



Child Law Practice

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Helping Lawyers Help Kids

IN PRACTICE

Incarcerated Parents: What You Should Know When Handling an Abuse or Neglect Case

by Mimi Laver

A mother is incarcerated several hours from the courthouse and the child's foster care placement. The father has told the caseworker he does not want to be involved with the child. Ensuring speedy permanency for children is essential, yet there are special considerations when working with a parent who is incarcerated. What are these issues and what steps should be taken to ensure this case is progressing appropriately?

As an attorney or judge handling a case involving an incarcerated parent, you have several key issues to address. Appellate decisions from around the country offer some guidance on a parent's right to participate in a hearing, reasonable efforts for incarcerated parents, and the impact of incarceration on termination of parental rights. This article explores selected recent decisions and case law trends. It also provides practice tips for lawyers and judges handling cases like the one above.

Right to Participate

When a parent is in prison and a hearing will take place, what should you do to include the parent in the court proceeding? Does the parent have an absolute right to be in court or is it enough that he is represented during the hearing? Should the parent be included by conference call, depositions, or given the opportunity to review testimony with her attorney before the case moves forward? Appellate courts around the country have been

dealing with these and similar questions.

In deciding whether incarcerated parents have a procedural due process right in a hearing, many state courts follow the Supreme Court decision *Matthews v. Eldridge*¹ and cases following *Matthews*. *Matthews* set out a three-prong test in which a court must consider:

1. the private interest that will be impacted by the governmental action;
2. the risk of an erroneous deprivation of the private interest through the procedures used and the probative value, if any, of additional or substitute procedural safeguards; and
3. the opposing government interest and what the additional or substitute procedural requirement would entail.²

(See sidebar, "What is *Matthews v. Eldridge* Really About?", p.150.)

In balancing these factors, state courts have found a fundamental due process interest exists in a TPR

hearing. Some courts have gone further to consider whether that due process right automatically means a parent must attend a hearing for the right to be protected. In *In re L.V. v. W.V.*,³ the Supreme Court of Nebraska crafted the following considerations to help courts decide whether a parent should be at a TPR hearing, and if not, whether the parent's due process rights were protected:

- the delay resulting from prospective parental attendance;
- the need for a prompt disposition;
- the amount of time the proceeding has been pending before the juvenile court;
- the expense to the state of transporting the parent;
- the inconvenience or detriment to

(Continued next page)

What's Inside:

147 CASE LAW UPDATE

156 ON THE HORIZON
School-Based Legal
Clinics: Staking a New
Frontier

160 KIDS IN COURT
Child Witness Q&A

ABA Child Law PRACTICE

Child Law Practice (CLP) provides lawyers, judges and other professionals current information to enhance their knowledge and skills, and improve the decisions they make on behalf of children and families. Topics include: abuse and neglect, adoption, foster care, termination of parental rights, juvenile justice, and tort actions involving children and families.

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(Continued from previous page)

parties or witnesses;

- the potential danger or security risk posed by the parent's release from custody or confinement to attend the hearing;
- the reasonable availability of the parent's testimony through means other than attending the hearing; and
- the best interests of the parent's children.⁴

Based on these considerations, the *L.V.* court determined that because proper safeguards were used, the incarcerated father did not have a right to attend the termination hearing. Other state appellate courts have used the *L.V.* analysis to decide whether a parent received appropriate due process protection.⁵ Courts seem to agree that incarcerated parents lack an absolute right to attend a TPR hearing, but that they must have an opportunity to meaningfully participate in the hearing.⁶ Most appellate courts leave the decision about the participation method to the trial court. It could include a parent:

- participating by phone *using equipment that works*;⁷
- submitting deposition testimony and having an opportunity to review the transcript of the state's case and submitting an affidavit in response;
- having the right to review the evidence presented against him, present evidence on his own behalf, and challenge the evidence presented;⁸ or
- having adequate representation at the hearing with the opportunity to consult counsel about cross-examining witnesses.⁹

Practice Tips:

Judges:

- Know whether your state appellate court or legislature has provided direction on how to

protect a parent's due process rights.

- Avoid appellate delays (e.g., do not allow an important hearing, such as a TPR hearing that involves an incarcerated parent, to go forward without the parent's meaningful participation).
- Be consistent from case to case when deciding what factors you will consider when deciding if participation is meaningful. This will help attorneys practicing in your courtroom be prepared to provide diligent representation for parents and help ensure fairness across cases.
- Remember, while speedy permanency is essential for the well-being of the child, protecting the parent's rights and ensuring an accurate and thorough judicial process is just as vital.
- Consider reviewing the systemic barriers to prisoners being brought to your court (i.e., do the sheriffs resist transporting them; are prisoners in your court a lower priority than prisoners in other courts; are out-of-county/state writs not being handled correctly). Use your position to influence a change.

Parents' Attorneys:

- Object to any hearing proceeding without your client's participation and be prepared to argue reasons why the parent should be present.
- Find out if appearing in court could cause problems for the parent when she returns to prison, such as losing status and credit in certain programs for time away from prison, and discuss this issue with your client.¹⁰
- Know ahead of time what factors your judge will consider when deciding if participation is meaningful.
- Ensure an appropriate process has

(Continued on page 150)



What is *Matthews v. Eldridge* Really About?

The three-prong test set out in the *Matthews* decision is more than a lot of legalese. It serves as a way for courts to make a cost-benefit analysis of a number of factors to try to safeguard an individual's rights without unduly prejudicing the government. This test also provides the court with assurance that it is receiving all relevant and important information to make the correct and fair decision. In an abuse/neglect or termination case, the judge's analysis of the factors may include the following:

What are examples of the private interests that could be at stake?

- The parent's right to a relationship with the child.
- The parent's ability to assist counsel in her defense such as helping with cross-examination of witnesses.

What is the risk of error?

The risk is that without proper information, the judge may not reach the correct decision. For example, there is generally a disparity between the resources available to the parent and the government. This could, for instance, mean the government provides expert testimony against the parent that she could not counter with her own expert. The judge must be aware of this difference and try to provide safeguards to counterbalance the discrepancy.

What are examples of the opposing governmental interests that must be considered?

- The child's interests.
- The government's obligation to protect the child's safety and well-being.
- The financial costs of the extra safeguards such as transportation from the prison.

(Continued from page 146)

been developed to protect your client's rights by arguing the need for the parent's participation and assisting the court in making your client available.

- Make a record – if the process seems unfair, you will need a clear record for appeal.

Agency Attorneys:

- Attempt to have the incarcerated parent brought to court or ensure a process is in place before the hearing to allow the parent to participate in the proceeding.
- Understand your jurisdiction's requirements about adequate

notice and provide the parent proper notice of the proceedings.

- Make a record of the reasons it is important to proceed immediately, even if the parent is not present, such as the importance of timely decision making for the child.

Children's Representatives:¹¹

- Ensure proper protections are in place if testifying in front of the incarcerated parent would be difficult for the child.
- Advocate for the parent's presence in court if it will minimize delays for the child or support your case. The parent's presence may reduce the risk of appeal,

and can make the trial move quicker than if parties need to conduct depositions or take extra time at trial when the parent is participating by phone.

- If the child will be present in court, prepare her in advance for what to expect and how she might feel when seeing the parent.

Reasonable Efforts

The child welfare agency's duty to provide reasonable efforts is complicated when the parent is incarcerated. In most cases, the child welfare agency must still provide the family necessary services to facilitate reunification or another permanency plan. The agency should explore with the incarcerated parent and prison social worker, if one exists, what services are accessible in prison. The parent may be able to participate in substance abuse treatment, parenting sessions, and job-related programs.

Even if no services exist at the prison, a parent can:

- write or call the child if appropriate;
- write or call the agency to ask about the child;
- be actively involved in the child's health and education by participating, by phone, in any conferences and meetings about these issues;
- participate in hearings to the extent allowed by the court; and
- actively request visitation.

Visitation should be arranged when feasible and safe for the child because it helps maintain the attachment between parent and child and is an important indicator of whether a child will return to a parent.¹² The parent should be assisted in developing a placement plan while in prison and at the beginning of the case. If relatives can care for the child while the parent is in prison,

that arrangement may be the best for the child and the whole family.¹³ Parents have an obligation to be involved with their child and the child's care. Incarceration does not relieve the parent of the obligation; rather, the parent must comply with the services the agency and prison offer.¹⁴ There are cases in which the agency is not required to make reasonable efforts to reunify the parent and child and this may be based on a parent's crime or incarceration. See below for more on this issue.

Practice Tips:

Judges:

- Know what services are available to incarcerated parents in your state.
- Understand how far the appellate courts in your state have gone to set guidelines for level of parental responsibility.
- Be clear with all parties, from the beginning of the case on, that the agency must provide reasonable efforts and the parents must comply with them unless there has been a judicial decision that the agency is not required to provide reasonable efforts to reunify or a parent's rights have been terminated.
- Remember to strike a balance between ensuring reasonable efforts to parents and speeding permanence for children, while respecting the child's need for connection to his family.

Parents' Attorneys:

- Counsel your client to be involved.
- Request the agency to provide services to the parent.
- Request court orders for the services and visitation if needed.
- Talk to your client about relative placement and push the agency to investigate any potential family members.
- Find out if your state has any

special programs for incarcerated parents to be placed with their children and advocate for a family placement.¹⁵

(See Promising Programs, p.153, for information about similar programs.)

Agency Attorneys:

- Counsel the agency to provide any services possible, including visitation and regular communication between the parent and child when appropriate.
- If services are not available, counsel the agency to document its efforts to locate the services and the reasons they are not available.
- Advise the agency to work with the parent early to find kin to care for the child.
- Encourage the agency to work with prison staff to develop family-friendly programs.

Children's Representatives:

- Evaluate the appropriateness of visitation and other parent-child contact by talking with the child, her therapist, foster mother, and other adults in her life.
- Request services and visitation from the agency and court if it is what is best for the child (or what the child wishes depending on your model of representation).
- Foster communication between the child and parent when appropriate. Ensure the child has the parent's address and phone number. Arrange times with the prison for the child to call the parent.

Reasonable Efforts Not Required

A court may determine that providing efforts to reunite a parent and child is not reasonable. The Adoption and Safe Families Act (ASFA)¹⁶ categorizes some of these cases as aggravated circumstances and gives

examples of these circumstances—when a child was abandoned, the victim of sexual abuse, or the victim of chronic abuse or torture.¹⁷ States may legislate their own list of aggravated circumstances, and a number of states have gone beyond those set out in ASFA. Waiving reasonable efforts is a tool to move the child towards permanency early in a case and it may or may not lead to termination of parental rights and adoption.

Some states have defined incarceration as an aggravated circumstance. Length of incarceration is a factor in some states, while age of the child is a factor in others.¹⁸ California, on the other hand, places emphasis on detriment to the child. The statute provides the following guidance to courts when deciding detriment:

the court shall consider the age of the child, the degree of parent-child bonding, the length of the sentence, the nature of the treatment, the nature of the crime or illness, the degree of detriment to the child if the services are not offered and, for children 10 years of age or older, the child's attitude toward the implementation of family reunification services, and any other factors.¹⁹

Some courts have reviewed cases in which the agency believed services should not be delivered. While incarceration may not be listed as a factor in the state statute, courts have gone beyond the state's enumerated list of aggravated circumstances to decide services are not needed if the services would be "futile" and the incarceration is "persistent and ongoing" and not a "temporary crisis" likely to dissipate in the near future.²⁰

As ASFA implementation spreads in your area, expect to see more cases involving aggravated circumstances soon.

Practice Tips:

Judges:

- Know what your state's statutes and case law say about incarceration as a reason to waive the agency's obligation to provide reasonable efforts.
- Find out if a general clause in the law gives you discretion when deciding whether making reasonable efforts would be effective or futile in reuniting the family.
- Remember this order generally means the parent and child will not be reunited. Carefully balance the age of the child and degree of attachment with the parent, the likelihood the parent will be released from prison and be able to care for the child in a reasonable period, the child's right to permanence, and the parent's rights to the child.

Parents' Attorneys:

- Be aware of any state statutes and case law addressing incarceration as a reason to waive reasonable efforts.
- Soon after your appointment, counsel your client about when reasonable efforts are not required and the likely consequences, including TPR. Find out whether your client wants to fight a no reunification services order.
- If your client wants to work towards reunification, find ways that your case differs from your state statute and any case law. For example, think about the length of the client's sentence, the child's age, the crime for which your client is serving time, and any existing attachments between your client and the child.

- Consider appealing a no reunification services decision.

Agency Attorneys:

- In appropriate cases, bring the no reunification services issue before the court as early in the case as

possible. If the court finds the agency is not required to make reasonable efforts to reunify, ensure the case moves towards permanency, including filing a TPR if necessary, as quickly as possible.

- Be clear with the judge about how long the length of incarceration is expected to last.
- The child's developmental needs and relationship with the parent are key to the judge's ability to make a thoughtful decision. Ensure the caseworker has information about this, documents it well, and presents it to the court.

Children's Representatives:

- Work with the caseworker, foster parent or caretaker, the child's therapist, relatives and other people in the child's life to determine whether ending reunification services is in the child's best interests.
- Discuss this issue with the child to find out her position.
- Depending on your assessment of the case, collaborate with the agency attorney or parent's attorney to reach the best outcome for the child.
- If the court decides the agency need not make reunification efforts, ensure the agency makes and follows through on an appropriate permanency plan that includes necessary services for the child.

Termination of Parental Rights

Most case law involving incarcerated parents stems from termination of parental rights (TPR) cases. In addition to the right to participate line of cases, discussed above, frequently addressed issues include:

Incarceration as a Ground or Factor in TPR—Appellate courts

largely agree that incarceration alone is not a ground for TPR. However, some courts have found incarceration is an element of abandonment of the child, and the TPR can be based on abandonment. In *Michael J. v. Arizona Dep't. of Economic Security*,²¹ the Arizona Supreme Court stated, "Imprisonment, per se, neither 'provides a legal defense to a claim of abandonment' nor alone justifies severance on the grounds of abandonment. Rather, incarceration is 'merely one factor to be considered in evaluating the father's ability to perform [his] parental obligations.'"²² Many courts agree with the *Michael J.* court and terminate based on abandonment if the incarcerated parent does not communicate with the child or try to comply with the case plan.

Similarly, some courts have allowed the use of incarceration to demonstrate parental unfitness as a ground for termination. In *In re M.D.S.*,²³ the Kansas Court of Appeals considered a father's claim that incarceration prevented him from completing his case plan and should not be used as a factor in determining parental unfitness. The court rejected this claim and found the trial court properly terminated the father's rights. The court relied on the Kansas statute setting out factors for deciding a parent's fitness, including conviction of a felony and imprisonment.²⁴

Length of Incarceration—A

number of state legislatures and appellate courts have determined the length of a parent's incarceration is relevant to terminating parental rights. Some laws specify the exact number of years the parent must be incarcerated.²⁵ Other statutes are more general, requiring for example, the state show the incarceration will last a "substantial portion of the period of time before the child will attain the age of 18 years."²⁶

Appellate courts usually consider length of incarceration as one factor in deciding a TPR, rather than basing the entire decision on this issue. A Colorado court, for example, terminated a mother's parental rights based on unfitness after considering the length of her incarceration and the length of her child's time in foster care.²⁷ The *Michael J.* court, on the other hand, thought it important to conduct a case-by-case analysis to determine if the "sentence...is of such a length that the child will be deprived of a normal home for a period of years."²⁸ This totality of the circumstances analysis seems a common way courts decide these types of cases.²⁹

Nature of Crime—ASFA's implementing regulations require agencies to file a TPR petition within 60 days of a judicial determination that reasonable efforts to reunify the child and parent are not required because the parent was convicted of certain crimes.³⁰ While this does not necessarily make the type of crime a ground for termination, the 1996 amendments to the Child Abuse Prevention and Treatment Act (CAPTA) require these crimes be included in state legislation as TPR grounds.³¹ Some states have expanded the list of crimes that are grounds for termination beyond the CAPTA crimes.³² Expect to see more case law on this issue in the near future.

In analyzing the state statutory grounds for TPR, the Texas Court of Appeals reversed a TPR. The court found when deciding to terminate an imprisoned parent's rights, it is necessary to look at the expected length of sentence **and** whether the underlying conduct leading to the incarceration was the type from which child endangerment could be inferred.³³ In this case, the mother was convicted after writing bad checks and she did everything she could to comply with the case plan while in prison. When the parent is



Helping Incarcerated Parents and Children

Chicago Legal Advocacy for Incarcerated Mothers (CLAIM) provides legal and educational services to help imprisoned mothers preserve their families. Through public advocacy, CLAIM promotes policies and programs to benefit families of imprisoned mothers. **Contact information:** 220 South State Street, Suite 830, Chicago, IL 60604, 312/332-5537, Web site: www.C-L-A-I-M.org

The Community Prisoner Mother Program and the Family Foundations Program are projects of the California Department of Corrections Office of Community Resources, Women and Children Services Unit. These programs provide residential settings for women who are convicted of nonviolent crimes, generally drug offenses, and their young children. The women had to be the primary caretaker of their children and cannot have a history of child abuse. They are under 24-hour supervision and receive intensive services such as substance abuse treatment, parenting education, alcoholics anonymous, and child care. The staff also observes the interaction between the mother and child. **Contact information:** David Robinson, Chief, Women and Children Services Unit, CA Department of Corrections, 1515 S Street, Room 400 South, Sacramento, CA 94283, 916/327-7944, 916/445-6029 (fax).

The Family and Corrections Network provides services for families of incarcerated individuals. Their Web site has an extensive list of links to legal services, agencies that assist family members, and foundations that support work relating to incarcerated parents. **Contact information:** 32 Oak Grove Road, Palmyra, VA 22963, 804/589-3036, 804/589-6520 (fax), and e-mail: fcn@fcnnetwork.org, Web site: www.fcnetwork.org

The Incarcerated Mothers Law Project is a joint program of Volunteers of Legal Service and the Women's Prison Association. Through this program, pro bono attorneys provide legal education and direct representation to mothers who are incarcerated in New York city jails and two state prisons. Issues handled include custody, visitation and responsibilities toward children while incarcerated. **Contact information:** Sara Effron, Assistant Director, 54 Greene Street, New York, NY 10013, 212/966-4400, e-mail: volspobono@worldnet.att.net

Legal Services for Prisoners with Children (LSPC) advocates for the civil rights and empowerment of incarcerated parents, children, family members and people at risk for incarceration by responding to requests for information, trainings, technical assistance, litigation, community activism, and the development of more advocates. LSPC's focus is on women prisoners and their families, and it emphasizes that issues of race are central to any discussion of incarceration. **Contact information:** 100 McAllister Street, San Francisco, CA 94102, 415/255-7036, Web site: www.prisonerswithchildren.org



For Your Library

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Wright, Lois E. & Cynthia B. Seymour. *Working With Children and Families Separated by Incarceration: A Handbook for Child Welfare Agencies*. Washington, DC: CWLA Press, 2000. This handbook explains the special needs of children whose parents are in prison and suggests ways to improve child welfare policies and practices. Available by contacting Cynthia Seymour, 202/942-0270.

incarcerated for a nonviolent crime, or one not resulting from an act against a child, courts may be willing to consider facts favoring the parent.

Practice Tips

Judges:

- Know if your state's TPR statute and case law identify factors to consider when terminating an incarcerated parent's rights;
- Determine if your state's case law gives you discretion to consider certain factors, such as length of sentence, when terminating a parent's rights.
- Don't forget to do a best interest

analysis in reaching your decision in a TPR.

Parents' Attorneys:

- Know your state case law so you can distinguish your client's case.
- Conduct a thorough investigation. Find out what portion of a sentence a parent is likely to serve. Try to learn about the quality of your client's relationship with the child. Find out what efforts your client made to be in contact with the child from prison. Use these facts to argue against TPR if that is your client's wish.
- If your client is incarcerated for a

crime unrelated to the child, or other children, establish this during the hearing.

- If your state statute allows and your client desires, negotiate for an open adoption agreement.

Agency Attorneys:

- Be prepared to prove several grounds for TPR, if possible. Don't rely just on the fact that the parent is incarcerated.
- Gather and present the court with information about the parent's criminal history, care of the child before incarceration, and attachment with the child.
- Consider referring the case to mediation, especially if relatives are willing to adopt.
- Depending on your state's statutory framework, consider filing a TPR motion soon after the child enters foster care. In some cases, you can bypass the no reasonable efforts decision process and proceed immediately to TPR.

Children's Representatives:

- Conduct a thorough investigation to ensure TPR is in the child's best interest and is what the child wants. Consider the child's relationship with the parent no matter what the sentence is or the nature of the parent's crime.
- If TPR is your position, help the agency attorney bring the case, or file your own TPR motion if allowed by your state's statute.
- If TPR is not appropriate, tell the caseworker and agency attorney your position and help the parent's counsel fight the motion, if one is filed.
- If your state statute allows, consider whether an open adoption is in the child's best interest, and if so, advocate for such an agreement.

Conclusion

Handling a case involving an