



Movement to repeal a Clinton-era law sparks debate about foster care and adoption

BY JULIANNE HILL

After watching her kids move to 16 different foster homes over five years, Ashley Albert stood in a conference room on the ninth floor of the King County Superior Court in Seattle on a January day in 2016, trembling and sick to her stomach as she read documents that would allow her two youngest children to be adopted.

She hadn't expected that option would be presented when she walked into the courtroom that day, but there it was. Her lawyers gave her five minutes to decide. She left the courtroom, went into the stairwell and kicked, screamed and sobbed.

"I didn't want my kids adopted," says Albert, a mom of three from

Burien, Washington, a Seattle suburb. "I thought that adoption was for parents that really, really felt like this baby was going to be better off with someone else; people who like just kind of vanished. And that wasn't either one of my truths."

Albert, 36, was a foster child herself in the late 1990s; she was taken from her mother, who she says wrestled with a crack cocaine addiction. She says she was sexually abused in foster care. As a young mom, Albert struggled with mental health issues and alcohol addiction, which led to jail and homelessness and put her own children at risk.

In 2012, social workers told Albert she could receive help with housing and resources if she agreed to de-

pendency for her kids, which meant they would be placed in foster care. She agreed.

Now, back in court, she faced a reckoning: Albert was told that unless she allowed her children to be adopted, a petition to terminate her parental rights would be filed and her case could instead end in a closed adoption with her losing all parenting rights, including seeing her kids.

Feeling gut-punched, she walked back into the courtroom and signed the papers.

"I felt I was tricked," she says. "They said if I didn't file it, they were going to do it anyway."

She places the blame for her children's adoption squarely on the Adop-



tion and Safe Families Act of 1997, a policy of President Bill Clinton's administration focused on preventing kids from staying in foster care indefinitely by finding them permanent adoptive homes. It's a policy that disproportionately affects families of color like hers, Albert says.

Parents of 1 in 41 of all Black children in the U.S. and 1 in 37 of all Native American children will have their rights terminated, compared with 1 in 100 parents of all children, according to the National Institutes of Health.

Albert, who is African American, and the act's other abolitionists believe it echoes the practice of separating enslaved children from their parents and homes.

"ASFA kidnapped my family, held us hostage," Albert says. "ASFA has its foot on my family's neck. It has us by the throat."

After more than 25 years, the act sits at the center of a debate among legal scholars, attorneys and activists: Is this law in the best interest of children, or is it unjust and unconstitutional?

Three issues—the law's timeline for filing petitions to terminate parental rights, its procedures that can lead to closed adoptions and its disproportionate impact on families of color—fuel the firestorm.

'Reasonable efforts'

In the late 1990s, as the war on drugs demonized crack mothers, and the number of kids in foster care reached its all-time high, adoption was seen as the gold-standard solution—providing consistent, safe, permanent care needed to develop a child's well-being—compared with the limbo of foster care.

The Adoption Assistance and Child Welfare Act of 1980 was then in full force. Focused on family preservation, it required states to make "reasonable efforts" to prevent kids from being removed from their homes and to return those who had as soon as possible.

Those "reasonable efforts" became unreasonable, says James Dwyer, a professor at William & Mary Law School. Parents were given years to change their



President Bill Clinton, surrounded by members of Congress and adopted children, signs the Adoption and Safe Families Act of 1997. The law was designed to speed up the movement of children from foster care to permanent homes.

circumstances while kids remained in foster care placements that couldn't end in adoption.

With a series of headlines such as one 1992 Massachusetts case in which a child was taken from a foster family and returned to a father who had been accused of putting the child's face in boiling water, Congress took action. The Adoption and Safe Families Act passed with bipartisan support in 1997.

"There were certain acts [by parents] that were so, so, so bad that really no effort [at reunification] needed to be made," says Dave Camp, the then-U.S. representative from Michigan who introduced the act, which specifies murder and assault of a child as reasons to end parental rights. "It really put some criteria behind what were reasonable efforts to reunite families."


To encourage adoptions, the act offers states incentives—\$4,000 for each foster child adopted; \$6,000 for each adoption of a child with special needs.

From 1998 to 2022, states collectively received \$942 million, according to the Department of Health and Human Services.

Adoptive parents of foster kids receive a stipend each month from the federal government. States offer additional adoption assistance. To quicken the adoption process, the act sets a timeline: If kids are in foster care 15 of the last 22 months, then the state can file a petition to terminate parental rights, allowing adoptions to proceed.

"Kids were languishing in foster care," Camp adds. "Certainty and stability are very important for children, and so if they're not going to be reunited with families, adoption is a possibility."

"But despite its name, ASFA doesn't require adoption," says Shanta Trivedi, an assistant professor at the University of Baltimore School of Law and faculty director of its Sayra and Neil Mey-



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- ASHLEY ALBERT

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erhoff Center for Families, Children and the Courts. “What happens after termination of parental rights, ASFA doesn’t specify.”

Ticking time bomb

The 15/22 timeline, as it’s known, is a flash point.

“That time frame causes a lot of harm,” says Albert, now a parent advocate leader at Repeal ASFA, a group devoted to fighting to end the termina-

tion of parental rights. “We like to call that the ‘family death penalty.’”

The clock starts ticking the moment that children are removed and put into state care. Opponents say 15 months often is not enough time for parents to fulfill their sometimes-lengthy court-ordered reunification plans, handle immigration issues, leave prison or recover from addiction.

“That [timeline] might arbitrarily end the time that the court is working

toward reunification, when a parent is well on the way to trying to be able to parent the child in a safe way or in a stable way but still has work to do,” says Sara Block, academic director for child and family law programs at Loyola University Chicago School of Law.

In the late 1990s, Colette Payne, a Chicago mom, was fighting addiction to crack cocaine and synthetic heroin. Caseworkers threatened to permanently



University of Baltimore School of Law assistant professor Shanta Trivedi

take away her rights to her three boys if she didn't meet a list of requirements, including drug treatment, within the time frame, she says.

"I'm explaining that there aren't any beds at the facility that I'm trying to get into," she says. "There's not enough treatment, not enough therapists, and they want you to do things in this short time frame."

Ultimately, the boys' grandmother adopted them, says Payne, now director of the Women's Justice Institute Reclamation Project in Chicago. The grandmother allowed Payne to visit and even live with the children. "I was very lucky."

Others, however, believe 15 months isn't fast enough. "It takes a long time before the courts finally decide to terminate parental rights. And in my view, they take too long," says Charles Nelson, a professor of pediatrics and neuroscience at Harvard University.

Brain science shows that children, particularly 1- to 3-year-olds, need consistent care to provide bonds critical to brain development.

"If we let a child languish in a bad environment—be it at home or foster care—during those critical periods of brain development, we're more likely

to deal in the harm done to children for the long term," says Nelson, first author of a landmark study examining the brain development of Romanian orphans in foster care.

Several states have fast-tracked the timeline. In California, for instance, review hearings can take place at 6 months for kids under 3 and 12 months for kids over 3.

"Attachment is obviously very important," says Block, author of *Together Unbroken: Stories, Law, Practice and Healing at the Intersection of Domestic Violence and Child Welfare*, an ABA publication. What's needed are more resources devoted to developing bonds between birth parents and their children while in foster care, she says. "You can maintain those attachments, even if a parent cannot be custodial just for the moment," she adds.

Timeline exceptions

The timelines have three exceptions: if the child is in kinship care; if a documented reason shows termination is not in the child's best interest; and if the state has not provided necessary services to return the child safely home.

"Massive use has been made of those exceptions," says Elizabeth Bartholet, a professor emeritus at Harvard Law School.

Use of these exceptions is not always going to be in the children's best interest, she says, adding "as bad as foster care is, sending children back will often be worse. Children are far more likely to be re-abused at home than in foster care."

The system still overwhelmingly protects parent rights, Bartholet adds. "There's a balance that needs to be struck between respecting parent rights to keep their children in situations where there can be healthy, nurturing relationships and the child's need to be protected against parents who can't provide that kind of parenting."

"Children are far more likely to be re-abused at home than in foster care," Harvard's Elizabeth Bartholet says.

Others disagree. Very few kids ever need foster care, Baltimore School of Law's Trivedi says. "We don't want parents in a situation where they are not healthy and not in a position to take care of a child. But removal—we know that doesn't work."

A constitutional violation?

Some opponents argue the act violates the Constitution, saying the timelines clash with the guarantee of liberty under the 14th Amendment due process clause, which supports the right to family privacy and integrity.

"There are so many cases where judges have terminated parental rights based on time limits," says Dorothy Roberts, a professor at the University of Pennsylvania Carey Law School, "and every single one of them is ripe for judicial review and a constitutional argument."

Roberts says taking children under the time limits is an unconstitutional violation of their 14th Amendment rights, because children and parents are being deprived of a relationship with their families.

The act, in some circumstances, also allows states to speed up terminating parental rights if, for instance, a parent



Photos by Harry Canner, courtesy of Elizabeth Bartholet



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had previously involuntarily lost rights to another child.

“I don’t think that provision of ASFA would withstand strict scrutiny,” Trivedi says.

Bartholet disagrees. “The ASFA 15/22 rule is clearly constitutional,” she says. She acknowledges the interpretation of the 14th Amendment that protects parents’ rights against undue state intervention, but “the state continues to have the right to intervene to protect children,” she says. “And those who claim that the standard under current law is strict scrutiny are wrong.”

Fourth Amendment issues

ASFA can also clash with the Fourth Amendment, Roberts adds. Neglect charges often stem from unannounced visits from caseworkers who arrive without a warrant.

While few would argue against removing children suffering severe child abuse, 78% of maltreated children face neglect, according to the Department of Health and Human Services. Legally, neglect can include failure to meet physical, medical, educational or emotional needs.

In 2019, Philadelphia’s Department of Human Services sent a caseworker and a police officer to the home of a housing activist after it received an anonymous call that she may not have fed her child while she was protesting in front of the Philadelphia housing

authority for eight hours. She refused to let them search her home.

The case went to the Supreme Court of Pennsylvania’s Eastern District, which ruled that the child welfare agency violated the mother’s Fourth Amendment right to a warrant.

“The court held that the department could not base a search on an anonymous tip without any supporting evidence and without any nexus between the unsupported anonymous accusation and the search of her home,” Roberts says. “That was a great decision, which I wholeheartedly support.”

Bartholet disagrees. “While there may be one such case, there is no established law to this effect, nor should there be,” she says. “Unannounced, warrantless home visits are in many situations the only way to protect children against horrific maltreatment.”

The charges of neglect often stem from issues faced by poor people, says Ernestine Gray, a retired judge of the Orleans Parish Juvenile Court in Louisiana. “If these families had resources, they would not be in the system. They don’t have jobs; they don’t have income.”

Safety—not poverty—should be the determining factor in keeping kids with their parents, she adds.

“The law says that poverty is not a reason or a justification for taking people’s children,” says Gray, former chair of the ABA Judicial Division.

Legal strangers

Most domestic adoptions are open, with identifying information shared and contact between the child and birth family allowed.

But parents impacted by the act often have their rights terminated in a closed adoption and become the legal equivalent to strangers to their children. Often, records can be sealed, and the child receives an amended birth certificate substituting the adoptive parents’ names. Sometimes, if the termination happens well before the adoption, the birth parent has little to no information about the adoptive parents, who control who can and cannot see their children.

“I think of it as cutting off a limb. Sometimes you have to do that, or the infection is going to be taking over the body,” says Elizabeth Hendren, a Seattle family law attorney. “But we’ve gotten to this point where it’s like to be safe, we’re going to just chop it off and act like everything’s fine.”

While there are no criminal or civil consequences for birth families making contact, “the sentiment is these are bad parents. Cut them out,” says Christine Gottlieb, director of New York University School of Law’s Family Defense Clinic.

Some states offer exceptions. In Washington, where Albert’s case for her two youngest children was heard, provisions allow for an open adoption only if it’s negotiated before parents’ rights



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are terminated. If parents don’t take the option for open adoption before those 15 months, their cases go to court, Hendren says.

“Then, if you lose, you’re never going to see your kids again,” Hendren says. “For a lot of parents, including Ashley, that’s a gamble they’re not willing to take.”

Albert signed papers allowing an open adoption, which included her demands that the children’s names not be changed and that she could visit and call them. But afterward, the adoptive mother refused her calls, and Albert learned her daughter’s name was changed, she says. Her mental health spiraled, and she attempted suicide.

In 2018, Albert went to the Superior Court of Washington King County, fighting the adoptive mom who had denied her access to her kids as agreed. After a three-day trial, the judge ruled Albert had a valid, enforceable open adoption agreement, says Hendren, who represented Albert. Since then, Albert was able to see the kids, “but nowhere

near the number of visits dictated by the order,” Hendren says.

Different kinds of conversations

The Supreme Court’s June decision in *Haaland v. Brackeen* upheld the Indian Child Welfare Act, which prioritizes child placement with Indian families from the child’s tribe or another tribe over families from different races. Its impact could be far-reaching.

“I am somewhat hopeful that the decision might lead to some different kinds of conversations,” Gray adds. ASFA “hits very heavily on poor minority families, African American, Native American. The laws [involving child welfare] themselves, in my opinion, discriminate.”

Statistics show that Black children are disproportionately affected by child welfare laws. Though 37.4% of all children experience a child protective services investigation by age 18, 53% of Black children will, according to the American Public Health Association. Black children are 2.4 times more likely, and Native American children are 2.7 times more likely than white children in foster care to experience a court-ordered termination of parental rights, according to the National Institutes of Health, and they have longer placements in foster care, receive fewer services and are less likely to reunify with families.

Fast track to adoption

Despite its critics, the act has met its goal, Bartholet says. “It appears to have reduced the length of time that children languish in foster care and expedited the period between being placed in foster care and adoption.”

Adoptions from foster care have increased to 25% of kids going to adoptive homes in 2021 from 17% in 2000; meanwhile, 203,770 children entered foster care in 2021—less than half of the all-time high of 567,000 children in 1999, according to the Annie E. Casey Foundation, a nonprofit focused on the well-being of children and youth.

Of those leaving foster care after less than 17 months, 77% move in with a parent or relative, according to the Health and Human Services Department. But reunification becomes less likely the longer children are in foster care. After 17 months, 25% reunite with parents or relatives and 47% are adopted.

From 1998 to 2021, 126,000 children “aged out” of the system with no connection to real family, an unknown number of whom are “legal orphans,” according to the National Coalition for Child Protection Reform.

There should be a way to determine if the child would be a legal orphan when parents’ rights are terminated, “a way to say we wouldn’t terminate unless children were in an adoptive placement,” Gray says.

Seeking solutions

In 2022, the ABA House of Delegates passed Resolution 606, calling members to challenge “laws, policies, and practices that devalue Black families and normalize systemic racism and family separation,” including the act.

However, the report accompanying the resolution acknowledges this “does not suggest that every child removal from the home is wrong.”

While no one claims the act is perfect, suggested solutions run the gamut.

In 2021, then-Rep. Karen Bass from California attempted to amend the act by introducing the 21st Century Children and Families Act. It modified the 15/22 timeline to 24 consecutive months, among other things. The bill died in committee.



Ashley Albert was reunited with her two children who had been adopted.

Some demand a complete repeal, creating an impact stretching beyond legal implications, Trivedi says.

“There is a significant chunk of the population that thinks that this act is responsible for the destruction of their families and communities,” she says. “There is this symbolic value of repealing a law.”

Roberts wants massive change. “We should eliminate the laws that permit family separation and replace them with policies that support families,” she says.

Laws could be restructured that encourage families to stay in contact. “We should think about this more, like when parents get divorced. Everyone understands that the other parent should get visits because it would be better for the kid,” Gottlieb says.

Bartholet, however, would keep the act as is.

“Certainly, I would leave it alone as compared to repealing it,” she says, adding that ideally, she’d like shorter timelines for infants to be adopted.

Meanwhile, Albert continues her fight against ASFA. In July 2022, the woman who adopted Albert’s children dropped off the kids with all their belongings at Albert’s mother’s home, Albert says. No one in Albert’s family had seen or spoken to the children for more than 1½ years. No explanation was given by the adoptive mom.

“The weekend turned into a summer, the summer turned into two school years,” Albert says. Both kids struggle with their mental health. Her daughter, 12, now lives with her, and her son, 15, lives with her mother and sees Albert regularly. “I’m very glad, I’m just upset,” she says.

Legally, the adoptive mother remains the parent, not Albert, making it difficult for Albert to sign papers for school or for her children to receive support services. Albert says the adoptive mother has refused to start paperwork giving Albert legal rights.

“The kids need support, and they need resources,” she says. “It’s hard when you have your hands tied.” There has been no contact with the adoptive mom since the kids arrived.

Meanwhile, Albert continues working with others impacted by ASFA.

“After coming out on the other side of the anger and the pain of losing my children, now I’m into the fight,” she says. “This is very personal to me, really personal to me.” ■

Legal affairs writer Julianne Hill received an Early Childhood Reporting Fellowship from the Dart Center for Journalism and Trauma for this report.