

The Impact of Incarceration on Parental Rights in New Jersey

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Beyond one's liberty interest, no greater constitutional right impacts incarcerated parents than the critical question of access to their children. Quite frequently, parents involved in the criminal justice system are involved in the child welfare system. Unfortunately, incarcerated parents are often denied information about their substantive rights, provided inconsistent options to protect their rights and left wondering what, if anything, they can do to (a) see their children during the term of incarceration; (b) maintain their parental rights; and/or (c) prevent the termination of parental rights if their children are not yet born or not actively bonded to the incarcerated parent at the time a legal action is commenced by the state's Child Protective Services².

This article will provide a general overview of how incarceration may fit the definition of abuse or neglect as defined in New Jersey, and how parental rights may be affected by a parent's incarceration.

ABUSE OR NEGLECT

In New Jersey, child abuse or neglect is very broadly defined. The applicable statute, N.J.S.A. 9:6-8.21(c), provides several alternative grounds for a finding that a parent has abused or neglected her child:

c. "Abused or neglected child" means a child less than [eighteen] years of age whose parent or guardian, as herein defined, (1) inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ; (2) creates or allows to be created a substantial or ongoing risk of physical injury to such child by other than accidental means which would be likely to cause death or serious or protracted disfigurement, or protracted loss or impairment of the function of any bodily organ; (3) commits or allows to be committed an act of sexual abuse against the child; (4) or a child whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as the result of the failure of his parent or guardian, as herein defined, to exercise a minimum degree of care (a) in supplying the child with adequate food, clothing, shelter, education, medical or surgical care though financially able to do so or

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² Known as the Division of Child Protection and Permanency (DCP&P), formerly the Division of Youth and Family Services (DYFS), in New Jersey.

though offered financial or other reasonable means to do so, or (b) in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or substantial risk thereof, including the infliction of excessive corporal punishment; or by any other acts of a similarly serious nature requiring the aid of the court; (5) or a child who has been willfully abandoned by his parent or guardian, as herein defined.

The section of N.J.S.A. 9:6–8.21(c) most commonly relied upon by the Division of Child Protection and Permanency ("DCP&P") to find that a child has been "neglected" is subsection (c)(4)(b) - i.e., "a child whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as the result of ... the failure of his parent or guardian to exercise a minimum degree of care". However, when a parent is incarcerated, the Division will often seek a finding based upon subsection (c)(5), i.e., a child who is "willfully abandoned by his parent or guardian". "Abandonment" is also defined in Title 9 at N.J.S.A. 9:6–1, as follows:

Abandonment of a child shall consist in *any* of the following acts by anyone having the custody or control of the child: (a) ***willfully forsaking*** a child; (b) failing to care for and keep the control and custody of a child so that the child shall be exposed to physical or moral risk without proper and sufficient protection; (c) failing to care for and keep the control and custody of a child so that the child shall be liable to be supported and maintained at the expense of the public, or by child caring societies or private persons not legally chargeable with its or their care, custody and control.

See also, Lavigne v. Family & Children's Soc'y of Elizabeth, 11 N.J. 473, 480 (1953) (describing abandonment, albeit in a context preceding the enactment of Title Nine, as conduct that " ' evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child' " (quoting Winans v. Luppie, 47 N.J. Eq. 302, 304 (E. & A. 1890))).

This definition of child abandonment involves a specific intent element that is often lacking when a parent becomes incarcerated. Many parents commit offenses outside the presence of their children and have no desire to forego parenting duties or to relinquish their claims to the child by committing criminal acts. Ultimately, our courts have held that whether a parent's incarceration constitutes abandonment depends upon the facts of each case. Incarceration is not *per se* child abuse or neglect.

The seminal case on this issue is In re Adoption of Children by L.A.S., 134 N.J. 127, 136 (1993). The L.A.S. case established that "[i]ncarceration is ... probative of whether the parent is incapable of properly caring for ... or has abandoned the child." It provides a framework for how to analyze not only the issue of whether the child was *willfully* abandoned by the parent, but also what, if any, long term resolution can be achieved as a result of the abandonment (i.e., whether or not parental rights should be terminated as a result).

TERMINATION OF PARENTAL RIGHTS

In L.A.S., the Court considered whether an incarcerated father's sentence to life in prison for first-degree murder warranted terminating his parental rights. L.A.S. at 130. The Court held that incarceration alone is insufficient to prove parental unfitness or abandonment and terminate parental rights. Id. at 137; *see also*, N.J.S.A. 30:4C-15.1(b) (detailing current three statutory bases for terminating parental rights on abandonment grounds).

Termination of parental rights is only permissible and appropriate in those circumstances where DCP&P can prove the following four overlapping prongs:

- (1) The child's safety, health or development has been or will continue to be endangered by the parental relationship;
- (2) The parent is unwilling or unable to eliminate the harm facing the child or is unable or unwilling to provide a safe and stable home for the child and the delay of permanent placement will add to the harm. Such harm may include evidence that separating the child from his resource family parents would cause serious and enduring emotional or psychological harm to the child;
- (3) The division has made reasonable efforts to provide services to help the parent correct the circumstances which led to the child's placement outside the home and the court has considered alternatives to termination of parental rights; and
- (4) Termination of parental rights will not do more harm than good.

N.J.S.A. 30:4C-15.1(a). Termination of parental rights on the grounds of abandonment are set forth in section (b), which provides that in order "to terminate parental rights on the ground that the "parent has abandoned the child" ... the following standards [must be] met:

- (1) a court finds that for a period of six or more months:
 - (a) the parent, although able to have contact, has had no contact with the child, the child's resource family parent or the division; and
 - (b) the parent's whereabouts are unknown, notwithstanding the division's reasonable efforts to locate the parent; or
- (2) where the identities of the parents are unknown and the division has exhausted all reasonable methods of attempting identification, the division may immediately file for termination of parental rights upon the completion of the law enforcement investigation; or

(3) where the parent voluntarily delivered the child to and left the child at, or voluntarily arranged for another person to deliver the child to and leave the child at a State, county or municipal police station or at an emergency department of a licensed general hospital in this State when the child is or appears to be no more than 30 days old, without expressing an intent to return for the child, as provided in [N.J.S.A. 30:4C-15.7], the Division shall file for termination of parental rights no later than 21 days after the day the division assumed care, custody and control of the child.

From a review of this statute, we know that if the identity of the parent is known, then the parent's incarceration must span six (6) months or more. Under the first statutory scheme, the parent must cease contact with the child, the resource parent (foster parent) or the Division, and essentially fall off the radar screen, despite the Division's reasonable efforts to locate them.

Under the second statutory scheme, if the parent is unknown to the Division, the Division must exhaust "all reasonable methods of attempting identification", and shall act upon receipt of the law enforcement search. This section applies to cases in which one parent (often the mother) does not identify the other parent (the father), the Division has exhausted all "reasonable methods" to locate the father (such as auditing neighbors, random checks to the mother's home, inquiries at hospitals, childcare centers and schools, etc.), and a review of records from the Department of Corrections and local law enforcement yields no information. Many parents may have legitimate basis to seek to void a judgment on the grounds that the Division declared them "unknown" because the other parent failed to identify the other parent, and the Division then failed to do enough to locate them. However, criminal records checks are routinely obtained by the Division, leaving this defense to termination of parental rights unavailable to incarcerated parents.

Because of these very specific requirements, the Division often does not rely upon abandonment as a basis to find abuse and neglect and the attendant basis to terminate parental rights. The basis often relies upon the harm found in a parent's absence and the impact on the child. This harm requires a fact-sensitive analysis of various factors established by the L.A.S. case. The Court in L.A.S. found "that unquestionably, incarceration is a relevant factor in resolving termination of parental rights cases. L.A.S., *supra*, 134 N.J. at 138. "However, it is by no means settled or obvious that incarceration is so inimical to that relationship as to justify its termination as a matter of law." Id. at 137. That said, an incarcerated parent has difficulty "performing the 'composite of tasks' associated with parenthood and cannot continue to undertake or to share the daily responsibilities of raising a child." Id. at 138–39.

The Court found that:

[A] parent's lengthy incarceration is a material factor that bears on whether parental rights should be terminated. Incarceration may be such a factor based on either abandonment or parental unfitness.

Further, we conclude that the nature of the underlying crime giving rise to incarceration is relevant in determining whether parental rights should be

terminated, because it may bear on parental unfitness. We also determine that the hearing to decide whether parental rights should be terminated must be based on a broad inquiry into all the circumstances bearing on **incarceration** and criminality, and must include an assessment of their significance in relation to abandonment or parental unfitness.

[Id. at 143.]

The Supreme Court remanded the case for consideration of whether the circumstances surrounding the father's lengthy incarceration were sufficient to terminate his parental rights based on the following factors:

[P]erformance as a parent before incarceration, to what extent his children were able to rely on him as a parent, and what effort, if any, he has made to remain in contact with his children since his incarceration. The court should also consider whether [the parent] will be able to communicate and visit with his children; what effect such communications and visitation will have on the children in terms of fulfilling the parental responsibility to provide nurture and emotional support, to offer guidance, advice, and instruction, and to maintain an emotional relationship with his children. Further, the court must consider the risk posed to his children by [the parent]'s criminal disposition; what rehabilitation, if any, has been accomplished since [the parent]'s incarceration; and the bearing of those factors on the parent-child relationship. The court should, with the aid of expert opinion, determine the need of the children for permanency and stability and whether continuation of the parent-child relationship with [the parent] will undermine that need. Further, the court should determine the effect that the continuation of the parent-child relationship will have on the psychological and emotional well-being of the children.

Id. at 143–44.

When evaluating these factors, the Court must still consider what efforts the Division has made to offer services appropriate given the circumstances to the incarcerated parent. In other words, the issue of incarceration and its impact on the child must be considered in assessing prong one - the harm to the child and whether the parent is willing or able to ameliorate that harm. But that does not end the inquiry, for the Court must find all four prongs of the statute exist before granting an application by the Division to terminate parental rights.

Prong three, i.e., whether the Division has made "reasonable efforts" depends on the facts and circumstances of each case. Id. The L.A.S. Court acknowledged that the Division is necessarily impeded by the difficulty and "possible futility" of providing services to an incarcerated parent. Id., citing N.J. Div. of Youth & Family Servs. v. S.A., 382 N.J. Super. 525, 535–36 (App.Div.2006). Courts have held that reasonable efforts may be satisfied when the Division provides services to, and seeks reunification with, the custodial parent from whom the child was removed. In re Guardianship of D.M.H., 161 N.J. 365, 393 (1999); *see also*, T.S.,

supra, 417 N.J.Super. at 242–44 (finding that, because father had no relationship with his daughter prior to incarceration, providing services to him would be futile). Although the Court has stated that providing services to incarcerated persons is difficult and may be futile, and that the Division is permitted to focus its services on the primary caretaker, the Division is not permitted to avoid providing services to all incarcerated persons, regardless of their seeming unwillingness to improve their parental fitness. *See* D.M.H., supra, 161 N.J. at 393. Absent an order under N.J.S.A. 30:4C–11.3, the Division may not ignore requests or avoid providing services to an incarcerated parent. *See* S.A., supra, 382 N.J.Super. at 535–36.

HOW THE LAW IS APPLIED

Armed with these precepts, one is left to question how the Courts have applied these principles to the facts before them. A review of published and unpublished cases addressing the impact of incarceration on parental rights appears to focus on the relationship between the incarcerated parent and the child. The younger the child, and the more tenuous the relationship between the incarcerated parent and the child, if a relationship exists at all, the greater likelihood that a lengthy incarceration may warrant termination of parental rights.

In New Jersey Div. of Youth and Family Services v. J.M., 2009 WL 2015246, the evidence established that a critical period in a child's development occurs between birth and the age of two when a child bonds with his caregiver. During this critical period for the baby, the parents were incarcerated, and the baby was therefore unable to bond with them. Because their respective terms of incarceration extended beyond this two year period, causing the parents to have essentially no relationship with the child that provided him with nurture or sustenance or that would harm him if disrupted, the length of the parents' incarceration, and the child's need for permanence and stability supported a finding of an abandonment, thereby satisfying the first prong of the Termination standard.

Incarceration out of state was held to be a major contributor to the Division's inability to facilitate some form of access between the incarcerated parent and the child, justifying termination of parental rights. *See*, New Jersey Division of Child Protection and Permanency v. A.R., 2014 WL 7883580. In A.R., the Court relieved the Division of the obligation to provide services to the incarcerated father where defendant was incarcerated in Virginia, rendering any attempt by the Division to visit him directly or arrange visitation with the child much more difficult than if he were in New Jersey. More compelling than the logistical difficulties was the fact that the defendant never requested visitation or contacted the Division regarding the child, even though the Division informed him of her removal from the custodial parent upon its occurrence. Under these circumstances, the Division was not obligated to do more.

The Appellate Division has held that a parent's recidivism may be sufficient to justify a finding of irreparable harm caused by a parent, sufficient to warrant a termination of parental rights. *See*, New Jersey Division of Child Protection & Permanency v. R.V.R., 2014 WL 7333378. In R.V.R., the father had been incarcerated numerous times, each time reoffending and each time, being incarcerated for multiple protracted periods. The Court's focus was on the cycle of inconsistency created by the father and its attendant harm to the child.

Many courts are loathe to compel visitation with the incarcerated parent in jail, especially where the parent and child had little to no relationship before the term of incarceration. *See, New Jersey Div. of Youth and Family Services v. D.H.*, 2005 WL 3196577. In *D.H.*, the father appealed the termination of his parental rights, premised upon the Division's failure to provide him with "adequate services", inasmuch as the Division did not arrange for supervised visitation at the prison. The Appellate panel affirmed the trial Court's finding that the Division need only provide what constitutes "reasonable" services, pursuant to N.J.S.A. 30:4C-15.1(c). Relying upon the absence of a prior relationship between father and daughter, and the father's long and continuing term of confinement, the Court held that it would be unreasonable to compel such visitation.

CONCLUSION

As with most areas of child welfare law, the determination of the legal consequence of incarceration on the parent-child relationship is not subject to bright-line rules and *per se* results. Rather, Courts are to be mindful that each child's circumstances warrant a fact-sensitive analysis. For parents who have established a relationship with their children before the term of incarceration, there is far greater hope for maintaining their parental rights despite being incarcerated. But, no matter the length of parent-child relationship, it is incumbent upon the parent to remain in contact with the Division, to offer oneself for rehabilitation and treatment, to request parental access with the child, in jail or prison or by electronic means, to remain proactive in seeking reunification with the child, and to make every effort to demonstrate an earnest desire to be a positive influence in the life of the child, no matter the previous choices made, which culminated in incarceration.