



Child Law Practice

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Helping Lawyers Help Kids

ENGAGING FATHERS

Representing Incarcerated Nonresident Fathers in Child Welfare Cases

by Kathleen Creamer

“While ‘use a gun, go to prison’ may well be an appropriate legal maxim, ‘go to prison, lose your child is not.’”

In re Brittany S., 17 Cal. App. 4th 1399, 1402 (Ct. App. 1993).

If you are an attorney appointed to represent an incarcerated nonresident father, you will likely face some common challenges: no one may know where the father is located, everyone is suspicious of his past criminal activity, and no one is quite sure where he fits into his child’s life. To further complicate things, research shows that when a child enters foster care, social workers often engage in little outreach to nonresident fathers and make little effort to include them in

case planning for their children.¹ The reality is that not only do these fathers have legal rights worth defending, they also have the potential to make real contributions to their children’s lives.²

Many fathers may themselves be viable permanency resources for their children. They may also connect their children to other permanency resources, such as paternal relatives, and can provide valuable information regarding the child’s health, education, and family history. It can be important for a child in foster care to know she has a parent who cares about her well-being, even if he can’t be a placement option. The child welfare system must recognize the valuable role incarcerated fathers can play in their children’s lives. Your legal representation is critical to ensure the father is given a voice in his child’s life and a role in his child’s permanency planning.

This article shares key legal issues that arise when representing nonresident incarcerated fathers in child welfare cases and effective representation strategies.

Key Legal Issues

As the number of incarcerated fathers nationwide rises,³ the child

welfare system struggles to resolve the rights and responsibilities of these fathers. The enactment of the Adoption and Safe Families Act (ASFA), and with it the requirement that the state move to terminate parental rights once children have been in foster care for 15 of the last 22 months,⁴ has raised numerous questions about the rights of incarcerated parents, particularly those whose sentences may exceed 15 months.⁵ At all times during the case, be aware of the ASFA timeframes and how they may impact your client. Pay special attention to the exceptions to the 15

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About this Series

The series gives attorneys and judges tools to better engage nonresident fathers in child welfare cases. Article topics include:

- Nonresident Fathers’ Constitutional Rights (Nov. 08)
- Representing Nonresident Fathers (Dec. 08)
- Understanding Male Help-Seeking Behavior (Jan. 08)
- Involving Nonresident Fathers: Tips for Judges (Mar./Apr. 09)
- Representing Incarcerated Fathers (this issue)
- Child Support Issues
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Assessing Case Plan Supports

The detention facility where your client is incarcerated is a valuable partner in case planning efforts. Be sure you know what regulations and resources the detention facility has to support case planning, including:

- Does the facility offer parenting programming? Marriage/relationship classes? GED programming? Job training?
- Does the facility offer drug/alcohol treatment? Mental health treatment?
- How can the father access available programming? Is there a waiting list?
- Is the father assigned a social worker at the facility? Is that social worker available to help him communicate with the child welfare agency and his attorney?
- Will father be able to send mail? How can he obtain paper, pens, envelopes and stamps?
- What are the phone regulations? How often can the father use the phone? Who may he call? Who pays for phone calls?

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of 22 month rule.⁶ Because the father may avoid termination of parental rights when his children are residing with family members,⁷ explore early on and throughout the case any viable relative placements for the children. Also make sure you know the law in your jurisdiction,⁸ particularly how it addresses such controversial issues as:

- **Does the incarcerated father have the right to be physically present at hearings?** If not, does he have the right to participate in these proceedings by phone?⁹ Does this right attach at all phases of the child welfare case, or only at the termination of parental rights phase? Most jurisdictions require some opportunity for the parent to meaningfully participate in his hearings.¹⁰ However, some have held that phone participation is sufficient,¹¹ while others have held that no presence is required so long as the client is represented by counsel.¹²
- **Does the incarcerated father have a right to visit with the child at his detention facility?** If there is no absolute right to

visitation, what factors must the court consider in deciding whether to permit visitation? Many jurisdictions use a “best interest of the child” standard to determine whether to permit visitation in prison,¹³ while others will not deny visitation without an affirmative showing of harm to the child.¹⁴

- **Will incarceration alone be sufficient to terminate parental rights (TPR)?** Most states have TPR statutes that address parental incarceration.¹⁵ In many jurisdictions, a parent’s incarceration is itself a ground for termination, particularly where the parent is facing a lengthy sentence.¹⁶ In others, it is a factor that may be considered along with its impact on the parent-child relationship.¹⁷ A few jurisdictions relax the ASFA requirement that termination petitions be filed when a child has been in care for 15 of the last 22 months when a parent is incarcerated.¹⁸

Ensuring Meaningful Client Participation in the Case Attorney-Client Communication

Given the significant legal challenges facing the incarcerated father,

regular attorney-client communication and planning is critical. Ensuring regular communication may be challenging when the father is frequently moved from facility to facility, or he is located far from the courthouse.¹⁹ Locating a client in the prison population may also prove difficult, although several local and state jurisdictions and the Federal Bureau of Prisons have online inmate locators.²⁰ These locators should reveal the father’s location and his assigned inmate number. Because detention facilities use these numbers rather than names to identify inmates, be sure to include the inmate number on all communications with the father and prison staff.

With regular in-person and written communication, you can coach your client through the child welfare process, ensuring he is aware of his case plan goals and what steps he can take during incarceration to meet these goals.²¹ Often resources to meet some permanency plan goals, such as parenting education or drug treatment, are available at the correctional facility and you should encourage your client to take advantage of such programming.

Also encourage your client to communicate regularly with the child welfare agency and reach out to his child in any way possible. Counsel your client throughout the dependency process to ensure he understands the court proceedings and his legal options. In cases where reunification cannot be reasonably achieved within the statutory timeframe or is not the father’s preference, counsel the father on other permanency options and their legal effects. These options may include voluntary relinquishment and adoption, guardianship by paternal kin, or, in some jurisdictions, open adoption with ongoing contact.

Participating in Court Proceedings

Your role includes making diligent

efforts to ensure your client has an opportunity to meaningfully participate in court proceedings. This includes arranging for your client to participate in person at every hearing by filing any necessary written motions.²² Where in-person participation is prohibited by the court or the detention facility, try to arrange alternative means of participation, such as audio or video conferencing. Also take steps to ensure your client can appear at the hearing in plainclothes rather than a uniform and shackles.

You will need to fully prepare your client to participate in the hearing. Explain the purpose of the hearing, what requests or recommendations the other parties are likely to make, and what issues the judge will have to resolve. The father should be prepared to respond to questions concerning his relationship with his child and what role he hopes to play in his child's permanency plan, as well as questions related to his sentence and his plans upon release. After the hearing, explain in writing what the court ordered, when the next hearing is, the purpose of the next hearing, and what steps he should take in the interim.

Participating in Case Planning

The incarcerated father has the right to be included in all planning for his

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child. Often the child welfare agency neglects to ensure the father participates in this planning and does not clearly instruct him about the goals he must reach to reunify with his child.²³ Ask the child welfare agency to involve you and the father in all planning meetings about the child. The father should have the opportunity to collaborate with the child welfare agency to

Assessing Visitation Conditions

The father's attorney should contact or, if possible, visit the detention facility to obtain answers to these questions:

- Are touch visits permitted, or will the child have to visit through a plexiglass wall?
- Will the father have to remain shackled during the visit?
- What kind of security is present? What will the child experience when going through security?
- Who is permitted to supervise the visit?
- How child-friendly are the visitation accommodations (e.g., are the walls colorful or decorated, are there toys, books, or child-sized furniture)?
- Is there a special family visitation room?
- Is it possible to visit outside?
- Are there toys or activities for the child?

determine what goal is appropriate for his child. If the father does not seek to reunify with his child, he still may be able to help plan for his child. For example, he may be able to suggest paternal relatives as placement resources for the child, or help link the child to other relatives or family friends for support. Additionally, the father may provide valuable input into the needs of the child and can help determine what sorts of educational, therapeutic, or medical supports may be appropriate.

Any case plan goals set for the

father should be feasible and appropriate to his circumstances. Although few states have defined the agency's reasonable efforts obligation for incarcerated parents,²⁴ few permit the reasonable efforts requirement to be waived based on parental incarceration.²⁵ The case plan should state clear goals for the father and explain what efforts the child welfare agency will make to

assist him. For instance, if the case plan calls for written communication between father and child, ask the agency to ensure the father has paper, envelopes, and stamps. If the case plan calls for visitation, the agency should detail who is responsible for transportation and how frequently visits will occur.

Facilitating Contact/Visitation

Especially when reunification is the case plan goal, regular visitation is key to maintaining and improving the relationship between the father and child.²⁶ Although many jurisdictions permit and even encourage visitation at the father's jail or prison, concerns surround sending children to detention facilities. In particular, child welfare agencies and children's attorneys often fear visitation may harm the child's physical or emotional safety.

It is therefore important to advocate vigorously for visitation. Address visitation concerns directly by gathering and presenting evidence about the visitation conditions at the father's detention facility. Visitation conditions vary widely and many detention facilities try to ensure visitation is a child-friendly and positive experience. Concerns may be

Additional Resources:

National Resource Center on Children and Families of the Incarcerated

www.fcnetwork.org/

Includes an "incarcerated fathers library," a searchable database of national and state programs providing assistance to children of offenders, and a wealth of other resources.

Center for Children of Incarcerated Parents

www.e-ccip.org/index.html

Offers publications for parents and advocates, research on children of incarcerated parents, and other useful information.

National Resource Center for Family-Centered Practice and Permanency Planning

www.hunter.cuny.edu/socwork/nrcfcpp/info_services/children-of-incarcerated-parents.html (Children of Incarcerated Parents Web site)

Includes links to dozens of resources, many specific to youth in foster care.

alleviated by thoroughly investigating and sharing a facility's visitation conditions.

If the court prohibits visitation, explore any other resources available to ensure ongoing contact between the father and child. A growing number of detention facilities offer virtual visitation, which allows the father and child to visit by videoconferencing. Others allow parents to create and send a video or audiotape of themselves reading or talking to the child. Additionally, e-mail access is being piloted by the Federal Bureau of Prisons and may be available in some state facilities as well.²⁷ It may help to contact the detention facility as well as a local prisoner services organization²⁸ to identify programs that ensure father-child contact.

Conclusion

Although representing an incarcerated nonresident father can be challenging, there is tremendous opportunity for legal advocacy to have a positive impact on the family. Your representation ensures the father has a voice in his child's future, and the opportunity to forge a lifelong relationship with the child.

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Endnotes

¹ A study of 1,222 caseworkers in four states found that the child welfare agency failed to reach out to the nonresident father in more than 50% of cases in which children were placed in foster care. Malm K., J. Murray and R. Geen. *What About the Dads? Child Welfare Agencies' Efforts to Identify, Locate and Involve Nonresident Fathers*. Washington, D.C.: The Urban Institute, 2006.

² Note that maintaining the parent-child relationship is of great long-term benefit to the father. Research shows that incarcerated men who assume parenting roles upon release have higher rates of post-release success. Hairston, C. Finney. "Prisoners and Families: Parenting Issues During Incarceration." *Paper presented at the From Prison to Home conference*, 2002, 43. <www.urban.org/UploadedPDF/410628_PrisonersandFamilies.pdf>

³ From 1991 to 2007, the number of fathers in prison rose by 76%. Glaze, Lauren E. et al. "Parents in Prison and their Minor Children." *Bureau of Justice Statistics Special Report*. Washington, D.C.: U.S. Department of Justice, Office of Justice Programs, 2008, 2.

⁴ 42 U.S.C. § 675(5)(E).

⁵ "The requirement to file a termination petition has a special impact on incarcerated parents whose children are in foster care. For many of

these parents, time will simply run out before they can complete their sentences." Hirsch, Amy, et al. *Every Door Closed: Barriers Facing Parents with Criminal Records*, 2002, 67. <www.clasp.org/publications/every_door_closed.pdf>

⁶ 42 U.S.C.A. § 675 (5)(E) provides the following exceptions to the 15/22 month filing requirement: the child is being cared for by a relative, the existence of a compelling reason that termination would not be in the best interest of the child, and the failure of the state to provide reasonable efforts.

⁷ *Ibid.*

⁸ For an overview of state statutes regarding parental incarceration and ASFA, see Lee, Arlene et al. *The Impact of the Adoption and Safe Families Act on Children of Incarcerated Parents*. Washington, D.C.: Child Welfare League of America, 2005.

⁹ For a useful discussion of how courts approach due process and the right to participate, see Laver, Mimi. "Incarcerated Parents: What You Should Know When Handling an Abuse or Neglect Case." *ABA Child Law Practice* 20(10), December 2001, 145-146, 150-155.

¹⁰ *Ibid.*, 146.

¹¹ See, e.g., *In re A.P.* 692 A.2d 240 (Pa. Super. Ct. 1997).

¹² See, e.g., *In re J.L.D.*, 794 P.2d 319 (Kan. Ct. App. 1990); *In re C.C.E.*, 540 S.E.2d 704 (Ga. Ct. App. 2000); *In re Eric L. II v. Eric L. Sr.*, 2008 NY Slip Op. 4175 (App. Div. 4th Dep't 2008).

¹³ See, e.g., N.Y. Soc. Serv. Law § 384-b(7)(f)(2).

¹⁴ See, e.g., *In re J.N.*, 138 Cal. App. 4th 450, 500 (Ct. App. 2006) (it is error to deny visitation without showing of detriment to child); *In re C.J.* 729 A.2d 89, 95 (Pa. Super. Ct. 1999) (showing of grave threat required to suspend prison visitation).

¹⁵ Lee et al., 2005, 11.

¹⁶ Twenty-five states have statutes that permit termination based on the length of incarceration. *Ibid.*

¹⁷ See Ga. Code Ann. § 15-11-94(4)(B)(iii) (2008); 10 Okla. Stat. Ann. § 7006-1.1(A)(12)(2008); Or. Rev. Stat. § 419B.504(6)(2008).

¹⁸ See Colo. Rev. Stat. Ann. § 19-3-604(2)(k)(IV)(2008); Neb. Rev. Stat. § 43-292.02(2)(b)(2007); N.M. Stat. Ann. § 32A-4-28(D)(2008).

¹⁹ Over 60% of parents in state prison and over 80% in federal prison are held more than 100 miles from their home. Mumola, Christopher J. *Incarcerated Parents and their Children*.

Bureau of Justice Statistics Special Report.
Washington, D.C.: U.S. Department of Justice,
Office of Justice Programs, 2005.

²⁰ See, e.g., the Federal Bureau of Prisons
website: <[www.bop.gov/iloc2/
LocateInmate.jsp](http://www.bop.gov/iloc2/locateInmate.jsp)>

²¹ For an overview of the communication and
representation obligations of parents'
attorneys, see the *ABA Standards of Practice
for Attorneys Representing Parents in Abuse
and Neglect Cases*. Washington, D.C.:
American Bar Association, Center on Children
and the Law, 2006 <[www.abanet.org/child/clp/
ParentStds.pdf](http://www.abanet.org/child/clp/ParentStds.pdf)>.

²² The attorney should also be mindful that
there may be costs to the father of being away
from the jail, such as losing jail privileges.
Ibid., 18.

²³ "Fathers in Prison." *Best Practice, Next
Practice: Family-Centered Child Welfare*,
Summer 2002, 31, <[www.hunter.cuny.edu/
socwork/nrcfcpp/downloads/newsletter/
BPNPsummer02.pdf](http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/newsletter/BPNPsummer02.pdf)>.

²⁴ California is among the few states to
describe required efforts for incarcerated
parents, including visits, phone calls and
transportation. Cal. Welf. & Inst. Code §
361.5(e)(1)(2008). See also N.Y. Soc. Serv.
Law § 384-b(2)(b)(2008) (defining
"incarcerated parent" as "parent" for terms of
reasonable efforts requirement.)

²⁵ Allard, Patricia and Lynn Lu. *Rebuilding
Families, Changing Lives: State Obligations to
Children in Foster Care and Their
Incarcerated Parents*. New York, NY:
Brennan Center for Justice at NYU School of
Law, 2006, 20, <[http://brennan.3cdn.net/
a714f3bf3bc8235faf_4am6b84bh.pdf](http://brennan.3cdn.net/a714f3bf3bc8235faf_4am6b84bh.pdf)>. But
see N.D. Cent. Code § 27-20-02 (3)(2007),
defining parental incarceration as an
aggravating circumstance, based on length of
incarceration.

²⁶ Margolies, Julie Kowitz and Tamar Kraft-
Stolar. *When 'Free' Means Losing your
Mother: the Collision of Child Welfare and the
Incarceration of Women in New York State*.
New York, NY: Women in Prison Project,
Correctional Association of New York, 2006,
19. <[www.correctionalassociation.org/
publications/download/wipp/reports/
When_Free_Rpt_Feb_2006.pdf](http://www.correctionalassociation.org/publications/download/wipp/reports/When_Free_Rpt_Feb_2006.pdf)>.

²⁷ See, e.g., the Federal Bureau of Prisons Web
site at <[www.bop.gov/inmate_programs/
trulincs_faq.jsp#2](http://www.bop.gov/inmate_programs/trulincs_faq.jsp#2)>.

²⁸ See, e.g., PB&J Family Services in New
Mexico ([www.pbjfamilyservices.org/
index.html](http://www.pbjfamilyservices.org/index.html)) and The Pennsylvania Prison
Society (www.prisonersociety.org/index.shtml).

Resources

University of Washington Videos Explore Youth Advocacy, Parenting Intervention Strategies

Four new videos from UW School of Law's Court Improvement Training Academy now available for free.

Several new programs from the University of Washington School of
Law's **Court Improvement Training Academy (CITA)** offer insight
into youth advocacy and child welfare issues.

CITA partnered with the Washington Defender Association to create the new series "Issues for Youth Advocates and the Systems in which They Work."

The series includes "**Adolescent Brain Development**," an overview of
the topic by Dr. Fran Lexcen, forensic examiner at Child Study and
Treatment Center. "**Representing Youth**" is a discussion of how to be an
ethical and effective advocate for youth led by UW School of Law As-
sociate Dean Lisa Kelly. Tracee Parker of the Safe Havens Visitation
Center explores the impact of domestic violence on youth and, in par-
ticular, how those issues might be addressed in the context of a visita-
tion center in "**Impact of Domestic Violence on Youth**."

CITA also teamed up with Partners for Our Children, the Foster Care
Assessment Program at the Harborview Center for Sexual Assault and
Traumatic Stress and the University of Washington School of Social
Work to create "**Parenting Interventions in Child Welfare: Creating a
Continuum of Care**." Lucy Berliner, director of the Harborview Center
for Sexual Assault and Traumatic Stress, and Byron Manering, execu-
tive director of the Brigid Collins Family Support Center, discuss evi-
dence-based interventions for behavioral issues.

The Court Improvement Training Academy is funded with Federal
Court Improvement Training Grant money through a contract with the
Washington State Administrative Office of the Courts. Videos on these
topics can be seen on uwtv.org, [iTunes U](http://iTunes), and YouTube.

Visit uwcita.org to learn about upcoming training opportunities and for
more videos, PowerPoint presentations, handouts and other information
created by experts featured in these new videos as well as other state
and national experts.

Family Violence Prevention Fund's

Fifth National Conference on Health and Domestic Violence

Provides valuable professional education on the latest research and
innovative health prevention and clinical responses to domestic violence.

Location: Sheraton New Orleans Hotel, New Orleans, Louisiana

Date: October 8-10, 2009

For more information: Contact Vedalyn DeGuzman,
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