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Proceedings to Terminate Parental Rights

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Inside

Best Interests of the Child Remain Paramount in Proceedings To Terminate Parental Rights

By Anne Crick and Gerald Lebovits

Except for going to jail, nothing interferes with personal liberty more than terminating a parent's right to a child. New York Social Services Law (hereinafter "SSL") § 384-b safeguards parents' due process rights, but its focus is on children's best interests. As SSL § 384-b(1)(a) provides, "the health and safety of children is of paramount importance."

The law of terminating parental rights includes recent statutory changes to SSL § 384-b and their application in current case law, as well as the interaction of termination proceedings with abuse and neglect proceedings under Article 10 of the Family Court Act (hereinafter "FCA").

The Decision to File

A petition to terminate parental rights (hereinafter "TPR") is filed on behalf of a foster child by a foster care agency to place the child in the agency's care and custody, thus freeing the child for adoption. The agency may have determined independently that the child's best interests would be served by freeing the child for adoption, or it may be under a court order to file or be compelled to file by statutory deadlines.

The Adoption and Safe Families Act (hereinafter "ASFA"), enacted federally in 1997[1] and implemented in New York in 1999,[2] is designed to achieve permanence for children who have been in foster care for extensive periods of time. ASFA encourages agencies to expedite children's departure from foster care by returning them to rehabilitated parents or by freeing them for adoption.[3] To this end, ASFA requires yearly permanency hearings for every child in foster care so that Family Court can monitor the agency's service plan and assess whether the agency and the parent are actively working toward reunifying parent and child.[4] If the court finds that the permanency goal of reunification is not in the child's best interests, it may order the agency to file a TPR petition.[5]

Statutory deadlines may also require an agency to file a TPR petition. ASFA created new deadlines by which an agency must file a TPR petition. The deadlines prevent children from languishing in foster care if the agency's diligent efforts fail to permit the safe reunification of parent and child. The agency must file if the child has been in foster care for 15 of the last 22 months; six months if Family Court previously entered an abandonment finding in an FCA Article 10 neglect case; or a year if the parent was convicted of a crime connoting severe or repeated abuse.[6] The agency need not file if the child is with a relative in kinship foster care or direct parental placement; the agency did not diligently offer the parent rehabilitative services; or the agency has a documented, compelling reason not to file, as when the permanency goal is not adoption or the child is over 14 and will not consent to adoption.[7]

ASFA's critics were concerned that the new deadlines would cause parental rights to be terminated unnecessarily or precipitously.[8] Sometimes 15 months is too short for a parent to be rehabilitated. In other cases, the parent has consistently visited and maintained a parent-

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child bond with an older child that the agency is loath to break permanently—even if the agency knows that the child cannot be returned to the parent safely. The TPR deadlines can help break this stalemate and assist in safely returning the child home.

Parents who have been less than diligent about participating in rehabilitative services receive a wake-up call when a TPR is filed. With the time it takes to conclude a TPR, a respondent-parent can demonstrate at disposition rehabilitation achieved while the TPR is pending. In these cases, if reunification with the parent is in the child's best interests, the judge can suspend judgment, imposing conditions the parent must fulfill so that the child's permanency is achieved quickly.

Filing the Petition: How, What, Who?

TPR petitions are filed by the child's foster care agency. In New York City, if the Administration for Children's Services (hereinafter "ACS") placed the child directly into a foster home, ACS is the "foster care agency" and will file the TPR. A relative who has care and custody of the child may also file a TPR petition. If the agency has failed to comply with ASFA's deadlines or a court order to file the TPR by a certain deadline, the child's foster parent or the child's law guardian may file the TPR on the court's direction.[9]

One petition must be filed for each child, who must be under 18 when the petition is filed. Mothers and all legal and putative fathers must be named as respondents. Surrogate Court and Family Court have concurrent, original jurisdiction when both parents die or abandon the child. Family Court has exclusive original jurisdiction over all other cases.[10]

The foster care agency must attempt personal service on the parents. If that fails, the court may allow substituted service.[11] If the agency does not know where the parent is, the court may authorize publication notice if the agency submits an affidavit documenting its diligent efforts to find the parent.[12]

Notice must also be served on those who fit the statutory definition of "notice fathers," fathers of out-of-wedlock children who have no parental rights that must be terminated before adoption but who are entitled to receive a TPR petition.[13] Notice fathers may offer evidence about the child's best interests. In permanent-neglect cases they may participate only at disposition.[14] Although a notice father's rights need not be terminated, an agency that has a cause of action against a notice father should name him as a respondent rather than risk a later challenge to adoption.

The court will assign a law guardian for the child. In New York City, the law guardian will, absent a conflict of interest, be a staff attorney from The Legal Aid Society, Juvenile Rights Division. In counties that have no Legal Aid Society, the child's law guardian will be selected from the local assigned-counsel roster. The court makes every effort to assign the child the same law guardian who has been representing the child in the underlying neglect or abuse case and in the yearly permanency hearings.[15]

If the agency asserts in its TPR petition that diligent efforts should be excused as against the child's best interests, then the agency must prove this element at the TPR fact-finding hearing.

If one or more of the respondent-parents cannot afford counsel, the court will appoint one. But respondent-parents do not enjoy continuity of counsel. At the close of disposition of the neglect or abuse case, the respondent-parent's attorney is discharged. Every year, when the agency petitions to extend the child's placement in care, the respondent must again request legal representation. Recognizing the need for continuity, many judges will ask the original attorney to pick the case back up, but the attorney need not do so. And it is during these years that the parent is in most need of a zealous advocate to ensure that the agency is doing all it should to reunite parent and child.[16] By the time the TPR is filed, it may be too late for the attorney who is handling the TPR to affect the outcome of the case.

Diligent Efforts: To Plead or Not to Plead?

A cause of action that includes the agency's diligent efforts to reunite parent and child must be pled in detail, specifying efforts and time periods of the efforts.[17] Instead of pleading diligent efforts, the agency may assert that efforts should be excused as contrary to the child's best interests or that efforts have been previously excused by court order pursuant to FCA § 1039-b.

If the agency asserts in its TPR petition that diligent efforts should be excused as against the child's best interests, then the agency must prove this element at the TPR fact-finding hearing. For example, if the parent is abusive during visits, or if visits traumatize the child, the agency may be excused from attempting to strengthen the parent-child bond through visitation.[18] An agency's diligent efforts, however, include not only facilitating visitation but also providing rehabilitative services. Respondent-parents should argue that the agency cannot show how working to rehabilitate the

parent contravenes the child's best interests. Even if parent-child contact would harm the child, the respondent should argue, parent-caseworker contact would not be harmful. The respondent can further argue that if the agency had provided better rehabilitative services, perhaps visitation would have ceased being contrary to the child's best interests. These arguments explain why it is difficult to excuse diligent efforts when a TPR is filed.

Alternatively, the agency may assert that diligent efforts need not be pled because Family Court previously excused them under FCA § 1039-b. The petitioner in an Article 10 neglect or abuse case may file an FCA § 1039-b motion to excuse "reasonable" efforts to reunite parent and child. This motion may be filed any time after the neglect or abuse case is filed. A motion under FCA § 1039-b will be granted if the agency shows that the parent repeatedly or severely abused the child; that the parent was convicted of killing another child of the parent or attempting or conspiring to kill or soliciting the murder of the subject child or another child of the parent; that the parent was convicted of assault causing serious physical injury to the child or another child of the parent; or that a prior TPR ended the parent's rights to another child.

If the agency's motion is based on a prior TPR, the parent can defend by proving that parental reunification is in the subject child's best interests, that reasonable efforts will promote the child's health, and that reasonable efforts to rehabilitate the parent will likely succeed.

Some have suggested that the standard of proof at a hearing under FCA § 1039-b should be clear and convincing evidence, because a finding to excuse reasonable efforts may someday be used in a TPR proceeding, which must be proven to that standard.[19] However, FCA § 1039-b is contained in FCA Article 10, which requires only a fair preponderance of the evidence.[20]

An FCA § 1039-b motion may be filed any time after the neglect or abuse case is filed. The question therefore arises whether an agency may use the motion retroactively to excuse its past obligation to make efforts. In *Marino S.*, the most thoroughly reasoned case on point, Family Court held that a motion under FCA § 1039-b may be filed when the TPR is filed and may work retroactively to excuse unmade agency efforts.[21] The *Marino S.* court accepted the filing of an FCA § 1039-b motion but noted its redundancy with the court's ability to excuse diligent efforts in the fact-finding stage of the TPR.[22] The Appellate Division put the question to rest in *Fernando V.* by holding that an FCA § 1039-b motion may be filed concurrently with a TPR. The *Fernando V.* court went further by holding that terminating a parent's rights to a sibling excused lack of efforts to the subject child, although in that case all the TPRs were filed concurrently.[23]

In any event, the agency should file an FCA § 1039-b motion as soon as possible because the court need not grant the motion retroactively. The better practice in planning for a child's future is to get advance permission not to make reasonable efforts rather than to seek forgiveness later.

Choosing and Defending a Cause of Action

The four causes of action for terminating parental rights are abandonment, permanent neglect, parental mental illness or retardation, and severe or repeated abuse. By far the most common is permanent neglect, which covers most circumstances, including many encompassed by other causes of action.

Abandonment In an abandonment action, the agency must prove that the parent failed to maintain contact with the child and the agency for six months.[24] The agency must prove that the parent intended to forgo parental rights and obligations by failing to visit and communicate with the child or agency though able to do so.[25] The parent's subjective intent is irrelevant.[26] An action may be based on parental actions even if the parent intends to maintain parental rights.[27]

Unlike a permanent-neglect action, discussed below, the agency need not prove in an abandonment case that it tried to reunite parent and child, even if the agency can contact the parent.[28] Similarly, the agency need not prove that it tried to find a parent whose location is unknown.[29]

The ability to visit is presumed. If the agency proves lack of contact, the burden falls to the parent to prove inability to contact.[30] Ability to contact is presumed even if the parent is incarcerated or in another state. A jailed parent must maintain contact with the agency and child.[31] The parent's claim of not knowing the child's location is no defense absent proof the parent has made every effort to find the child.[32] A parent may prove an inability to visit and communicate by showing physical or financial inability or that the agency prevented or discouraged communication. If so, an abandonment action will fail. But insubstantial or sporadic contact will not defeat a finding of abandonment.[33]

The six-month period must immediately precede the petition's filing. If a parent fails to maintain contact with the child and agency for six months or longer, and the agency is planning to file a TPR petition based on abandonment, the parent can defeat the TPR by one meaningful contact with the child the day before filing. But if the child has been in care for a year, a TPR may still lie in permanent neglect.

Permanent Neglect For a permanent-neglect action to succeed, the agency must prove that the parent neglected the child for 12 consecutive months the child was in foster care. These 12 months can be for any year

the child was in care, not necessarily the year before the TPR is filed.[34] Thus, if a parent neglects a child the first year the child is in care but then works with the agency, the agency may still file a TPR if the child's best interests are served by adoption, perhaps because the child has bonded with the foster parent.

For the year of permanent neglect, the agency must prove that the parent failed to plan for the child's departure from foster care to a stable home or failed to maintain contact substantially and continuously or repeatedly with the child, although physically and financially able to do so. A parent's success in one of those two areas will not substitute for a lack in the other. A permanent-neglect case will succeed if the parent failed either to plan with the agency or to visit the child. The parent must maintain consistent and meaningful contact with the child. Sporadic or brief visits will not defeat a permanent-neglect action.[35]

A parent must work with the agency to plan for the child's departure from foster care. A parent may do so by arranging for the child to be discharged to a fit and willing relative. Generally, however, a parent is expected to plan for the child's future by cooperating with agency referrals for rehabilitative services so that the child may be returned home to the parent safely. The parent must participate in the services earnestly. As the Third Department has held, "Token participation in the program offered by the agency, without ameliorating the condition that led to the removal of the child from the parents' home, will not preclude a finding of failure to plan."[36]

The agency must prove that it diligently tried to strengthen the parent-child relationship. The agency must keep the parent informed of the child's well-being, offer services to resolve what caused the child to be in foster care, include the parent in planning for the child's departure from foster care, and arrange for parent-child visitation.[37] Because a permanent-neglect finding may lie in the parent's failure to visit the child or to plan for the child's departure from foster care, the agency must prove diligent efforts appropriate to the allegation against the parent. If the allegation is that the parent failed to plan, the agency must prove that it diligently encouraged the parent to plan. If the allegation is that the parent failed to visit the child, the agency must prove that it diligently encouraged visitation.

The agency's efforts are excused if Family Court previously granted a motion to excuse reasonable efforts under FCA § 1039-b. Diligent efforts are also excused if the agency shows at the TPR phase that these efforts would have been detrimental to the child's best interests.

Incarceration does not excuse a parent's failure to plan or the agency's failure to make reasonable efforts.[38] The incarcerated parent must provide a feasible plan for the child's discharge from foster care. The agency must take the incarceration into account in formulating the service plan and arranging visitation. But agency efforts are excused if incarcerated parents fail more than once to cooperate in planning or visiting.[39]

Diligent efforts are further excused if the parent fails to apprise the agency of the parent's whereabouts for six months.[40] If the agency does not know where the parent is, the agency cannot provide services or arrange visitation. This exception applies if the parent has contact with the child but not the agency, a circumstance seen most often in kinship foster-care cases when the parent visits the child in the relative's home and the neglect lies in failing to plan with the agency for the child's return.

The permanent-neglect cause of action is the most commonly used of the four causes of action. If a cause of action can be found in permanent neglect and another cause of action, permanent neglect is often easier to prove. Permanent neglect can be proved if the parent refuses to acknowledge severe or repeated abuse. A parent's failure to acknowledge severe or repeated abuse prevents meaningful rehabilitation and the child from being returned to the parent safely.[41] Similarly, if a mentally ill parent would be capable of caring for a child if compliant with medication but has a history of noncompliance, the agency may file on both mental illness and permanent neglect grounds.

Severe or Repeated Abuse For a TPR based on severe or repeated abuse, the agency must prove that the child has been in foster care for 12 months immediately before the petition is filed.[42] If Family Court enters an order pursuant to FCA § 1039-b that reasonable efforts are not necessary, the agency may file a TPR based on severe abuse immediately, but fact finding may not commence until after the child has been in care for one year. Evidence of facts and circumstances up to the date of the hearing are admissible.[43]

A finding of severe abuse under FCA Article 10 is admissible and relevant in a TPR for severe abuse. Article 10 petitions alleging abuse must contain a notice that a finding of severe or repeated abuse by clear and convincing evidence could constitute a basis to terminate parental rights in a subsequent proceeding under SSL § 384-b. An Article 10 order of fact finding that specifies that the determination was made on clear and convincing evidence is conclusive in a TPR proceeding.[44]

To show severe abuse, the agency may prove that the child was physically or sexually abused, that the parent was convicted of killing or attempting to kill another child in the parent's care, or that the parent was convicted of assaulting the child or another child in the parent's care.[45] For TPR cases arising from physical abuse, the agency must show that the child has suffered serious

physical injury because of the parent's reckless or intentional acts under circumstances evincing a depraved indifference to human life.[46] For cases arising from sexual abuse, the agency must show that the child was abused because the parent committed or allowed to be committed a sexual felony on the child.[47]

For cases arising from killing or attempted murder, the agency must show that the parent was convicted of murder or manslaughter of another child of the parent or attempted murder or manslaughter of the child, another child of the parent, or another child for whose care the parent was responsible,[48] or of soliciting, conspiring or facilitating the same.[49] For cases arising from assault, the agency must show that the parent was convicted of committing or attempting to commit assault in the first or second degree or aggravated assault against the child, sibling or another child for whose care the parent was responsible.[50]

In all cases of severe abuse, the agency must demonstrate that it diligently tried to rehabilitate the abusive parent and strengthen the parental relationship and that these efforts were and will likely be unsuccessful in the foreseeable future. The agency need not prove diligent efforts not in the child's best interests or if the court previously found under FCA § 1039-b that diligent efforts are not required.

For a TPR based on severe or repeated abuse, the agency must prove that the child has been in foster care for 12 months immediately before the petition is filed.

Proving repeated abuse is more difficult than proving severe abuse. The agency must prove three elements to establish repeated abuse: abuse of the subject child, prior abuse of the subject child or another child in the parent's care, and the agency's diligent efforts to rehabilitate the parent.[51] The agency must prove by clear and convincing evidence either the abuse of the subject child or the prior abuse. The other instance may be shown by a preponderance.[52] A prior finding under Article 10 is admissible, and a finding by clear and convincing evidence is sufficient for the subject child's abuse or the prior abuse.[53]

The agency may demonstrate the first element, that the subject child was abused, by demonstrating either physical or sexual abuse. Physical abuse is shown by proof that the parent caused the child physical injury that created substantial risk of death, serious or protracted disfigurement, protracted impairment of physical or emotional health, or protracted loss or impairment of a bodily organ.[54] Sexual abuse is shown by proof that the parent committed or knowingly allowed a felony sex offense on the child.[55]

The second element, a prior incident of abuse, is established by proof that within five years prior to the TPR filing, the parent inflicted or allowed to be inflicted physical abuse or a felony sex offense upon the subject child or another child for whom the parent was responsible. Alternatively, the agency may offer proof that within five years prior to the TPR filing the parent was convicted of a sexual felony against the subject child, a sibling of the child or any other child for whom the parent was responsible.[56]

As in an action for severe abuse, the agency must prove that it made diligent efforts to rehabilitate the parent and strengthen the parental relationship and that these efforts were unsuccessful and are unlikely to be successful in the foreseeable future. The agency need not prove diligent efforts not in the child's best interests or if the court previously found that diligent efforts are not required under FCA § 1039-b.

Mental Illness or Retardation The relevant period of time for a cause of action for parental mental illness or retardation is prospective rather than retrospective, as is the case for the other causes of action. The agency must prove that the parent is "presently and for the foreseeable future unable, by reason of mental illness or mental retardation, to provide proper and adequate care for a child."[57] The child must have been in care for a year immediately before the petition is filed.

Mental illness is "an affliction with a mental disease or mental condition which is manifested by a disorder or disturbance in behavior, feeling, thinking or judgment to such an extent that if such child were placed in or returned to the custody of the parent, the child would be in danger of becoming a neglected child."[58] Mental retardation is "sub-average intellectual functioning . . . with impairment in adaptive behavior to such an extent that if such child were placed in or returned to the custody of the parent, the child would be in danger of becoming a neglected child."[59]

For a mentally ill or retarded parent, the agency must prove that the child would be in danger of neglect if left in the parent's care. Proof is not of parental fault or actual harm to the child but rather potential harm. Evidence of past neglect of children in the parent's care is relevant but unnecessary.[60]

The judge must hear from a court-appointed psychologist or psychiatrist and may receive other psychiatric, psychological or medical evidence from the

agency or parent. If the parent cannot be examined, the expert may testify from information that affords a reasonable basis for expert opinion.[61] The court may also consider the child's special needs to determine whether a parent who suffers from mental illness or retardation can meet those needs.[62]

Fact Finding, Dispositions and Permanency

At the fact-finding hearing of a TPR, the foster care agency must prove its cause of action by clear and convincing evidence.[63] Only competent, relevant and material evidence is admissible, but privileged communications are admissible.[64]

All evidence of circumstances and events that occurred after the child came into care and before the TPR petition was filed is admissible. Only the petitioning agency, the respondent-parents and the child's attorney may participate. The child's attorney, the law guardian, will advocate for the child's subjective wishes unless the child is too young to participate in planning the case. If so, the law guardian will advocate for the child's best interests based on objective criteria.

If the court finds that the agency has failed to establish its cause of action, the TPR will be dismissed. If the court enters a finding, it will proceed immediately to disposition or adjourn for a full dispositional hearing. At disposition, the only issue is whether the child's best interests will be served by being freed for adoption.[65] No presumption exists that the child's best interests are served by being returned to the parents.[66]

If the TPR is for permanent neglect or severe or repeated abuse, there must be a full dispositional hearing. Dispositional hearings are not required for TPRs based on abandonment or mental illness or retardation.[67] If held, they are typically perfunctory and center not on whether the parent's rights should be terminated but on the child's best interests and the plan for effecting adoption, especially if more than one adoptive resource has come forward.

Evidence at the dispositional hearing may include all facts and circumstances up to the dispositional hearing. At disposition, notice fathers, relatives and foster parents may intervene.[68] When the TPR is for permanent neglect, the standard at disposition is preponderance. All material and relevant evidence, including hearsay, is admissible. When the TPR is for severe or repeated abuse, the standard at disposition is clear and convincing. Only material, relevant and competent evidence is admissible.[69]

In the end, the success or failure of achieving permanency for children rests not in statutory amendments but in the daily efforts of the caseworkers, parents, lawyers and judges.

At the close of the dispositional hearing, the court may dismiss the petition, suspend judgment or terminate parental rights. If the court terminates parental rights, the court may commit the child to the custody of the agency, the foster parent or a relative who already has care and custody of the child. The court does not have the discretion to commit the child to a nonparty's custody.[70] The court usually commits the child to the custody of the agency, which may then consent to the child's adoption.

If the court suspends judgment, it is usually for six months or a year. Judgment may be suspended when the parent's circumstances have changed since the TPR was filed and the court finds that reunification with the parent is possible in the near future and in the child's best interests. When that happens, it is most often because the child is with relatives and has maintained a parental bond. A suspended judgment will have conditions the parent must fulfill. If the parent fails to fulfill these conditions, the agency may move to vacate the order and need only prove the parent's failure and, if applicable, the agency's efforts to provide rehabilitation. The court may terminate parental rights on proof to a preponderance that the parent failed to comply with the suspended judgment.[71]

Permanency hearings must be held yearly for every child in foster care, starting a year after foster-care placement.[72] Hearings continue after the child has been freed for adoption for every child not in a pre-adoptive home and for every child in a pre-adoptive home for whom no adoption petition is filed.[73] The issues at post-TPR permanency hearings are the appropriateness of the service plan, the status of the adoption process, and anything else about establishing permanency for the child and promoting the child's best interests.

Conclusion

TPR law is complex and important for parents, children and the public. Although ASFA increased the number of TPR petitions, it did not increase the resources necessary to achieve permanency, including funds for rehabilitative services and decreased caseloads for caseworkers.[74] Nor did ASFA provide for more lawyers and judges to handle the increased number of TPR filings—"[s]kyrocketing caseloads . . . not likely to diminish,"[75] according to New York State Chief Judge Judith S. Kaye

and Chief Administrative Judge Jonathan Lippman, that have led to further backlog in an already overloaded system.[76]

In the end, the success or failure of achieving permanency for children rests not in statutory amendments but in the daily efforts of the caseworkers, parents, lawyers and judges, all of whom must strive to seek the best for children, who desperately deserve and need safe and stable lives.

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1. Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified as amended in scattered sections of 42 U.S.C.).
2. 1999 N.Y. Laws ch. 7 statutory amendments to the N.Y. Family Court Act (hereinafter "FCA") and N.Y. Social Services Law (hereinafter "SSL"). *See generally* Cheryl Bradley, "Termination of Parental Rights in New York" in *New York Family Court Practice* ch. 4 (Merril Sobie ed., 1996); Janet R. Fink, *Implementing the Federal Adoption and Safe Families Act in New York, A Primer on the New Statute* 157, PLI Litig. & Admin. Prac. Course Handbk Ser. (Children's L. Inst. 1999).
3. Douglas H. Reiniger, "The Adoption and Safe Families Act/New York" in *Child Abuse, Neglect and the Foster Care System: Effective Social Work and the Legal System—The Attorney's Role and Responsibilities* 499, 502, PLI Litig. & Admin. Prac. Course Handbk. Ser. (2000) ("[T]he child is now the paramount concern. Agencies [must] engage in 'concurrent planning': from initial placement, social workers must simultaneously work . . . toward discharge . . . and adoptive planning. Efforts to recruit pre-adoptive homes and place foster children in pre-adoptive homes must [begin] as soon as a child is placed in foster care.").
4. SSL § 392; FCA § 1055.
5. FCA § 1055. In *In re Dale P.*, 84 N.Y.2d 72, 78, 614 N.Y.S.2d 967, 969-70 (1994), the Court of Appeals upheld a Family Court order directing the Commissioner of Social Services to file a TPR petition on behalf of a child not in foster care but directly placed in the care of a nonrelative custodian.
6. SSL § 384-b(3)(l)(i); Lauren Shapiro, *Adoption and Safe Families Act: New York State Implementation Law* 174, 180-81, PLI Litig. & Admin. Pract. Course Handbk. Ser. (Children's L. Inst. 1999) (explaining how ASFA altered agency determinations to file TPRs).
7. SSL § 384-b(3)(l)(ii); Alexander D. Lowe & Lisa Parrish, *Implementation of the Adoption and Safe Families Act: Part I—Guidelines for Permanency Reviews* 86, 94-99, PLI Litig. & Admin. Prac. Course Handbk. Ser. (Children's L. Inst. 2000) (detailing mandatory-filing requirement and outlining exceptions).
8. Interview with Edwina Richardson-Thomas, Esq., March 28, 2001. Ms. Richardson-Thomas, a County Law Art. 18-B attorney who specializes in TPR cases in Manhattan Family Court, chairs the Committee on Children and the Law of the Association of the Bar of the City of New York.
9. SSL § 384-b(3)(b); SSL § 384-b(3)(*l*)(iv).
10. SSL § 384-b(3)(d).
11. SSL § 384-b(3)(e).
12. Joseph R. Carrieri, *Practice Commentary to SSL § 384-b*, *McKinney's Cons. Laws of N.Y.*, *Book 52A*, at 334-37 (Supp. 2001) (explaining procedure and providing diligent-search checklist).
13. SSL § 384-c.
14. SSL § 384-c(3).
15. SSL § 384-b(3)(c).
16. Interview with Ms. Richardson-Thomas, *supra* note 8.
17. *In re Sheila G.*, 61 N.Y.2d 368, 373, 474 N.Y.S.2d 421, 422 (1984).
18. *In re Terry D.*, 53 A.D.2d 957, 957-58, 385 N.Y.S.2d 844, 845 (3d Dep't 1976).
19. *See, e.g.*, Fink, *supra* note 2, at 164 (citing *Santosky v. Kramer*, 455 U.S. 745 (1982) (requiring clear and convincing evidence to terminate parental rights)).
20. FCA § 1046(b); *In re Custody & Guardianship of Marino S., Jr.*, 181 Misc. 2d 264, 277-81, 693 N.Y.S.2d 822, 832-34 (Fam. Ct., N.Y. Co. 1999).
21. *See Marino S.*, 181 Misc. 2d at 277-81, 693 N.Y.S.2d at 832-34; *but see In re Jordy O.*, 182 Misc. 2d 42, 44, 696 N.Y.S.2d 654, 655-56 (Fam. Ct., N.Y. Co. 1999).
22. *See Marino S.*, 181 Misc. 2d at 280-81, 693 N.Y.S.2d at 833-34.
23. *See In re Commitment of Fernando V.*, 275 A.D.2d 280, 282, 712 N.Y.S.2d 537, 539 (1st Dep't 2000), *lv. denied* (N.Y. Feb. 20, 2001).
24. SSL § 384-b(4)(b).
25. SSL § 384-b(5)(a).
26. SSL § 384-b(5)(b).
27. *In re Vanessa F.*, 76 Misc. 2d 617, 621, 351 N.Y.S.2d 337, 343 (Sur. Ct., N.Y. Co. 1974).
28. SSL § 384-b(5)(b); *In re Anonymous*, 40 N.Y.2d 96, 103, 386 N.Y.S.2d 59, 63 (1976); *In re John T.*, 260 A.D.2d 642, 642, 688 N.Y.S.2d 697, 698 (2d Dep't 1999).
29. *In re Julius P.*, 63 N.Y.2d 477, 482-84, 483 N.Y.S.2d 175, 177-78 (1984).
30. *In re Howard R., Jr.*, 258 A.D.2d 893, 894, 685 N.Y.S.2d 369, 370 (4th Dep't), *lv. denied*, 93 N.Y.2d 816, 697 N.Y.S.2d 563 (1999); *In re Chaka F.*, 220 A.D.2d 310, 310, 632 N.Y.S.2d 552, 552 (1st Dep't 1995).
31. *In re Lakeside Family & Childrens Servs. ex rel. Angel Takima C.*, 242 A.D.2d 536, 537, 662 N.Y.S.2d 74, 75 (2d Dep't 1997).
32. *In re Anthony M.*, 195 A.D.2d 315, 316, 600 N.Y.S.2d 37, 39 (1st Dep't 1993).
33. *In re Alex "MM."*, 260 A.D.2d 675, 676, 688 N.Y.S.2d 707, 709 (3d Dep't 1999); *In re Michael W.*, 191 A.D.2d 287, 287, 595 N.Y.S.2d 30, 30-31 (1st Dep't 1993).
34. SSL § 384-b(7).
35. *In re Joseph ZZ.*, 245 A.D.2d 881, 883, 666 N.Y.S.2d 827, 831 (3d Dep't 1997), *lv. denied*, 91 N.Y.2d 810, 670 N.Y.S.2d 404 (1998).
36. *In re Jesus JJ.*, 232 A.D.2d 752, 754, 649 N.Y.S.2d 61, 64 (3d Dep't 1996), *lv. denied*, 89 N.Y.2d 809, 655 N.Y.S.2d 889 (1997).
37. SSL § 384-b(7)(f).
38. Joseph R. Carrieri, *The Rights of Incarcerated Parents*, N.Y.L.J., Jan. 12, 1990, at 1, col. 1.
39. *In re Custody & Guardianship of Sasha R.*, 246 A.D.2d 1, 5-6, 675 N.Y.S.2d 605, 607-08 (1st Dep't 1998).
40. SSL § 384-b(7)(e); *In re Vincent Anthony C.*, 235 A.D.2d 283, 283, 652 N.Y.S.2d 289, 290 (1st Dep't 1997) (holding diligent efforts excused for entire 12-month period).

41. *Jesus JJ.*, 232 A.D.2d at 754, 649 N.Y.S.2d at 63 (granting TPR for failure to plan based on father's refusal to acknowledge sexual abuse).
42. SSL § 384-b(4).
43. Shapiro, *supra* note 6, at 181.
44. SSL § 384-b(8)(d); Fink, *supra* note 2, at 169-70.
45. SSL § 834-b(8)(a). Note that one parent's murder of the other parent is not a ground to terminate parental rights in New York. For an argument that it should be, see Lillian Wan, *Parents Killing Parents: Creating a Presumption of Unfitness*, 63 Albany L. Rev. 333 (1999).
46. SSL § 384-b(8)(a)(i).
47. SSL § 384-b(8)(a)(ii).
48. SSL § 384-b(8)(a)(iii)(A).
49. SSL § 384-b(8)(a)(iii)(B).
50. SSL § 384-b(8)(a)(iii)(C).
51. SSL § 384-b(8)(b).
52. SSL § 384-b(8)(c).
53. SSL § 384-b(8)(e).
54. SSL § 384-b(8)(b)(i)(A).
55. SSL § 384-b(8)(b)(i)(B).
56. SSL § 384-b(8)(b)(ii).
57. SSL § 384-b(4)(c).
58. SSL § 384-b(6)(a).
59. SSL § 384-b(6)(b).
60. *Compare In re Harlem Dowling-Westside Ctr. for Childrens & Family Servs. ex rel. Ebony Shaquiera C. v. Marion L.C.*, 264 A.D.2d 845, 845, 695 N.Y.S.2d 590, 591 (2d Dep't 1999), *appeal dismissed*, 94 N.Y.2d 890, 706, N.Y.S.2d 77 (2000), *with In re Michelle H.*, 228 A.D.2d 440, 440-41, 643 N.Y.S.2d 646, 646-47 (2d Dep't 1996).
61. SSL § 384-b (6)(e); *In re Donald LL.*, 188 A.D.2d 899, 901, 591 N.Y.S.2d 876, 877 (3d Dep't 1992).
62. *In re Dale T.*, 236 A.D.2d 744, 744-45, 654 N.Y.S.2d 45, 45-46 (3d Dep't 1997) (terminating rights of retarded mother unable to care for abused son).
63. SSL § 384-b(3)(g); *Santosky v. Kramer*, 455 U.S. 745 (1982).
64. SSL § 384-b(3)(h).
65. *In re Guardianship of Star Leslie W.*, 63 N.Y.2d 136, 147, 481 N.Y.S.2d 26, 32 (1984).
66. *Id.* at 147-48, 481 N.Y.S.2d at 32.
67. *In re Alex "MM."*, 260 A.D.2d 675, 676, 688 N.Y.S.2d 707, 709 (3d Dep't 1999) (abandonment); *In re Tyesha W.*, 259 A.D.2d 349, 349, 687 N.Y.S.2d 16, 17 (1st Dep't 1999) (mental illness); *In re Joyce T.*, 65 N.Y.2d 39, 46, 489 N.Y.S.2d 705, 710 (1985) (mental retardation).
68. SSL § 384-b(11).
69. SSL § 384-b(8)(f); *Marino S.*, 181 Misc. 2d at 201 n.7, 693 N.Y.S.2d at 834 n.7.
70. *In re Jennifer A.*, 225 A.D.2d 204, 206, 650 N.Y.S.2d 691, 692 (1st Dep't 1996) (finding that parent permanently neglected child and overruling Family Court's decision to discharge child with nonparty maternal aunt), *lv. denied*, 91 N.Y.2d 809, 670 N.Y.S.2d 403 (1998).
71. *In re Ericka LL.*, 256 A.D.2d 1037, 1037-38, 683 N.Y.S.2d 323, 325 (3d Dep't 1998).
72. FCA § 1055.
73. FCA § 1055-a; SSL § 392.
74. Stephanie Jill Gendell, *In Search of Permanency: A Reflection on the First 3 Years of the Adoption and Safe Families Act Implementation*, 39 Fam. & Concil. Cts. Rev. 25, 31 (2001) (reviewing ASFA's history, purpose and impact); Sean D. Ronan, *No Discretion, Heightened Tension: The Tale of the Adoption and Safe Families Act in New York State*, 48 Buffalo L. Rev. 949, 966-67 (2000).
75. Judith S. Kaye and Jonathan Lippman, *New York State Unified Court System: Family Justice Program*, 36 Fam. & Concil. Cts. Rev. 144, 144 (1998).
76. Ronan, *supra* note 74, at 966.