

Terminating a parent’s rights over his or her child is a “drastic,”¹ “heartbreaking,”² and “painful”³ event and one of the hardest rulings that a judge must make.⁴ A child of a parent who had his or her parental rights terminated may be adopted without the parent’s consent.⁵ Thus, terminating parental rights has severe consequences with high stakes⁶ in that it permanently severs the parent-child relationship thereby rendering the parent legally unable to participate in the child’s life.⁷ For inmate parents, the process of challenging a petition terminating parental rights is even more complicated and difficult.⁸

Imagine a 27-year old mother who attended nursing school at night. During the day, she worked as a hospital receptionist. She hoped that her meager income would provide some sustenance for her four children whose father died of cancer. During one summer evening, however, the young mother was lured into a scuffle with neighborhood thugs as she was walking home from school. She is consequently sentenced to two-and-a-half years in prison for assault, and her children are placed in foster care. Today, she cannot participate in his children’s daily affairs.⁹ She is without parental rights because she is said

¹ *Matter of Guardianship and Custody of Veronica Jonice N.*, 177 A.D.2d 119, 581 N.Y.S.2d 14 (1st Dept. 1992).

² Hannot, *Lessening the Sting of ASFA: The Rehabilitation-Relapse Dilemma Brought About by Drug Addiction and Termination of Parental Rights*, 45 *Fam. Ct. Rev.* 524 (2007).

³ Hort, *Is Twenty-Two Months Beyond the Best Interest of the Child? ASFA’s Guidelines for the Termination of Parental Rights*, 28 *Fordham Urb. L.J.* 1879, 1909 (2001).

⁴ *Id.* at 524.

⁵ Jasper, *Rights of Single Parents*, pg. 57 (2005)

⁶ Pitchal, *Children’s Constitutional Right to Counsel in Dependency Cases*, 15 *Temp. Pol. & Civ. Rts. L. Rev.* 663, 674 (2006).

⁷ Fleischer, *Termination of Parental Rights: An Additional Sentence for Incarcerated Parents*, 29 *Seton Hall L. Rev.* 312 (1998).

⁸ 29 *Seton Hall L. Rev.* at 317, 341.

⁹ Approximately 1.3 million children nationwide have mothers in the correctional system. See Levy-Pounds, *From the Frying Pan to the Fire: How Poor Women of Color and Children are Affected by Sentencing Guidelines and Mandatory Minimums*, 47 *Santa Clara L. Rev.* 285 (2007)

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to have permanently neglected her children.¹⁰ Her gifts, letters and telephone calls to her children from prison, were considered sporadic and insubstantial by the Court.¹¹

In *Re Kerry J.*,¹² the Court similarly ruled that an incarcerated father's gift, letter and telephone inquiries to his son were "insufficient" to defeat the lower court's finding of abandonment. The Court terminated the father's parental rights because his contacts from prison were deemed as "sporadic."¹³ The Court did not give any weight¹⁴ to the father's remaining contacts since those contacts were after the applicable six-month period.¹⁵ Likewise, in *In re Annette B.*,¹⁶ a widely cited case, the Court labeled the father's attempts to contact his children as "minimal" and "sporadic," and as a result insufficient to rebut a finding of abandonment.¹⁷

In making such findings however, the Court should take more notice of the realities that an inmate parent faces when attempting to contact his or her children. For instance, inmate parents at times do not have "phone[s] or consistent location[s] at which to receive mail" since they are commonly in and out of penitentiary treatment centers.¹⁸ Moreover, it has been documented that parents are frequently thwarted in

¹⁰ A child, who is in the care of an authorized agency, is "permanently neglected" when a parent either fails to maintain contact or fails to plan for the future of the child. See, *Matter of Mary Ann FF*, 129 A.D.2d 899, 901 514 N.Y.S.2d 536, 537 (3rd Dept. 1987)

¹¹ New York Social Services Law § 384-b [7][a] provides in pertinent part that a parent who has "failed for a period of either at least one year or fifteen out of the most recent twenty-two months following the date such child came into the care of an authorized agency substantially and continuously or repeatedly to maintain contact with or plan for the future of the child..."

¹² 288 A.D.2d 221, 732 N.Y.S.2d 430 (2nd Dept. 2001).

¹³ *Id.* at 221, 732 N.Y.S.2d at 431.

¹⁴ *Id.*

¹⁵ New York Social Services Law § 384-b [4][b] authorizes termination of parental rights when a parent abandons a child for a period of six months immediately prior to the date the petition was filed.

¹⁶ 2 A.D.3d 721, 722, 769 N.Y.S.2d 587, 588 (2nd Dept. 2002)

¹⁷ *Id.* at 722, 769 N.Y.S.2d at 588

¹⁸ Calkins, *Ineffective Assistance of Counsel in Parental-Rights Termination Cases: The Challenge for Appellate Courts*, 6 J. App. Prac. & Process 179, 185 (2004).

contacting their children because of uncooperative relatives,¹⁹ or restrictive prison policy and administration.²⁰

Such obstacles and restrictive formalities in prison policy were taken under consideration *In re Medina Amor S.*,²¹ a recent First Department case in which the inmate parent was constrained by a stringent State regulation of requiring inmates to have a person's name before being permitted to call an agency.²² There, the Court appropriately used the inmate parent's limited contacting ability in its substantive derivation for finding that the foster agency did not prove by clear and convincing evidence that the inmate father abandoned his children. ²³ In the same way, the Court in *In Re D.T.*, correctly refused to terminate the rights of an inmate mother who was denied visiting her son due to a restrictive Texas policy which unwarrantedly recognized that visitation was not in the child's best interest because the mother had been relocated to a correctional facility outside the region where her son had been placed. ²⁴

Furthermore, in *In re Medina Amor*, and in other instances, an inmate parent may not know the name of his or her child's caseworker due to the caseworker leaving the foster care agency or being reassigned. ²⁵ Also, several problems may arise when an inmate parent's relatives become unaccommodating to the situation and refuses to provide an inmate parent details of his or her children's whereabouts.

¹⁹ Id at 725, N.Y.S.2d at 590.

²⁰ Roberts, *Criminal Justice and Black Families: The Collateral Damage of Over-Enforcement*, 34 U.C. Davis L. Rev. 1005, 1016 (2001)

²¹ 2008 WL 109666 (1st Dept. 2008)

²² Id at *3.

²³ 2008 WL 109666 at *4 (1st Dept. 2008)

²⁴ 34 S.W.3d 625, 629 (2000)

²⁵ Id at *2.

For instance, in *In Re Annette B.*, the dissent took pains to underline that after the parent was incarcerated, there was “little else” the parent could have done in contacting his child given that the child's maternal grandmother either could not or would not help the inmate parent to locate the children.²⁶ Courts should therefore explore and give weight to such countervailing considerations with respect to the numerous obstacles an inmate parent faces in contacting his or her children just as the First Department properly did in *In Re Medina Amor S.*, as such considerations may go unlooked.

Inmate parents are also significantly hindered to arrange for parent-child visits either due to the hardships imposed on the inmate's children traveling,²⁷ primarily due to the remote areas where most prisons are located,²⁸ or when an inmate parent's spouse moves to another county or state with the children. ²⁹ Moreover, while mandated by the New York Social Services Law to exercise “diligent efforts” to arrange for child-parent visits at correctional facilities,³⁰ some authorized foster care agencies have carelessly disregarded this essential obligation thereby drawing admonishment from the Court.³¹

Another matter, often overlooked, is the reality of when a child may not have a desire to communicate with his or her parent. In such instances, it would be fundamentally unfair to punish an inmate parent by terminating his or her parental rights on the grounds that there was insufficient or “sporadic” communication.

²⁶ 2 A.D.3d 721, 725, 769 N.Y.S.2d 587, 590 (2nd Dept. 2002).

²⁷ Lewis, Behind the Glass Wall: Barriers that Incarcerated Parents Face Regarding the Care, Custody and Control of their Children, 19 J. Am. Acad. Matrim. Law. 97, 107 (2004)

²⁸ Roberts, Criminal Justice and Black Families: The Collateral Damage of Over-Enforcement, 34 U.C. Davis L. Rev. 1005 (2001). In New York, most prison facilities are located in rural low-populated locations. (See <http://www.docs.state.ny.us/faclist.html> Department of Correctional Services Facilities Listings, last accessed March 20, 2008) It should be noted that 40% of female inmates in New York are incarcerated in Albion, a rural city located 400 hundred miles away from New York City (See, Nyrary, Foster Children with Mothers in Jail <http://www.gothamgazette.com/article/children/20040303/2/901> last accessed March 21, 2008).

²⁹ *In re Annette B.*, 2 A.D.3d 721, 723 769 N.Y.S.2d 587, 589 (2nd Dept. 2003)

³⁰ New York Social Services Law § 384-b [7][e][ii], [f][5].

³¹ In one instance, the Family Court was “a little shocked” that “the caseworker and her supervisor were not familiar with the law requiring them to work with incarcerated parents and expressed concern over the lack of communication with respondent.” See, *In re Medina Amor*, 2008 WL 109666 at *4 (1st Dept. 2008).

There are many reasons why a child chooses to create distance from his or her inmate parent.³² Such reasons include an immediate strain in the relationship after the child learns about the facts surrounding his or her parent's imprisonment. Also with respect to visits, a child may find the environment threatening, stressful or awkward.³³ Moreover, when a child reaches a certain age, they may lead very busy lives, and become detached from his or her inmate parent thereby unavailable when the inmate parent calls.

Statutory misapplications possibly rooted in the wording of the relevant law further compounds the dilemmas inmate parents face. For example, instead of applying the more demanding abandoned standard³⁴ in a proceeding seeking to terminate parental rights on the grounds of abandonment, the Family Court, in *In Re Medina Amor S.* took "the easier route,"³⁵ by improperly employing the permanently neglected child element of "insubstantial" contacts and, wrongly applying the "best interest" standard.³⁶ In reversing, the First Department in *In Re Medina Amor S.* stressed that "by improperly applying the permanent neglect standard, the [lower] court in effect bootstrapped its finding of abandonment to draw an inescapable conclusion that freeing these children for adoption was in their 'best interests'."³⁷

It should be noted that the "abandoned" child standard and a "permanently neglected" child standard are governed by separate and distinct provisions of the New York Social Services Law, and the "conditions which bring the provisions of each section into

³² Adalist-Estrin, Communication Tips for Prisoners and Their Families (<http://www.fcnetwork.org/cpl/CPL107-CommunicationTips.html> Last accessed March 28, 2007).

³³ Id.

³⁴ New York Social Services Law § 384-b [5] [a] provides that a "child is 'abandoned' by his parent if such parent *evinces an intent* to forego his or her parental rights and obligations..." (emphasis added) "Abandonment, as it pertains to adoption, relates to such conduct on the part of a parent as evinces a purposeful ridding of parental obligations and the foregoing of parental rights a withholding of interest, presence, affection, care and support." *Corey L. v. Martin L.*, 45 N.Y.2d 383, 380 N.E.2d 266, 408 N.Y.S.2d 439 (Ct. App. 1978)

³⁵ 2008 WL 109666 at *5

³⁶ Id at *5

³⁷ 2008 WL 109666 at *5 (1st Dept. 2008)

play are entirely different.” *Matter of Ulysses T.*, 87 A.D.2d 998,999 449 N.Y.S.2d 815, 817 (4th Dept. 1982) Thus, the provisions apply to two different situations and accomplish two different things. In distinguishing the two provisions, the Court, in *Matter of Ulysses T.*, emphasized that “the abandonment section is intended quickly to free for adoption children whose parents have shown no interest in them; the neglect section is designed to free for adoption children whose parents, who although technically not guilty of abandonment, have failed to maintain regular contact with their children.”³⁸

Indeed, the heart of the governing Social Services Law³⁹ notes that a “permanently neglect child” is one whose parent “failed...substantially and continuously or repeatedly to maintain contact with and plan for the future of the child.”⁴⁰ The ensuing sub-section sheds light on the “substantially” maintaining contact requirement, providing that “[a] visit or communication by a parent with the child which is of *such character* as to *overtly demonstrate a lack of affectionate and concerned* parenthood shall not be deemed a substantial contact (emphasis added).”

Glaringly missing however is the statute’s guideline as to “continuously or repeatedly maintain[ing].” Therefore, in its absence, Courts have seemingly ruled in a conflicting and irreconcilable manner. For example, would visits on six different occasions during a six-month period be considered “continuously or repeatedly maintain[ing]” contact thereby sufficient to preclude a finding for terminating parental rights? The Court apparently did not think so in *In Re Timothy H.*⁴¹

Contrastingly however, in *In re Kip D.*, the Court thought this standard was satisfied when a parent merely expressed a desire to visit one’s son even though she missed “many”

³⁸ *Id.* at 998, 449 N.Y.S.2d at 817.

³⁹ 3 NY Fam Ct. Law & Prac § 13:10 (2007)

⁴⁰ New York Social Services Law § 384-b [7][a]

⁴¹ 37 A.D.3d 1119, 2000 830 N.Y.S.2d 426 (4th Dept. 2007)

weekly get-togethers.⁴² Adding at least some clarification to the statute with respect to “continuously or repeatedly maintain contact” would likely remedy and correct this apparent divergence and guide Courts to more disciplined⁴³ and harmonious rulings.

Furthermore, the “permanently neglect child” provision also lacks guidelines in situations where the parent is thwarted to communicate and interact with his child due to a genuinely compelling reason such as prison policy, hostile relatives, or the considerable far distance of correctional facility. As found in the “abandoned child” standard, which prudently notes “in *the absence of evidence to the contrary*,” a similar wording to the “permanently neglected child” standard as to “continuously or repeatedly maintain contact” will help steer Courts away from bootstrapping a finding of abandonment via permanent neglect⁴⁴ and appropriately place inmate parents on stronger legal footing when he or she challenges a termination of parental rights proceeding.

Alternatively, while the ability of the inmate parent to contact is presumed,⁴⁵ another reasonable proposal would involve an amendment to guide correctional facilities to forego certain constrictive contacting policies such as requiring inmates to have their child caseworker’s name.⁴⁶ While this could call for the Court to weigh the inmate parent’s interest in contacting his or her child against the interests of correctional facilities, such a balancing in the favor of inmate parents would seemingly foster a compellingly legitimate and imperative social purpose: to significantly increasing parent-child contact. In turn,

⁴² 115 A.D.2d 864, 866 496 N.Y.S.2d 563, 564 (3rd Dept. 1985)

⁴³ For instance, when ruling on an inmate parent’s communication with his or her child, some Courts have plainly tagged the contacts as insufficient without providing much explanation. See, *In re Miguel K.*, 1 A.D.3d 438, 766 N.Y.S.2d 899 (2nd Dept. 2003) and in *In re Kimberly Y.*, 9 A.D.3d 412, 779 N.Y.S.2d 369 (2nd Dept. 2004), where the Court label the inmate parents’ contacts “insufficient” and therefore inadequate to defeat the court’s finding of abandonment. In such cases, the Court missed valuable opportunities to provide clear substantive principles with respect to when an inmate parent has or has not satisfied the “sufficient” contact requirement.

⁴⁴ *In re Medina Amor*, 2008 WL 109666 (1st Dept. 2008).

⁴⁵ *In re Guardianship of Doe*, 189 Misc.2d 512, 515 733 N.Y.S.2d 326, 328 (Fam. Ct. 2001).

⁴⁶ 2008 WL 109666 at *3 (1st Dept. 2008).

inmate parents would less likely become antisocial with their children, and would allow the parent to practice their newly acquired prison-taught parental skills frequently, thereby reduce the likelihood of psychological damage to the child which often results from infrequent parental contact.⁴⁷

Moreover, such proposed changes would fittingly comport to the past legislative amendments that granted “special considerations”⁴⁸ to inmate parents. Indeed, such considerations were exemplified in prior legislative memoranda where the New York Legislature repeatedly expressed its concern over the lack of due process afforded to inmate parents.⁴⁹

It should be noted however, that in comparison to a few other states, New York has come a long way to grant inmate parents some deference in termination of parental rights proceedings in that it does not authorize terminating parental rights on the basis of incarceration.⁵⁰ Ohio, for instance, allows terminating parental rights on the grounds of the parent merely having been repeatedly incarcerated.⁵¹

Proponents of Ohio’s anomalous law argue that parents who are jailed repeatedly would create instability to the child’s home environment, and that repeated incarcerations affect the parent’s ability to provide for the child’s needs.⁵² These proponents however have grossly disregarded the statute’s ramifications in that, if enacted, the law would be excessively unfair to inmate parents. For example, a parent would have his or her parental rights terminated merely for being arrested a few times for petty “B” misdemeanor charges.

⁴⁷ Califa, *Prisoners as Parents: The Importance of Strong Parent-Child Relationships During Parental Incarceration*, pg. 18.

⁴⁸ L. 1983, ch. 911, § 1.

⁴⁹ McKinney’s 1983 Session Laws of New York; Memorandum of Executive Department, Council of Children and Families, pg. 2706.

⁵⁰ New York Social Services Law § 384-b [7] (McKinney’s 1983)

⁵¹ R.C. 2151.414 (E)

⁵² Hardin, *Early Termination of Parental Rights: Developing Appropriate Statutory Grounds*, pg. 62.

It comes of no surprise therefore that a minority of jurisdictions have adopted statutes that are similar to Ohio's.⁵³

While New York has not adopted the kind of harsh termination of parental right statutes similar to Ohio in relation to inmate parents, its laws still fall considerably short compared to other states that have seemingly placed the inmate parent on stronger legal footing with regard to inmate-child contact. For example, Mississippi will terminate a parent's right only if there is *no* contact for a period of one year⁵⁴ unlike New York's statute which will not preclude terminating a parent's rights even when the parent has visited or contacted the child albeit "sporadically."⁵⁵ Therefore, had New York adopted a statute similar to Mississippi's, the inmate parent who made telephone calls, and sent gifts and letters in *In Kerry J.*,⁵⁶ would have unquestionably maintained his parental rights.

In short, although many children of inmate parents are often in a better position to be placed for adoption, there are instances where that is not the case especially where the inmate parent has diligently demonstrated a keenness to communicate with his or her child. Courts should be able to confidently render decisions on termination of parental rights proceedings without any apparent uncertainty stemming from an imprecise Social Services Law or an uniformity in case precedence.

New York's legislature should consider amending the Social Services Law provisions in relation to the termination of parental rights. Such change to the pertinent language

⁵³ Id. The few states that have adopted laws similar to Ohio's will additionally weight other considerations. For instance, Delaware's termination of parental right statute is significantly akin to Ohio's for the exception that Courts in Delaware must consider post-conviction conduct before permitting termination.

⁵⁴ Ann. Code § 43-21-603

⁵⁵ *In re Jamie Rumbel C.*, 43 A.D.3d 762, 763 842 N.Y.S.2d 422, 423 (1st Dept. 2007)

⁵⁶ 288 A.D.2d 221, 732 N.Y.S.2d 430 (2nd Dept. 2001).

involving termination of parental rights would be in accordance with past amendments which properly granted “special consideration”⁵⁷ to inmate parents.

Indeed, such proposed amendments, as earlier discussed, would foster strong bonds between the inmate parent and child. In turn, this would provide educational and psychological nourishment to the inmate’s child who is the “hidden victim of incarceration,”⁵⁸ and help the inmate parent with his or her social skills when he or she adjusts back into society upon release. Moreover, with the considerable rise in incarceration rates in New York, particularly of females at an alarming 645% increase from the 1970s,⁵⁹ and the immense number of children entering into foster care,⁶⁰ such a sensible response to assist in keeping families together without an abrupt parental right termination is undoubtedly warranted.

⁵⁷L. 1983, ch. 911, § 1.

⁵⁸Clay, Hidden Victims of Incarceration: An Insight, 30 T. Marshall L. Rev. 423 (2005)

⁵⁹The Coalition for Women Prisoners, 2007 Proposals for Reform (http://www.correctionalassociation.org/WIPP/publications/CWP_Policy_Brochure_07.pdf Last accessed March 28, 2008)

⁶⁰Benites, In Defense of the Family: An Argument for Maintaining the Parental Rights of Incarcerated Women in Texas, 3 Scholar 193, 227 (2001)