationship. Mississippi provides for termination where there is "extreme and deep-seated antipathy by the child toward the parent or when there is some other substantial erosion of the relationship between the parent and child which was caused at least in part by the parent's . . . prolonged imprisonment."<sup>24</sup> Some states link incarceration to abandonment in their termination statutes. In Tennessee, the abandonment ground for TPR with respect to an incarcerated parent asks, in part, whether the parent has engaged in conduct prior to the incarceration that shows a "wanton disregard for the welfare of the child."<sup>25</sup>

Since ASFA was enacted, seventeen states have modified their statutes, some to specifically address how the ASFA timeframes should be

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17. *Id.* at 20.

18. *Id.* at 11.

19. *Id.*

20. UTAH CODE ANN. § 78-3a-408(2)(e) (2002); IOWA CODE ANN. § 232.116(1)(o) (West Supp. 2008).

21. LA. CHILD. CODE ANN. arts. 1015(6), 1036(E) (2004).

22. TENN. CODE ANN. § 36-1-113(g)(6) (Supp. 2007).

23. DEL. CODE ANN. tit. 13, § 1103(a)(5)(a)(3) (1999).

24. MISS. CODE ANN. § 93-15-103(3)(f) (2004).

25. TENN. CODE ANN. § 36-1-102(1)(A)(iv) (2005).

considered when a parent is incarcerated. Colorado added an exception to 15/22-month filings whereby TPR may not be filed if the child's stay in foster care is "due to circumstances beyond the control of the parent such as incarceration of the parent for a reasonable period of time . . . ."<sup>26</sup> The Colorado Supreme Court has found, however, that this exception does not preclude courts from considering the time the child has spent in foster care and the overall best interests of the child. Rather, this exception "merely makes the duration of foster care a discretionary factor in the fitness inquiry."<sup>27</sup>

Several states have expressly precluded incarceration as the sole basis for bringing a termination proceeding at the 15/22-month juncture. Nebraska's statute provides that a TPR petition may not be brought at the 15/22-month mark if the sole factual basis is either incarceration or the inability of the parent(s) to afford health care.<sup>28</sup> Similarly, New Mexico provides that a petition may not be brought if the sole factual basis is a parent's incarceration.<sup>29</sup> By contrast, Texas (post-ASFA) modified its statute to permit termination when incarceration would result in two or more years of a parent's inability to parent.<sup>30</sup> Illinois' modified statute allows for termination if a parent is incarcerated when the termination petition is filed and, among other factors, the parent will not be able to discharge parental responsibilities for more than two years due to the incarceration.<sup>31</sup>

Florida amended its termination statute to allow termination if a parent is expected to be incarcerated for a substantial portion of the time before the child reaches the age of eighteen.<sup>32</sup> In *B.C. v. Department of Children & Families*, the Florida Supreme Court found that trial courts should calculate this time period from the date the termination petition is filed (as opposed to looking at the total length of a parent's sentence and asking whether the sentence is a substantial portion of the child's life to date).<sup>33</sup> In addition, the *B.C.* court held that 28.6% of the child's remaining minority was not a substantial portion of the child's life and overturned the termination.<sup>34</sup> The court in *B.C.* followed the reasoning of two second-district lower courts,

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26. COLO. REV. STAT. § 19-3-604(2)(k)(IV) (2007).

27. *K.D. v. People*, 139 P.3d 695, 702 (Colo. 2006).

28. NEB. REV. STAT. § 43-292.02(2) (2004).

29. N.M. STAT. ANN. § 32A-4-28(D) (LexisNexis Supp. 2007).

30. LEE, IMPACT OF ASFA, *supra* note 12, at 18; TEX. FAM. CODE ANN. § 161.001(1)(Q) (Vernon Supp. 2008).

31. LEE, IMPACT OF ASFA, *supra* note 12, at 17; 750 ILL. COMP. STAT. 50/1(D) (West Supp. 2008).

32. LEE, IMPACT OF ASFA, *supra* note 12, at 17; FLA. STAT. ANN. § 39.806(1)(d)(1) (West Supp. 2008).

33. *B.C. v. Dep't of Children & Families*, 887 So. 2d 1046, 1054-55 (Fla. 2004).

34. *Id.* at 1054.

which found that 25% and 32% calculations were not substantial portions of the respective children's remaining minorities.<sup>35</sup> The Florida Supreme Court also reminded both lower courts and litigants of the constitutionally protected fundamental liberty interest of parents in raising their children. The court explained that TPR must be the "least restrictive means" to protect a child from serious harm.<sup>36</sup>

Case law in other states cautions against filing for termination solely on the basis of parental incarceration and the resultant failure to meet case-plan goals. In *In re Max G.W.*, the Wisconsin Supreme Court recently overruled a lower-court decision granting a TPR petition.<sup>37</sup> The lower court based its decision on a finding of unfitness due to the failure of the parent to find suitable housing, a case-plan goal that was impossible for her to meet given her incarceration.<sup>38</sup> The Wisconsin Supreme Court held that this violated the incarcerated parent's substantive-due-process rights.<sup>39</sup>

The basic facts and timeline in *Max G.W.* are typical of those of mothers incarcerated at the SESCF. In *Max G.W.*, a two-year-old child went into state care in September 2002 due to his mother's incarceration and his maternal grandmother's inability to continue to care for him.<sup>40</sup> The mother, incarcerated for driving under the influence and fleeing an officer, was not eligible for release until March 2006.<sup>41</sup> In April 2004, the State moved to terminate the mother's rights based on a finding of unfitness, namely her inability to meet the conditions of return within the next twelve months due to her incarceration, including her failure to find suitable housing.<sup>42</sup> The court in *Max G.W.* relied on a Nevada case to hold that parental unfitness cannot be based solely on incarceration.<sup>43</sup> To render the Wisconsin termination statute constitutional, the court found that other factors must be considered during termination analysis.<sup>44</sup> In addition to the parenting role prior to incarceration, these factors include the parent's compliance with case-plan goals during incarceration and the parent's efforts to maintain contact with his or her child during the term of imprisonment.<sup>45</sup>

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35. *Id.* (citing *W.W. v. Dep't of Children & Families*, 811 So. 2d 791, 792 (Fla. Dist. Ct. App. 2002); *In re A.W.*, 816 So. 2d 1261, 1264 (Fla. Dist. Ct. App. 2002)).

36. *B.C.*, 887 So. 2d at 1052 (citing *Padgett v. Dep't of Health & Rehabilitative Servs.*, 577 So. 2d 565, 571 (Fla. 1991)).

37. *In re Max G.W.*, 716 N.W.2d 845, 848-51 (Wis. 2006).

38. *Id.* at 848.

39. *Id.* at 852.

40. *Id.* at 849.

41. *Id.* at 849, 851.

42. *Id.* at 850.

43. *Id.* at 859-60 (citing *In re J.L.N.*, 55 P.3d 955, 959 (Nev. 2002)).

44. *Id.* at 861.

45. *Id.* (interpreting WIS. STAT. § 48.415(2) (2008)).

In the Nevada case on which the Wisconsin Supreme Court relied, *In re J.L.N.*, the Nevada Supreme Court overturned a lower-court termination. The Nevada Supreme Court held that incarceration alone is insufficient to satisfy the statutory requirement of parental fault for “failure to adjust.”<sup>46</sup> The Nevada termination statute contains a rebuttable presumption that termination is in a child’s best interests when a child has been in out-of-home care for fourteen of the last twenty consecutive months.<sup>47</sup> A parent may overcome the presumption by offering evidence of “compelling reasons” why termination should not be ordered.<sup>48</sup> The *J.L.N.* court, calling termination a “civil death penalty,” established helpful guidelines to evaluate whether an incarcerated parent should have his or her parental rights terminated.<sup>49</sup> The guidelines would be used even when the ASFA timeframes are implicated.<sup>50</sup> These guidelines include analyzing the nature of the crime, the sentence imposed, the person(s) the crime was committed upon, the parent’s conduct toward the child prior to and during the incarceration, and the child’s specific needs.<sup>51</sup>

The facts in *J.L.N.* are similar to the facts underlying the cases of mothers I have met with at the SESCOF. The mother in *J.L.N.* was incarcerated for violating probation (leaving the state) with underlying nonviolent crimes (passing bad checks and forgery).<sup>52</sup> The caseworker’s testimony at the termination hearing is of interest in this case. She testified that she felt compelled to file for termination due to the 14/20-month ASFA timeframe, even though she did not think this plan was in the child’s best interests given the strong bond between the mother and her seven-year-old child.<sup>53</sup>

### *B. Exceptions Within ASFA and Other State Statutes*

Contrary to the seemingly common practice among caseworkers, the ASFA does not require such unduly strict adherence to its timeframes. Although ASFA does require states to move more quickly toward “permanency” for a child—a permanency hearing must be held within twelve months of child entering foster care<sup>54</sup> and a termination petition must be filed

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46. *In re J.L.N.*, 55 P.3d at 959–61.

47. NEV. REV. STAT. ANN. §§ 128.105, 128.109 (LexisNexis 2004).

48. NEV. REV. STAT. ANN. § 432B.553(2) (LexisNexis 2006).

49. *In re J.L.N.*, 55 P.3d at 958 (quoting *Drury v. Lang*, 776 P.2d 843, 845 (Nev. 1989)).

50. *Id.* at 958, 960–61.

51. *Id.* at 959–60.

52. *Id.* at 956–57.

53. *Id.* at 957.

54. 42 U.S.C. § 675(5)(C) (2000).

if the child has been in foster care for fifteen out of the past twenty-two months<sup>55</sup>—advocates should be aware of the three federally allowed 15/22-month exceptions under the federal law. Particular attention should be paid to the “compelling reason” exception, which Vermont has partially incorporated into its law and policy. The three federally allowed exceptions are as follows:

- (1) “At the option of the State, the child is being cared for by a [fit] relative”;<sup>56</sup>
- (2) “The State agency has documented in the case plan . . . a compelling reason for determining that filing such a petition would not be in the best interests of the . . . child”;<sup>57</sup> or
- (3) “The state agency has not provided to the family, consistent with the time period in the case plan, services that the State deems necessary for the safe return of the child to the home, when reasonable efforts to reunify the family are required.”<sup>58</sup>

Colorado provides a fourth exception to specifically address parental incarceration.<sup>59</sup> Termination at the 15/22-month time period is not required in Colorado if a child has been in foster care due to “circumstances beyond the control of the parent such as incarceration of the parent for a reasonable period of time, court delays or continuances that are not attributable to the parent, or such other reasonable circumstances that the court finds are beyond the control of the parent.”<sup>60</sup>

Vermont, unlike many other states, has not statutorily adopted any of the three exceptions to 15/22-month terminations. However, the first exception, living with a relative, seems to comport nicely with the Department for Children and Families’ (DCF) Kinship Care Policy.<sup>61</sup> This policy provides that “[t]he connection to family, kin and community is essential to child wellbeing [sic].”<sup>62</sup> Other states, such as New Hampshire, have explicitly adopted this exception requiring a relative to provide appropriate care.<sup>63</sup> California’s approach is more detailed, creating a termination exception for a child who is:

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55. 45 C.F.R. § 1356.21(i) (2007).

56. *Id.* § 1356.21(i)(2)(i).

57. *Id.* § 1356.21(i)(2)(ii).

58. *Id.* § 1356.21(i)(2)(iii).

59. COLO. REV. STAT. § 19-3-604(2)(k)(IV) (2007).

60. *Id.*

61. VT. DEP’T FOR CHILDREN & FAMILIES, POLICY NO. 91, at 1–3 (2004), in FAMILY SERVICES POLICY MANUAL (n.d.), available at <http://dcf.vermont.gov/fsd/policies/> (follow “Kinship Care” hyperlink).

62. *Id.*

63. N.H. REV. STAT. ANN. § 169-C:24-a(III)(a) (Supp. 2007).

living with a relative who is unable or unwilling to adopt the minor because of exceptional circumstances that do not include an unwillingness to accept legal or financial responsibility for the minor, but who is willing and capable of providing the minor with a stable and permanent home environment, and the removal of the minor from the physical custody of his or her relative would be detrimental to the minor's emotional well-being.<sup>64</sup>

Although Vermont does not statutorily recognize any of the 15/22-month exceptions, DCF has adopted the "compelling reason" exception.<sup>65</sup> In determining whether a compelling reason exists, "the safety and wellbeing [sic] of the child are the primary consideration [sic]."<sup>66</sup> The factors articulated in Vt. Stat. Ann. title 33, section 5540 are used to determine a child's best interest.<sup>67</sup>

The phrase "compelling reason" is also found in the permanency hearing section of Vermont's Juvenile Proceedings Act.<sup>68</sup> This section requires the commissioner to demonstrate a "compelling reason" why it is not in a child's best interests to return home, be freed for adoption, or be placed with a "fit and willing relative or legal guardian," and instead be placed or continue to live in a "planned permanent living arrangement."<sup>69</sup> Interestingly, the "fit and willing relative" language is almost identical to the language used in the first ASFA 15/22-month exception. Although the term "compelling reason" is not defined in the statute, the Vermont Supreme Court in *In re A.G.* upheld a denial of TPR based on the lower court's finding that the "once strong bond between mother and A.G." constituted a sufficiently compelling reason not to order termination.<sup>70</sup> In a similar vein, the pertinent federal regulations provide that a "significant bond" between a parent and child can be a "compelling reason" to order another planned permanent living arrangement if the parent has an "emotional or physical disability" that prevents him or her from caring for the child and the "child's foster parents have committed to raising [the child] to the age of majority" and will "facilitate visit[s] with the disabled parent."<sup>71</sup>

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64. CAL. WELF. & INST. CODE § 727.3(c)(5) (West 2008).

65. VT. DEP'T FOR CHILDREN & FAMILIES, POLICY NO. 125, at 5 (2004), in FAMILY SERVS. POLICY MANUAL (n.d.), available at <http://dcf.vermont.gov/fsd/policies/> (follow "Permanency Planning for Children in Custody" hyperlink).

66. *Id.* at 6.

67. *Id.*

68. VT. STAT. ANN. tit. 33, § 5531(d) (Supp. 2007).

69. *Id.* § 5531(d)(4).

70. *In re A.G.*, 178 Vt. 7, 17, 868 A.2d 692, 700 (2004).

71. 45 C.F.R. § 1356.21(h)(3) (2007). See *supra* Part 1.A (discussing grounds for termination).



The federal regulations and other state statutes defining “compelling reason” could provide guidance should Vermont legislators address this issue. Under the federal regulations, acceptable “compelling reasons” for avoiding termination at the 15/22-month juncture include situations where adoption is not the appropriate permanency plan for the child or where no ground exists to file a petition to terminate parental rights.<sup>72</sup>

Vermont legislators might also consider whether and how to include the child’s wishes in termination proceedings. In some states the wishes of the child can constitute wholly, or in part, a “compelling reason.”<sup>73</sup> North Dakota considers the “expressed wishes” of a child ten or more years old.<sup>74</sup> In California, a finding that a child twelve or more years old objects to termination forms the basis for a “compelling reason” exception.<sup>75</sup> New Mexico likewise has created an exception for a child fourteen or more years old who is “firmly opposed” to the termination and is “likely to disrupt any attempt to place him with an adoptive family.”<sup>76</sup>

In some states the “compelling reason” focuses on parents’ attempts to reunify with children. In Oregon, a compelling reason is found when a parent “successfully participat[es] in services” that are part of a reunification plan and the court expects that the child will be able to return to the home within a reasonable period of time.<sup>77</sup>

The Supreme Court of Delaware recently found that ASFA did not require a caseworker to document a compelling reason to forego a 15/22-month termination even though the deadline had expired and the permanency plan called for a standard guardianship.<sup>78</sup> The court rejected the argument that the applicable statutory language only embraced “permanent guardianships,” and further rejected the notion that a child living under a guardianship with nonrelative foster parents was living in “limbo”—that is, without the security of a safe and stable environment that “rises to the level of permanency.”<sup>79</sup>

Some states merge the “compelling reason” exception to 15/22-month terminations with the third federal exception. That exception applies when states fail to provide services to the family that would enable the child to

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of parental rights).

72. 45 C.F.R. § 1356.21(i)(2)(ii)(A–B) (2007).

73. N.D. CENT. CODE § 27-20-20.1(7)(b)(5) (2007).

74. *Id.*

75. CAL. WELF. & INST. CODE § 727.3(c)(1)(A) (West 2008).

76. N.M. STAT. ANN. § 32A-4-29(G)(3) (LexisNexis Supp. 2007).

77. OR. REV. STAT. § 419B.498(2)(b)(A) (2007).

78. *CASA v. Dep’t of Servs. for Children, Youth & Their Families*, 834 A.2d 63, 65 (Del. 2003).

79. *Id.* at 66 (citing *Div. of Family Servs. v. Hutton*, 765 A.2d 1267, 1274 (Del. 2001)).

return home “when reasonable efforts to reunify the family are required.”<sup>80</sup> Reasonable efforts to reunify are required in all cases under ASFA unless a court has determined that “aggravated circumstances” exist.<sup>81</sup> For example, the parent has been convicted of certain crimes such as the murder of one of the parent’s children or the parent has had his or her rights to another child terminated.<sup>82</sup> In Oregon, one “compelling reason” is that a court or citizen review board has found that the department has failed to make reasonable efforts when the case plan called for reunification.<sup>83</sup>

Some states that wish to except cases from 15/22-month terminations on the basis of the state’s failure to provide services do so with an exception modeled after the third federal exception’s language. Colorado and Nevada take this approach.<sup>84</sup> Illinois’ exception allows a tolling of the fifteen-month time period when a court finds that the state has failed to make reasonable efforts within certain timeframes.<sup>85</sup>

So what constitutes “reasonable efforts,” and how should they be evaluated when a parent is incarcerated? In Nevada, courts must apply a “reasonable person” standard when determining whether “reasonable efforts were made.”<sup>86</sup> New Jersey sets out a nonexhaustive list of tasks that might demonstrate “reasonable efforts” on the part of the agency, including “consultation and cooperation with the parent in developing a plan for appropriate services” and “facilitating appropriate visitation.”<sup>87</sup> Applying this statute in 2006, the New Jersey Superior Court Appellate Division remanded a termination case, involving an incarcerated parent, in which the agency failed to provide any services (or even return phone calls) to the parent. The agency contended that it was not required to provide services given the termination of the mother’s rights to another child.<sup>88</sup> The court found that despite the prior termination, the agency could still have determined that making reasonable efforts to reunify the family would have been in the child’s best interests.<sup>89</sup>

California has an extensive statute that addresses family-reunification services. The statute delineates services that may be provided to

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80. 45 C.F.R. §1356.21(i)(2)(iii) (2007).

81. 42 U.S.C. § 671(a)(D)(15)(i) (2000).

82. *Id.* § 671(a)(15)(D)(i)–(iii) (2000).

83. OR. REV. STAT. § 419B.498(2)(b)(C) (2007).

84. COLO. REV. STAT. § 19-3-604(2)(k)(III) (2008); NEV. REV. STAT. ANN. § 432B.553(2)(b) (LexisNexis Supp. 2006).

85. 750 ILL. COMP. STAT. ANN. 50/1(D)(m-1) (West Supp. 2008).

86. NEV. REV. STAT. ANN. § 432B.393(5)(a) (LexisNexis Supp. 2006).

87. N.J. STAT. ANN. § 30:4C-15.1(c)(1–4) (West 2007).

88. Div. of Youth & Family Servs. v. S.A., 889 A.2d 1120, 1122–23 (N.J. Super. Ct. App. Div. 2006).

89. *Id.* at 1126.

incarcerated parents unless a court has found by “clear and convincing evidence” that such services would be detrimental to the child.<sup>90</sup> These services include: (1) “[m]aintaining contact between the parent and child through collect telephone calls”;<sup>91</sup> (2) “[t]ransportation services, where appropriate”;<sup>92</sup> (3) “[v]isitation services, where appropriate”;<sup>93</sup> and (4) “[r]easonable services to extended family members or foster parents providing care for the child if the services are not detrimental to the child.”<sup>94</sup>

## II. RECOMMENDATIONS FOR REFORM IN VERMONT

### *A. Juvenile Proceedings Act*

Given this general legal landscape, I offer the following recommendations for statutory and policy reforms to address ongoing issues pertaining to ASFA and its impact on incarcerated parents. I would recommend that the Vermont Legislature add a section to the Juvenile Proceedings Act specifically addressing termination of parental rights with adoption of the three federally allowed exceptions to 15/22-month filings. I would also encourage the legislature to consider adding a fourth exception, based on the pertinent Colorado statute, which would give special consideration to the 15/22-month timeframe when a parent is incarcerated.

### *B. Delay in Filing Petitions*

As of Spring 2008, the New York State Assembly had passed a bill proposing major substantive changes to New York law on issues pertaining to the termination of parental rights of incarcerated parents. The bill includes a provision allowing a foster-care agency to delay filing a petition to terminate the parental rights of a parent when the parent’s incarceration or participation in a court-ordered treatment program is a “significant factor in the child’s placement in foster care,” as long as there is not some other documented reason that filing a petition would be “otherwise appropriate.”<sup>95</sup> I would recommend that similar legislation be proposed in Vermont.

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90. CAL. WELF. & INST. CODE § 361.5(e)(1)(A)–(D) (West 2008).

91. *Id.* § 361.5(e)(1)(A).

92. *Id.* § 361.5(e)(1)(B).

93. *Id.* § 361.5(e)(1)(C).

94. *Id.* § 361.5(e)(1)(D).

95. A. 8465, 230th Sess. (N.Y. 2007). *See also* New York State Assembly, Bill Summary – A08465, <http://assembly.state.ny.us/leg/?bn=A08465> (last visited Dec. 7, 2008).

*C. In-Depth Analysis of Termination of Parental Rights Procedures  
for Incarcerated Parents*

The legislature should appoint a study committee to undertake an in-depth analysis of the issues pertaining to the long-term care of children of incarcerated parents. This committee should include previously incarcerated parents who have experience with the DCF foster-care system.

The committee should review the two guardianship options in Vermont—permanent guardianship and standard guardianship<sup>96</sup>—and consider whether one or both can constitute a viable “permanency” option if the court finds that a proposed guardianship is in the best interests of the child. Currently, the permanency-hearing statute identifies as one permanency option that “the child will be referred for legal guardianship.”<sup>97</sup> Following the analysis of the Delaware court, the term “legal guardianship” could include standard guardianships as well as permanent guardianships.

Without legislative action, however, it is highly doubtful that such a liberal reading of this term can stand, given the legislature’s statement of policy when it enacted the current permanent-guardianship statute. The Vermont Supreme Court relied on this statement in deciding *In re A.S. & K.S.*, observing that the legislature intended “permanent guardianship[s] [to] be a last resort [used] only when the options of return to the parents and adoption have been fully explored and ruled out based on clear and convincing evidence.”<sup>98</sup> More recently, the court rejected a parent’s request for permanent guardianship in light of evidence that the child would be adopted.<sup>99</sup> The court viewed this as the “mother’s attempt to rewrite the statute,” affirming the holding in *A.S. & K.S.*<sup>100</sup> Given this state of affairs, this issue is ripe for legislative consideration.<sup>101</sup>

Both standard guardianships and permanent guardianships are useful permanency options. These options are particularly helpful in cases in which an incarcerated parent has a strong bond with the child but is unable to parent for some period of time and the child is living with relative caregivers (often grandparents) who do not wish to adopt the child. It is not uncommon for such caregivers to resist adopting the child due to financial considerations or the potential for strained family relationships with the incarcerated parent. Due to the ASFA timeframes, DCF sometimes requires

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96. VT. STAT. ANN. tit. 14, §§ 2661–2667 (2002); *id.* § 2645.

97. VT. STAT. ANN. tit. 33, § 5531(d)(3) (Supp. 2007).

98. *In re A.S. & K.S.*, 171 Vt. 369, 374, 764 A.2d 1188, 1191 (2000) (quoting 2000 Vt. Acts & Resolves 162 § 1 (codified at VT. STAT. ANN. tit. 14, § 2664(a) (2002))) (emphasis in *In re A.S.*).

99. *In re M.W.*, 2007 VT 90, ¶ 6, \_\_\_ Vt. \_\_\_, 933 A.2d 243, 244.

100. *Id.* ¶ 9.

101. *Id.*

the grandparent to adopt or risk losing the child to a new pre-adoptive home in the name of “permanency.” This posture can be highly disruptive not only to the child, but also to the greater extended family. A guardianship may be a viable permanency option in these situations and should be available if deemed to be in the best interests of the child.

Vermont should consider enacting an open adoption law. In my experience, many parents who face termination would more readily relinquish parental rights if they were able to maintain some level of court-ordered post-adoption contact with their children.

#### *D. Using California as a Model*

The Vermont Legislature should consider enacting a statute similar to California’s. That statute directly sets forth the reunification services DCF must provide to incarcerated parents.<sup>102</sup> Moreover, a subsection of that statute allows the presiding judge of a juvenile court to convene an interdisciplinary meeting to “develop[] and enter[] into protocols for ensuring the notification, transportation, and presence of an incarcerated or institutionalized parent at all court hearings . . . affecting the child.”<sup>103</sup> In Vermont, interagency protocols should also be developed to ensure an incarcerated parent’s participation in the case-planning process—providing, for example, transport to case-plan reviews and other important meetings, court permanency hearings, or, at a minimum, participation by phone or video-conferencing—if a child is in DCF custody. Such protocols should also include a system for maximizing visits between inmates and children, so long as this is deemed to be in the child’s best interests. Visits between incarcerated parents and their children are often sporadic or nonexistent, even when visits are part of a reunification case plan.

#### CONCLUSION

The time is ripe for Vermont to revisit its juvenile statutes and create a section of the Juvenile Proceedings Act that deals explicitly with termination of parental rights. This should include a 15/22-month section that adopts, at a minimum, the three federally allowed exceptions to 15/22 month filings. The legislature and agency policy makers need to review ASFA issues in light of the ongoing impact that ASFA has on incarcerated parents. Policy makers should also consider other legislative and policy changes to facilitate ongoing family relationships despite parental incarceration.

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102. CAL. WELF. & INST. CODE § 361.5(e)(1)(A)–(D) (West 2008).

103. *Id.* § 361.5(e)(2) (West 2008).