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ASFA threatens family bonds in a time of pandemic – Congress should Stop the Clock

By Kelly McGee, Staff Attorney

Congresswoman Gwen Moore has introduced legislation that is critically necessary to help parents whose children are in foster care and at risk of losing contact with their children, forever, because of COVID.

CFR has worked with more than 10,000 parents with 20,000 children since 2002. We work with approximately 2400 parents every year, half of whose children go into foster care. The overwhelming cause for these children entering foster care is allegations of ‘neglect’ which is often closely tied to poverty—substandard housing, inadequate daycare, or a lack of resources to connect to mental health or substance use services.

We meet parents when the City formally charges these parents, frequently on the first day they come to court- and all too often, immediately after the government has taken their children away. We represent them throughout the life of a case, including at the termination of parental rights stage.

Current federal law, because of a law called “ASFA” (which stands for the Adoption and Safe Families Act) states that if a parent’s child is in foster care for 15 out of 22 months, then they risk having their rights legally severed forever—which is called a ‘termination.’ This happens two ways: a parent is accused of failing to visit a child in foster care, or a parent is accused of failing to “plan” for a child’s safe return home. But even when a parent is doing their best, 15 months can pass quickly, especially if a parent is incarcerated for a short time, is struggling to address a mental health issue or overcome substance abuse, or has left an abusive partner and needs to find new housing and engage in counseling.

New York’s affordable housing crisis only compounds these issues; many of our clients have their children in foster care much longer than necessary because it takes so long to find a suitable apartment to house their reunified family. The only alternative is to reunite in a city shelter, which are often unsafe, poorly maintained and not places where many parents would want to raise children.

Preventing a termination is thus, for many parents, a race against the clock. But during the pandemic, that race is nearly impossible to win. The pandemic has had devastating effects on all of CFR’s clients—90% of whom are people of color who are disproportionately impacted by the pandemic. We are happy to see that Congresswoman Gwen Moore has introduced a bill to

ameliorate one of the most significant of these issues: parents having their rights terminated due to events beyond their control.

The Pandemic Poses A Severe Risk to Family Bonds:

For parents attempting to beat the ASFA clock, engaging in services such as individual counseling or substance use programs while enjoying quality visiting time with children is the primary route to reunification.

Recent reporting from the Department of Health and Human Services indicates that reunification of families was already at an all-time low; in 2017, reunifications dipped below 50% for the first time and continue to decline¹. COVID stands to make these statistics far worse because services and visits have been severely curtailed.

ASFA does not make automatic exceptions for catastrophic events such as COVID-19. Parents may now face the permanent loss of custody while the usual doors to reunification remain closed to them due to events beyond their control. If a parent's rights are terminated, they no longer have access to judicial recourse to ensure that they remain involved in a child's life. In New York, as in many jurisdictions, judges are prohibited from ordering post-termination contact between children and parents. As such, termination of parental rights severs all legal ties between a child and parent and forces a parent to rely on the decision of an adoptive parent as to whether they can visit with their child.

Congresswoman Gwen Moore's crucial legislation aims to provide an equitable alternative that would prevent agencies from using this pandemic-time to terminate parental rights.

Virtual Visits can't replace in-person time with your child:

For a parent whose child is in foster care, half the path to reunification is visiting. The ability to see their child for a few hours each week is a lifeline for promoting attachment and bonding. These crucial hours lessen the impact of removal by providing some consistency in connecting with their parents. However, in March of 2020, agencies across the country shut down their sites for visiting. Families who once ate, played games, and worked on homework together each week began only connecting via Facetime –if at all. Many families who lack the technology for virtual visits ceased seeing their children at all.

CFR conducted an internal survey of 753 families, comparing their visits before and after Governor Cuomo's NY Pause Executive Order was issued. Though the New York Administration for Children's Services (ACS) and the New York State Office for Children and Families issued guidance encouraging foster care agencies across the state to remain open and to continue facilitating in person visits using necessary precautions, 68 percent of our clients had their in person visits switched to virtual video visits. Many of our clients cannot even access this minimal visiting because of technology issues. Other parents of young children or children

¹ John Kelly, *Fewer Youth in Foster Care, But Family Reunifications Hit Record Low*, The Imprint (2020)

with disabilities are unable to have lengthy, meaningful visits due to their children's young age or special needs.

Of the 68 percent of CFR clients who are now virtually visiting,

- 88% of parents who had visits at an agency office switched to virtual visits
- 60% of parents who had visits supervised by a relative or friend in the community or in family homes switched to virtual
- 81% of parents who picked their children up for some unsupervised time before returning to an agency went virtual
- 55% of parents who enjoyed unsupervised day visits with their children went virtual
- 48% of parents who had their children for unsupervised overnight visits went virtual.

The vast majority of our clients who had agency supervised visitation when NY Pause went into effect were no longer able to have quality, face to face connection with their children. Approximately half of our clients who were able to see their children with no supervision stopped being able to see their children in person, and were only seeing them over a screen a few hours a week.

Alarming, of our clients whose children were in foster care and could only connect to them through virtual visits, 36% of the children were under the age of three; 50% were under the age of five. Parents of any child at that young age recognize how difficult it is to engage with them by phone or on a screen.

Many of our clients are still receiving a combination of in person and virtual visits as agencies begin to re-open since completely shutting down in mid-March. As parents and their children are slowly able to resume a portion of the family time they received before NY Pause, we cannot overstate the significant bonding and parenting time that our clients lost because of the shutdown and widespread agency closures.

Access to Services has been severely curtailed during COVID-19:

The other half of the path to reunification, our clients' ability to engage in needed services has been dramatically reduced or eliminated, due to events beyond their control.

Many parents engaged in important services like counseling or substance use treatment in person prior to the pandemic. Some, but not all of those services switched to virtual offerings. But many clients cannot engage in the services required to reunify due to issues with WiFi access (a common problem in NYC shelters) and lack of devices to connect to services. Parents also need access to technology in order to remain in contact with the foster care agency assigned to their case. They also need to be able to engage in important conferences where decisions are made about a plan for their children, which are now offered over video or phone. Based on CFR's interactions with our clients and the agencies, foster care agencies and ACS have failed to consistently provide support in remedying these technology issues.

Even if parents are able to connect online, these services are predominantly held in English; prior to the pandemic, our clients were able to access many services in other languages or with culturally competent providers. In a city as diverse as New York, it is still difficult for parents to access virtual counseling in Arabic, domestic violence classes in Bengali, or anger management classes in Creole.

Moreover, many of the services intended to promote attachment and bonding between parent and child are not suited to an online format. A parent who was engaging in play or dyadic therapy with their toddler in February of 2020 cannot engage in the same sensory experience with a young child as before.

Despite court orders requiring that agencies provide parents with referrals to services and monitor their compliance, many agencies have disavowed this responsibility due to the pressures and limitations posed by COVID-19. Though the law states agencies are supposed to make “diligent efforts” to assist parents in planning for reunification, when agencies refuse to do so, we have struggling parents effectively held to a higher standard, while the clock that could lead to the permanent break in their bond with their children just keeps ticking.

Congress should pass the Stop the Clock Act:

Families are thus threatened with the loss of their children and children face the possibility of becoming legal orphans by virtue of events beyond their control.

Congresswoman Gwen Moore’s bill, “Suspend the Timeline Not Parental Rights During a Public Health Crisis” Act, provides an equitable way forward. CFR heartily supports this bill, which would suspend the harsh ASFA timeline during the pandemic. The congresswoman’s bill would suspend the 15 month timeline imposed by ASFA during the pandemic and thus would allow families the time they need to reunify