

**Reinstatement of Parental Rights:
An Important Step Toward Solving the Problem of Legal Orphans**
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Even good laws sometimes have unintended negative consequences. The Adoption and Safe Families Act of 1997 (ASFA)¹ provides an excellent example of this phenomenon. ASFA, the preeminent federal child welfare statute, includes provisions intended to achieve timely permanency for children in the foster care system by expediting juvenile court processes toward the reunification or severance of families.² Striving to eliminate the problem of “foster care drift,”³ ASFA requires that a state move to terminate parental rights when a child has been in foster care for fifteen out of the most recent twenty-two months, unless certain exceptions apply.⁴ The law is oriented around a child’s sense of time, recognizing that delayed safety and permanency magnify the potential for prolonged trauma and emotional harm to the child. However, the legal process is imperfect and is inherently limited in its ability to realize the outcomes its processes are designed to reach. While ASFA’s tight timelines might have helped move many children to safer and more permanent families more quickly, the law also is responsible for the unintended consequence of creating a new population of “legal orphans.”

Legal orphans are children whose ties to their birth families have been legally severed through termination of parental rights, but who have not yet been adopted.⁵ For children who cannot be reunited with their parents, adoption is the preferred plan because it offers the greatest degree of legal permanence for the child within his new family. In order to free a child for adoption, the court must first terminate the legal rights of the child’s biological parents. However, when courts act either without an identified adoptive family for the child or with an adoptive resource that had been identified but subsequently fails, the termination renders the child a legal orphan.

The Proposed Model Code for Georgia (PMC), recently released by the State Bar of Georgia Young Lawyers Division Juvenile Law Committee, prescribes a remedy to the problem of legal orphans worthy of thoughtful consideration by the child advocacy community, the public, and state legislators. If enacted, it would create a process by which children can seek to have their parents’ legal rights restored following an involuntary termination of parental rights if certain conditions are met.

This white paper explains the value of the PMC provision for reinstatement of parental rights by taking a closer look at how the problem of legal orphans plays out in

¹ Adoption and Safe Families Act of 1997, Pub. L. No 105-89.

² 42 U.S.C. § 671(a)(15)(D)(i)-(iii) (2008).

³ “Foster care drift” refers to the situation in which children stay in foster care indefinitely while their parents struggle toward a reunification which may never happen.

⁴ 42 U.S.C. § 675(5)(D) (2008).

⁵ See Richard Brown, *Disinheriting the “Legal Orphan”: Inheritance Rights of Children after Termination of Parental Rights*, 70 Mo. L. REV. 125, 126 (2005).

Georgia, examining current Georgia law, and analyzing the relevant PMC provision and its projected impact.

Illustration of the Problem

Consider a typical case before a Georgia juvenile court. Deprivation of a child is alleged against a parent with a chronic and un-rehabilitated substance abuse problem. Through the life of the case the parent fails to successfully complete treatment despite repeated efforts to engage her. She loves her son, but ultimately faces a judicial proceeding to involuntarily terminate her parental rights because she cannot adequately care for him due to her incapacitated state. The termination of parental rights (TPR) is designed to legally situate her child to be permanently placed in another family, where he can benefit from greater stability, security, and nurturance. However, despite all good intentions, her son is not adopted by another family, perhaps because he is particularly challenging to parent as a result of special behavioral or health needs. He grows up in foster care, moving from placement to placement, arguably not receiving any more stability or nurturance than his mother was capable of providing. The TPR order operates to sever the legal relationship between him and his legal parents, his siblings and all extended family related by blood, marriage, or adoption. He is no longer able to inherit from his parents and cannot receive any public benefits that might flow to him through his parents.⁶ In a very real way, he becomes a legal orphan, belonging to no one legally or emotionally.

Now consider the likelihood that mother and son are able to maintain some degree of contact over the years through a shared network of relationships despite the juvenile court order severing their legal relationship. After years of struggle, his mother has managed to overcome her addiction, even though she did not do so in the amount of time provided by law to avoid the TPR, and her son has grown and matured and is better able to protect himself. Most importantly, she and her son still share the inviolable bond of their common biology. Unfortunately, they are now considered no more than strangers, at least legally-speaking.

Current Law

Older children, those with special physical, educational or emotional needs and those who come from larger sibling groups face dimmer prospects of finding an adoptive family, but that practical truth does not relieve the state of its interest in and responsibility for the well-being of those children, especially when state action leaves them parentless. Currently, Georgia does not offer a remedy for children left orphaned by the routine operation of the child welfare system. Consistent with ASFA, our state's deprivation laws set forth an aggressive timeline against which parents must correct and ameliorate the family conditions that necessitated the child's removal from the home or face a loss of their right to parent their child.⁷ Georgia's current Juvenile Code does not contemplate the possibility of reinstating parental rights after they have been surrendered or terminated; though it should be noted that no provision prohibits the re-establishment of parental rights.

⁶ See *Id.*

⁷ See O.C.G.A. §§ 15-11-58; 15-11-94 (2008).

In order to prevent parents from collaterally attacking a TPR order and delaying a child's right to a permanent home, juvenile courts lack explicit statutory authority to set aside an order terminating parental rights, even where circumstances have changed dramatically. However, some creative children's attorneys have been successful at achieving the ultimate outcome of restoring a legal parent-child relationship by persuading the juvenile court to approve a guardianship or custodial arrangement between a child and his or her parents following an involuntary TPR under certain case-specific circumstances, but these legal relationships fall short of full parent-child rights.⁸ Parents could theoretically adopt their biological child to whom they had lost parental rights, and anecdotes from practitioners in other states suggest this happens occasionally, but it is an unlikely and indirect route to recreate an intact family. Thus, for children who are freed for adoption through TPR but who are never actually adopted or are unlikely to be adopted, the laws do nothing to improve their station in life. Instead, the laws designed to protect and benefit them render them permanent legal orphans.

The most current data available suggests that this is the situation facing hundreds of children and youth in Georgia. As of September 30, 2007, 391 children in state custody had been lingering in foster care for three or more years since a court had terminated the rights of both of their parents. Their median age was 15.7 years and almost all were categorized as suffering from a disability. Over 100 of them were indicated as residing in institutional placements. More than half of these children are no longer being directed toward adoption, but rather are destined for emancipation or long-term foster care, and thus are unlikely to find a family before they age out of care at 18.⁹

Proposed Model Code Provision to Reinstate Parental Rights

The PMC includes a provision allowing a "child who has not been adopted after the passage of at least three years from the date the court terminated parental rights and for whom the court has determined that adoption is no longer the permanent plan" to petition the juvenile court to reinstate parental rights.¹⁰ The child may file the petition before the passage of three years if the state adoption agency agrees that the child is not likely to be adopted.¹¹ The court must notify DFCS, the child, the child's counsel and guardian *ad litem*, the child's foster parents, and the child's former parent whose rights were terminated, and conduct a hearing.¹² The child's petition to reinstate parental rights will be granted based upon clear and convincing evidence that the child is not likely to be adopted and that reinstatement of parental rights is in the child's best interests.¹³

The proposed statutory provision provides guidance to the court as to factors to consider when considering whether reinstatement of parental rights promotes the child's

⁸ For example, these relationships will not re-establish the child's right to inherit from the parents.

⁹ FFY 2007 AFCARS data provided by Andy Barclay on March 30, 2008.

¹⁰ P.M.C. § 15-11-423(a). This provision follows the progressive lead of California. *See* Cal. Welf. & Inst. Code § 366.26(i)(2).

¹¹ *Id.*

¹² *See id.* at (b).

¹³ *Id.*

best interests, including whether the parent is a fit parent and has corrected any deficits; the age and maturity of the child, and the ability of the child to express a preference; whether reinstatement of parental rights will present a risk to the child's health, welfare or safety; and any other material changes in circumstances.¹⁴ If the court grants the petition, the child will be restored to the parent's custody or, if necessary, transitioned with court supervision for six months.¹⁵

Notably, if enacted as proposed, this code section is explicitly intended to be retroactive, allowing children who are currently legal orphans to benefit by its passage.¹⁶ The focus of the provision is on providing additional protection for children, and in this way it is consistent with ASFA's child-focused framework. It recognizes the reality that biological and emotional bonds are not cleanly dissolved when legal ones are, and that sometimes parents can recover or reform after the case plan has run its course.¹⁷ Adding this provision to Georgia's Juvenile Code would create needed balance between the drive to get children to permanency as quickly as possible, and the recognition that sometimes formerly unfit parents can be a child's best resource.

The section does not undermine the goal of permanency or relieve the responsibility of the Division of Family and Children Services (DFCS) and the juvenile courts for moving cases forward. The PMC comments on this section note that the reason the petition can only be brought by the child is to alleviate concerns that a former parent whose rights have been terminated might attempt to delay or derail a pending adoption by bringing their own petition.¹⁸ Thus, this provision would preserve courts and DFCS's responsibility to achieve timely permanency for children, while providing an additional option for children when an adoption outcome cannot be achieved.

Conclusion

The experience of the past ten years practicing under ASFA and the state laws that implement it has shown that critical gaps exist in protection for children whose parents' rights have been terminated. Georgia's laws, like those of other states, reflect the urgency felt to expeditiously establish a permanent family for a child, but at the same time they fail to provide a practical solution for children for whom the processes have failed to work as intended. The PMC provision for reinstatement of parental rights would provide a valuable additional tool for children and child welfare professionals, while honoring ASFA's child-focused timeline to permanency. It would allow greater flexibility for courts, the child welfare system, and children's attorneys to engineer solutions tailored to the unique circumstances of an individual child that will produce better long-term outcomes for that child. It should be enacted by the Georgia legislature.

¹⁴ See *id.* at (c).

¹⁵ See *id.* at (d).

¹⁶ See *id.* at (f).

¹⁷ Some family problems, such as substance abuse, can take years to effectively address. See Nora Volkow, National Institutes of Health, *Science of Addiction*, available from the American Medical Association web site at http://www.ama-assn.org/ama1/pub/upload/mm/388/sci_drug_addiction.pdf (last visited May 14, 2008).

¹⁸ Comments, P.M.C. § 15-11-423.