

Basic Info on the Legal Rights of Foster Parents for Attorneys

By Margaret A. Burt Copyright - 9/11

For the attorney representing a foster parent or for counsel with a foster parent as an adversary, the legal rights of foster parents in child welfare situations are not easy to discover. Statutorily speaking, the relevant sections are spread out and hidden without reference to each other. The legislature seems to be saying foster parents have some rights - but they will have to find 'em first! In child welfare situations where the foster parent has a similar goal as the agency, the foster parent can generally rely on the agency counsel to advocate the position. In these situations, the foster parent is generally allowed to be present in the courtroom and, most often, the court will inquire if there is anything the foster parent may wish to add to the proceedings. The agency attorney and/or the child's attorney are usually open to answering basic questions the foster parent may have about the proceedings. However, for the foster parent who disagrees with the agency's agenda in a child welfare matter, there are some limited rights that may be useful. Counsel must familiarize themselves with these rights, as it is likely that no one else, including the court, will be familiar with them!

In order to use them, it is important to know what the rights of the foster parent are in New York State. Some rights require the foster parent to have had the child in their home for more than 6 or 12 months, others do not. There appears to be no rational reason why this requirement is there in some situations and not in others.

- Foster parents have a right to counsel and the right to have counsel appointed if they are indigent (you could argue that the foster care subsidy should not "count" toward a decision on indigency) FCA§ 262. The right to counsel is afforded in abuse and neglect proceedings, permanency proceedings, terminations, surrenders.
- Foster parents have a first priority to adopt (even over relatives) if the child has lived in their home for more than 12 continuous months when the child is freed for adoption. SSL§ 383 (3). This right is a key one. The agency will sometimes attempt to move a child from a foster home prior to the 12 months to prevent this right from attaching. If a relative appears late on the scene and seeks custody of a child who has been in the foster home for more than a year, this right may protect them from losing the child to the relative.
- Foster parents have a right to intervene as a party in ANY proceeding involving the custody of the child if the child has lived in their home for more than 12 continuous months. SSL § 383 (3). This allows foster parents to participate as a party in custody proceedings brought by relatives and in the dispositional hearings of terminations. In perm hearings, if a relative has brought a custody petition, a foster parent with more than 12 months of continuous care can object to custody being awarded to the relative and force a "best interests hearing" FCA §1055-b, 1089-a

Foster parents have a right to be formally noticed, appear, and offer information at all permanency hearings regardless of how long the child has been in their care. This includes having party status!!! 1089 (3)(b)(i) This section on party status appears to be in direct contravention of FCA § 1040. The only way to read both sections in harmony is to determine that the foster parent has party status as per FCA §1089 as FCA§1040 says that they do not receive party status by merely being entitled to notice. This can be a significant argument as it provides the foster parent the ability to call witnesses and seek discovery in permanency actions.

- Foster parents can bring a termination of parental rights proceeding if the court orders the agency to bring one and the agency does not do so for 90 days after the order. FCA §1055 (d), SSL §392 (6) c. It is critical to note that the agency is required to join the petition that has been filed by the foster parent! SSL §384-b (3)(1)(iv)
- Foster parents can also bring a termination of parental rights proceeding if the child has been in foster care for 19 months and the agency has not brought such a petition. Again the agency is then required to join the petition SSL § 384-b (3)(1)(iv)
- Foster parents have a right to a written 10 day notice, an internal conference and a fair hearing with the state as well as, ultimately, can bring court action to contest an agency decision to remove a child from their home regardless of how long the child has been in the home. 18 NYCRR §443.5, SSL§ 400, SSL § 22
- Foster parents who are related to the foster child in their home where the child has been in their home for over 6 months may apply to become subsidized guardians of the child and remove the child from foster care. If the agency denies this request, the foster parent has a right to a fair hearing from the state, SSL§ 458-f

The most common situations in which the foster parent and the agency disagree about the process of a case occur when the foster parent feels that procedures should be started to free the child for adoption and the agency disagrees. Also sometimes in situations where the foster parents and the agency disagree, the agency may try to move the child out of the foster home and back to the birth home or to another foster home that is more cooperative. Never underestimate the power of a simple phone call. Many times, the attorney for the foster parent can work magic for the client simply by talking with the agency attorney and the child's attorney and ascertaining their long-term plans. The foster parent may believe that the agency has a different outcome in mind due to the cautious statements of a caseworker but the attorney may be able to reassure the client that the intentions of the agency are in fact the same as their own, albeit on a slower track. If the agency disagrees with the foster parent or there is a fear of them moving the child, there are several pre-emptive strikes that can be considered. The foster parent's attorney can participate in or bring on a permanency hearing and seek a court order for agency to file a termination. Since the foster parent loses virtually all of their rights if the agency removes the child from their home, the attorney should seek an order from the court that the child not be removed from the foster parent's home. Convincing the child's attorney to agree with the foster parent's position can be very helpful. A more extreme tactic is for the foster parents to file a termination petition themselves. This will force the issue to be

decided by the court but can be expensive for the client. It should not be undertaken without a very careful review of the factual situation and the reasons for the agency's reluctance. Sometimes merely reminding the agency of this right can encourage a slow-moving agency to finally file a termination petition. It remains unclear exactly what is meant by the agency having to join the termination petition. Also unclear is if the foster parent is entitled to legal expenses from an agency who should have filed a termination petition. On the other hand, when the law remains unclear, the attorney is free to try to make some law!