

## **The Use of Incarceration as a Sanction in Family Dependency Drug Courts**

*By Judge Nicolette M. Pach (ret.)*

Substance abuse is a precipitating factor in 40-80 percent of confirmed child abuse and neglect cases (*Alcohol, Other Drugs, & Child Welfare*, Child Welfare League of America 2001, p. 2). It is no surprise that Family Courts have looked at the criminal drug court model for inspiration in designing family dependency treatment courts (FDTC). The differences between criminal drug courts and FDTC are currently a subject of great discussion. The adult criminal drug courts with a focus on public safety, provides support to and services to the participant in a holistic approach to become abstinent and to stop their criminal behavior. The focus of FTDCs are twofold: the paramount concern and focus is on child safety and well-being and the second is on achieving a permanent, safe and stable home for children. At the same time they provide the parent with support and services to become abstinent, gain control of their lives and provide a realistic chance for reunification with their children in a time frame that is considerate of the child's developmental and emotional needs.

A critical issue in criminal and family drug courts is securing participant compliance. In the criminal court the use of a incarceration as a sanction is clearly acceptable. One of the motivations for participation is the avoidance of jail by the defendant. The contract that is entered into clearly contemplates failure to comply may result in incarceration.

In family courts the motivating factor is usually the parent's desire to maintain or regain custody of his/her child. In family courts jail is not an anticipated outcome of the usual dependency case. Reunification or in the alternative termination of parental rights (TPR) may occur. Therefore the anticipated consequence of failure to comply with an order in a dependency case is the curtailment or loss of parental rights, not the loss of personal liberty.

While some FDTCs have concurrent criminal jurisdiction, most do not. Many family courts, however, may exercise contempt powers to secure obedience to court orders. So it is technically possible to incarcerate a parent for failure to comply with a court order to attend substance abuse treatment and remain abstinent.

Using the power of a contempt proceeding in a dependency case is controversial. The experience of the Suffolk County, New York Family Treatment Court (FTC) is offered here as it evolved from 1997 to 2002. In New York, the family court has the power to incarcerate for up to six months for contempt of court. In exercising it in the Suffolk County Family Treatment Court, the strongly held philosophy was that it is improper to use a jail sanction for contempt as *punishment*. It was only permissible if it is reasonably calculated to *gain compliance* with a court order. The court was forced to examine when the circumstances were ripe for securing compliance.

Patterns of compliance amongst participants emerged as the FTC developed. Some participants were immediately compliant when faced with the loss of or risk of losing

custody of their child(ren); as a result the issue of incarceration never arose. A second group of parents were clearly struggling and were not able to maintain sobriety or even get started in treatment in the early stages of the case. The court had not yet gotten their attention.

The family court in New York has the power to issue a bench warrant for failure to appear in court. Upon a failure to appear in court, where the parent had been demonstrating an unwillingness or inability to comply, had not been meeting with staff or appearing at treatment and whose whereabouts were unknown, the court issued the bench warrant. With the cooperation of the Suffolk County Sheriff's Department, parents were returned promptly to court.

For some, being brought to court in handcuffs in the back of a sheriff's car was the only wake up call they needed. For others, bail was set and the parent waited for a day, overnight or a weekend for attorneys to be assembled and further proceedings to take place before their release. Those few days in jail served to reinforce the seriousness of their circumstances and allow them enough sober time to recognize that their future opportunity to raise their own children was at risk. A contempt petition filed by the county attorney, representing child protective services, at this early stage could be used as leverage to get a parent into either a 28-day residential treatment program or a longer term residential treatment program if deemed necessary in exchange for a suspended jail sentence. The 28-day program often gave them a treatment base and the ability to continue treatment and subsequently meet their responsibilities in the community.

A category of parents consisted of those who continued to be unable or unwilling to comply. Months passed and attendance at treatment and at court was sporadic. Urine tests were often positive for substances of abuse and visitation with the children was irregular. At that point the county attorney might again file a contempt petition. However, in New York under the Adoption and Safe Families Act (ASFA), a permanency hearing must be held within a year of removal of a child—in other states it is held after only six months. At that hearing the court is required to approve a "permanent" plan for the child. The plan must be calculated to provide a safe and stable home in a timely fashion. The court must then take stock of whether a jail sentence for contempt is likely to result in compliance with the court order. Even if the court believes compliance might be forthcoming, an additional consideration is whether the parent will be able to make significant progress quickly enough to be considered as the permanent resource for the child.

In their experience, the Suffolk County, New York Family Treatment Court identified the second group of parents, especially in the early stage of the proceeding, as better candidates for the use of the court's contempt powers. Incarceration at that point is calculated to secure compliance in time for the family to be reunited, which is, after all, the ultimate goal of the family treatment court. The third group of parents, still non-compliant in the late stages of their dependency case when ASFA demands a permanent plan be made, may not be an appropriate target of the court's contempt powers. To what end is that power being exercised if it is too late to secure meaningful compliance?

While it may be tempting for staff of the treatment court to recommend a jail sanction out of frustration and desperation with the parent, it is up to the judge to determine if it would be a legitimate use of that power or if the time for securing the parent's compliance with the court order is past. It may well be time to focus on an alternate permanent plan for the children.

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