



VOLUNTEERS *of* LEGAL SERVICE

VOLS

Incarcerated Mothers Law Project Family Law Issues for Incarcerated Mothers

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Volunteers of Legal Service



VOLS was founded almost 40 years ago to close the justice gap through partnerships with community organizations, law firms and corporations. We train and work with pro bono attorneys from law firms and corporations to provide free legal services to our clients.



Today's Agenda



- Introduction to IMLP
- Family Law Background
 - Parental incarceration context
 - Common scenarios
 - Family law relevant to incarcerated parents
- Your Role
 - How advocates can make a difference
 - Interviewing tips & strategies
 - Incarcerated clients & trauma-informed lawyering
- Next Steps



Introduction to IMLP



Background of the IMLP



VOLS Incarcerated Mothers Law Project started in the 1990s by a group of attorneys and other legal professionals to address the lack of help for incarcerated mothers with family law needs.

Pre-pandemic, the IMLP conducted in-person clinics at 2 women's prisons—Taconic Correctional Facility and Rikers (Rose M. Singer Center).



Post-Pandemic Relunched IMLP



- **Telephonic intakes** and provision of assistance to incarcerated mothers
- **In-person intakes** at Taconic and Bedford Hills (and potentially other facilities)
- Assistance with retrieving copies of court orders
- Some assistance in drafting and filing petitions
- Rare instances of direct representation in family court (not expected – outside scope of clinic)
- Referrals to other legal services providers and CBOs working with recently-incarcerated mothers



Family Law Background

Parental Incarceration



Women and Mass Incarceration



Source: Speaker: Professor Michele Goodwin. TED. "Women and Mass Incarceration." © 2018 by TED.



Parental Incarceration Statistics—National



>5M

children in the US have had a parent in jail or prison.

2.7M

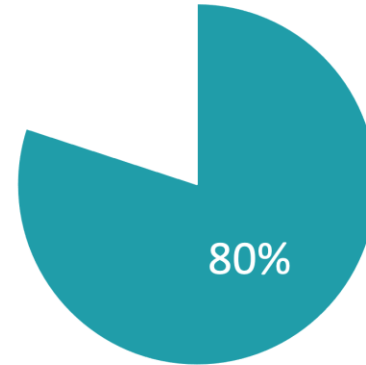
children have an incarcerated parent on any given day.

1.2M

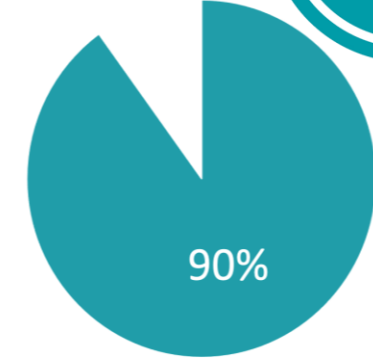
women are incarcerated – 7x higher than in 1980.

58K

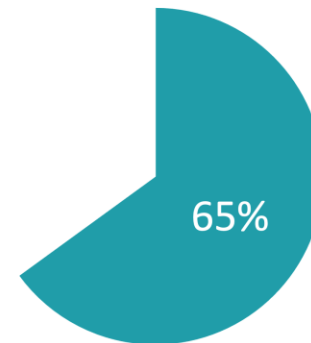
pregnant people are admitted to jail or prison every year.



of women in local jails and 50% of women in prison have kids.



of children live with their mother when their father is incarcerated, compared to 25% of children who live with their father when their mother is incarcerated.



of parents in prison have a history of alcohol or drug use. 55% suffer from mental health disorders.



of mothers in jail or prison have children in foster care, compared to 2% of fathers.



New York State:

- 105,000 children in NYS have at least one incarcerated parent on any given day.
- 1 in 5 children in NYC public schools have had an incarcerated parent. 25 percent of these children have had both parents incarcerated, 62 percent have had only their father incarcerated, and 14 percent have had only their mother incarcerated



Racially Disparate Impact



- **Nationally, 4% of white children and 25% of Black children have had an incarcerated parent**
- **Almost 90% of people held in NYC jails are Latino or Black**
- **In NYC public schools, twice as many Black and Latino students report having had an incarcerated parent compared to white peers**



Impact of Parental Incarceration (1 of 2)



- Increases the likelihood of childhood homelessness by 94-99%
- Increases the likelihood of infant mortality by 47-49%
- Loss of job due to incarceration results in housing instability and increased poverty for children
- Children who have had both parents incarcerated are 12 times more likely to sleep away from home than children who have never had a parent incarcerated
- Children who have had incarcerated parents are more likely to skip meals, partake in drugs and alcohol, have a poor diet, and be less physically active



Impact of Parental Incarceration (2 of 2)



- Parental incarceration is also linked to mental health issues such as anxiety, PTSD, and depression, which often present as behavioral issues, sleep issues, and poor school performance
- Children who have had both parents incarcerated are twice as likely to consider or attempt suicide than children who have never had incarcerated parents
- The negative outcomes of parental incarceration are present both during incarceration and after release, but research suggests that maintaining contact between parent and child during incarceration is a key factor in overcoming these challenges



Family Law Background

Common Scenarios



What issues can you expect?



The following slides will outline some of the more common scenarios and legal issues that we see in our work with incarcerated mothers.

These scenarios are just examples of how these types of cases proceed. You won't be expected to know next steps when confronted with these issues – we'll be advising you every step of the way.



Source: Prison Journalism Project



Common Fact Patterns, 1 of 2



- **Ms. P reports that her daughter's father never picks up phone and wants to file something in court**
 - We would inquire about other family members or friends who could help.
 - We'd advise her to keep calling for a month before filing to try to work things out and to document her attempts at connecting with her child.
 - We would review relevant family court petitions—enforcement, modification, etc.
- **Ms. S surrendered her parental rights some months back and asks how she can undo it. She also isn't getting the photos and updates she is entitled to.**
 - This is a tough conversation. We would talk about the grounds under which a person can vacate a surrender, the high difficulty in proving such grounds, and we talk about how she can get the photos and updates consistent with the order

Common Fact Patterns, 2 of 2



- Ms. M has 2 issues: (1) she will soon be released and wants to regain custody once she's out; and (2) she wants to switch custody of her child from the child's father to her sister (the child's aunt).

(1) We would counsel her on the “best interest of the child” standard in New York State family courts. Thus, we would advise her that she needs to have a job, a home that is suitable for the child, proven stability, people who can vouch for her sobriety. She needs to go at the child's pace.

(2) We would review courts' preference on parents having custody and we would talk about the difficulty non-parents face when petitioning for custody. We would also caution her that, in a court, the judge would make the custody determination.

Family Law Background

Relevant to Incarcerated Parents



Common Family Law Topics for Incarcerated Parents



1. Custody
2. Guardianship
3. Visitation
4. Article 10 (Abuse and Neglect)
5. Foster Care
6. Termination of Parental Rights
7. Surrender of Parental Rights



Source: Felony Murder Elimination Project



Custody: The Basics



Custody in NYS: physical or legal or both; sole or joint

- **Physical** custody relates to where child is living.
- **Legal** custody relates to decision making authority for child (health, welfare, education, religion, with whom the child associates, discipline).
- Joint legal custody means shared decision-making. This is an option for the incarcerated parent; requires cooperation and shared roles in childrearing.

NOTE: there is no **temporary custody** from court in NYS except during pendency of case. 

Custody: How do courts decide?



In custody disputes, NY courts look to child's **best interests**. They consider:

relative fitness

capacity to care for child

home environment

role as primary caretaker

relative stability

history of drug/alcohol use

abuse/neglect

mental health

willing to foster relationship with other parent

preference to keep siblings together

child's preference

proven domestic violence

NO gender preference



Custody: By a Non-Parent



Common Scenario: Children of incarcerated parents often live with another family member or other non-parent.

- Law: there is a superior right of parent over non-parent in a custody dispute; parent prevails as matter of law. *Bennett v. Jeffreys*, 40 N.Y.2d 543 (1976).
- Custody determination when non-parent involved entails two-step process:
 - 1) **Extraordinary Circumstances**: is the parent fit? Has there been a lengthy separation from the child? How much time has the child been with the non-parent? Was the child abandoned? Akin to standing.
 - 2) If the court finds extraordinary circumstances, they move to the best interest of the child analysis
- Consider an **order of guardianship** rather than custody



Custody: Change a Custody Order



Final order of custody can be vacated or modified if:

- agreement by parties; **or**
- substantial change of circumstance;
 - and then the court conducts a “best interests of the child” determination

Once someone is released from prison, can they regain custody?

- If a parental rights have not been terminated, a parent generally has the opportunity to regain custody after release.
- Release of parent from jail or prison is not necessarily a substantial change of circumstances, but it *is* a contributing factor.



Custody: Guardianship as an Alternative



Many non-parent primary caregivers for children need legal documents; a **guardianship order** is in many ways easier to obtain than a full custody order.

Who can file for guardianship?

- Anyone with a pre-existing relationship
- If the child is over the age of 14, their consent is necessary

Petition for Guardianship of the Person in NYS Family Courts

- Allows the guardian to have physical custody of the child
- Allows the guardian to make important decisions about the child's life
- This does not erode the parent's rights to their child—they can still petition for visitation, custody, etc.



Custody v. Guardianship



- Custody proceedings have traditionally been used by **parents**; guardianship proceedings by **non-parents**
- Both Orders (Custody or Guardianship) establish a legal relationship between the child and the caregiver and convey decision-making power to the adult
- **Standard in both:** best interests of the child
- There are slight **differences** between the proceedings
 - Service: Custody mandates in-person service; guardianship can be waived
 - Background checks: only done in guardianship cases
 - Post-release: guardianship order easier to overcome
- Incarcerated parent has **limited control** over these court proceedings





In General: Visitation between non-custodial parent & child is a right of parent and child

- Presumption that visitation is in child's **best interest**; Denial of visitation considered drastic remedy
- Substantial and specific evidence required to show visitation detrimental to child's well-being, causing harm to child

Parental incarceration: not a basis for denial of visitation

- Obstacles for incarcerated parents: distance; inaccessibility; resistance of caretaker; expense; time involved; logistics (area for advocacy)
- Can file petition to **enforce** or **modify** order of visitation (pros and cons to this)
- NYC Administration for Children's Services (ACS) assists with visits if child is in foster care or child welfare system and Hour Children (nonprofit org) assists many other families

Abuse and Neglect: The Child Welfare System



Source: Human Rights Watch. "If I Wasn't Poor, I Wouldn't Be Unfit:" The Family Separation Crisis in the US Child Welfare System. © 2022 by Human Rights Watch.



Article 10: Abuse or Neglect



- Article 10 cases are brought against parents accused of **abuse, neglect, or abandonment**
- Court must hold fact-finding hearing to determine if one or more allegations in petition is proven
- Attorneys for ACS/DSS act in the role of a prosecutor, even though it is a civil case
- Respondents and non-respondent parents have a **right to counsel**
- **No presumption** that a parent abused, neglected, or abandoned their child **due to their incarceration**. NY CLS Soc. Serv. § 384-b (7)(a). However, incarceration may not be used as a defense to rebut a presumption of abandonment where a parent fails to meet communication requirements in the statute. *In re Ariel C.*, 248 A.D.2d 976.



Foster Care



- Temporary out of home placement
- Requires government intervention
- Two types of placements:
 1. **Involuntary:** child removed from home by child welfare, police, or other authorities due to allegations of child abuse or neglect
 2. **Voluntary:** child placed at request of parent or other responsible adult
- Always a short-term arrangement with risk of **Termination of Parental Rights (TPR)**
- **Kinship Care** (by grandparents, other relatives, and sometimes family friends) should be attempted to avoid foster care/TPR



TPR: Incarceration and Loss of Parental Rights



When a parent is incarcerated, they will (at least) temporarily **lose physical custody** and their visitation will change.

In some cases, parents are at risk of losing their parental rights **permanently**. The following slides will outline those situations.



Source: Amplifier Art



TPR: Adoption and Safe Families Act (ASFA)



Source: PBS NewsHour. "Parents with criminal histories struggle to regain custody of children." © 2023 by NewsHour Productions.



TPR: ASFA and Expanded Discretion



ASFA: federal legislation of 1997—now part of every state’s law

The Law: 42 U.S.C.A. § 675(5)(e) **mandates** that foster care agencies file a petition to **terminate parental rights** (TPR) in certain instances:

- The child has been in the state’s care for **at least 15 of the past 22 months**
- The child has been found to be abandoned; or
- The parent has been convicted of murder, attempted murder, or felony assault against the child or another of their children

Foster care agency has the discretion not to file only if:

- Child is cared for by **relatives**
- Showing that terminating parental rights is not in best interests of child
- The agency has not made **reasonable efforts** to help family reunite
- NY foster care agencies have discretion to postpone filing if petition **based solely on incarceration** or participation in drug treatment program



TPR: More on Termination of Parental Rights



- TPR severs legal relationship between parent and child; biological parent becomes a legal stranger to their child
- Oftentimes, post-TPR, the child is adopted
- Often family member or foster parent is adoptive parent
- Child may be adopted without consent of the biological parent

Grounds for TPR (NY CLS Soc. Serv. § 384-b (4)):

1. Abandonment
2. Permanent Neglect
3. Severe Mental Illness
4. Severe/Repeated Child Abuse



Surrender of Parental Rights



Some parents might **voluntarily** surrender their parental rights.

Voluntary relinquishment of parental rights:

- Results in severance of legal relationship between parent and child
- Can include terms requiring adoption by specific person or post-termination contact
- Conditions in surrender are enforceable if in court order but if failure to comply, not grounds to set aside adoption
- In enforcement proceeding, court must determine whether enforcement is in child's best interests



After Loss of Parental Rights



- In *Matter of Hailey ZZ. (Ricky ZZ.)*, 19 N.Y.3d 422 (2012), the court determined that **post-termination visitation** cannot be ordered by court
- Contact with biological parents may be permitted at discretion of adoptive parents—if no orders to contrary
- Recent statute permits reinstatement of parental rights in **narrow** circumstances for child 14 or older, not adopted, and other requirements met
- Adoption registry for reconnecting adult children with biological parents



Your Role

As an Advocate



How can volunteers make a difference?



Strong advocacy can make a world of difference. The following slides will explain how advocates can help.



Source: ACLU



IMLP Volunteers can...



- Help parents understand the legal posture of a case & any existing orders
- Discuss how parents can enforce their rights
- Advocate with caretakers
- Encourage contact by mail, phone, in-person visits, drawings, photos, poems, involvement with schools, service providers.
- Especially when child is in foster care, but in all cases, encourage the client to keep documentation of (1) efforts to maintain relationship (copies of cards, letters, efforts to speak with service providers); (2) completion of programs; (3) graduation, employment, trainings, and efforts to apply for programs; (4) all parent-child contact



Looking Beyond Incarceration



It is very important to strategize with clients about doing everything right while incarcerated to help any future legal case. We talk about:

- The client's relationships with their children, their family members, the foster or adoptive families
- Maintaining contact with their child, pursuant to any court orders
- Staying out of trouble (very difficult given how easy it is to get tickets)
- Taking as many classes in parenting and addiction (if relevant) as possible
- Again—best interests of the child standard



Interviewing and Obtaining Information



Think of the interview in **three** parts:

- **Beginning:** How will you begin the conversation and help your client feel comfortable?
 - Take time for introductions; acknowledge if you are new to the project
 - Explain our mission to provide brief assistance to clients—we're not their new attorneys!
 - Explain that information shared will be kept confidential
- **Middle:** How will you gather information efficiently but sensitively?
 - Listen carefully to client's concerns on family law issues
 - Explain you will consult or research client's questions if you do not have immediate answers
 - Consult with supervising family law attorney to review case and formulate advice
- **End:** How will you wrap things up, respond to client's concerns, and prepare for next steps?
 - Clarify client's legal issues, identify next steps, and plans for follow-up, and be certain to follow-up as promised



Sensitivity in Interviewing



- Think in advance about meeting with clients who are in jail or prison. Pre-conceived notions and biases against incarcerated people are common. Reflect on and confront these notions before meeting with clients
- Be respectful, non-judgmental, and sensitive to client's feelings
- Understand that clients are in very stressful situations and likely feel desperation—be patient with clients who may have a difficult time processing their reality and the advice that you give them
- Remember that many clients have suffered trauma from addiction, abuse, and mental health issues. Approach difficult conversations with sensitivity and compassion, and make sure the client feels heard
- Only ask questions about the client's background and the reason they are incarcerated when it is necessary for their case. Avoid asking any more than you need to ask. Keep the focus on why you are there.



Your Role

Trauma-Informed Lawyering



What is Trauma-Informed Lawyering?



A trauma-informed perspective asks clients not "What is wrong with you?" but instead, "What happened to you?"

-Smyth, Trauma-Informed Social Work

- **Trauma-informed lawyering** acknowledges the prevalence and impact of trauma and attempts to create a sense of safety for all participants
- Trauma-informed lawyering is not a step-by-step formula, but a set of principles that inform your interactions with clients
- **Basic principles** of a trauma-informed approach include: Transparency; Predictability; Client Control; Reliability; Proactive Support; Patience; Role Definition and Boundaries



Trauma-Informed Lawyering: Incarcerated Clients



- Incarceration is inherently harmful to both physical and mental health, sometimes causing what experts call "Post-Incarceration Syndrome" (a diagnosis similar to PTSD)
- Incarcerated clients can experience family disconnection, loss of autonomy, lack of purpose, unpredictability, overcrowding, solitary confinement, and physical and sexual violence
- Additionally, clients may have had negative and/or traumatic experiences with lawyers and the legal system
- A trauma-informed approach recognizes that the trauma of incarceration can cause behaviors like shutting down, lashing out, inability to express oneself in a linear way, hypervigilance, suspicion, etc.
- Openly acknowledge any perceived discomfort and validate any feelings they might express – overall, listen closely and respond with empathy and compassion



Next Steps



Joining IMLP



- **In-person visits**—every 3rd Thursday of the month. At the prison, IMLP volunteers:
 - Meet with clients to hear about their lives, the issues they're facing
 - Fill out intake forms
 - Review the intake forms and any other records with experienced family law attorneys
 - Sometimes there is follow-up—this can be done from the office or at a subsequent in-person visit
- **Telephonic Assistance:** same work, less travel
- IMLP Support—Pro Bono Library, trainings, etc.



Suggested Reading/Watching



- *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* by Michelle Alexander
- *Becoming Ms. Burton: From Prison to Recovery to Leading the Fight for Incarcerated Women* by Susan Burton and Cari Lynn
- *13TH* (Netflix/[Free on Youtube](#))
- Tutwiler ([PBS Frontline](#))
- *Imperfect Victims: Criminalized Survivors and the Promise of Abolition Feminism* by Leigh Goodmark
- *Chokehold: Policing Black Men* by Paul Butler
- *Golden Gulag: Prisons, Surplus, Crisis and Opposition in Globalizing California* by Ruth Wilson Gilmore
- *Arrested Justice: Black Women, Violence, and America's Prison Nation* by Beth E. Richie
- *Just Mercy* by Bryan Stevenson
- Women's Mass Incarceration: The Whole Pie 2024 ([Prison Policy Initiative](#))
- Overlooked: Woman and Jails in an Era of Reform ([Vera](#))
- Racism at Every Stage...How NYC's Administration for Children's Services Discriminates Against Black and Brown Families ([NYCLU](#))
- The "Death Penalty" of Child Welfare: In Six Months or Less, Some Parents Lose Their Kids Forever ([ProPublica](#))
- "If I Wasn't Poor, I Wouldn't Be Unfit": The Family Separation Crisis in the US Child Welfare System ([Human Rights Watch](#))
- Mass Incarceration: An Animated Series ([ACLU](#))



QUESTIONS?



Contact VOLS' Incarcerated Mothers Law Project



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