

AMERICAN BAR ASSOCIATION
ADOPTED BY THE HOUSE OF DELEGATES

FEBRUARY 8-9, 2010

RECOMMENDATION

1 RESOLVED, That the American Bar Association urges bar associations, and law schools to
2 consider and expand, as appropriate, initiatives that assist criminal defendants and prisoners in
3 avoiding undue consequences of arrest and conviction on their custodial and parental rights.
4 Such initiatives should include:

5
6 (a) training criminal defense counsel to: 1) ascertain whether their clients have minor
7 children and if so, to ascertain the location of the children; and, 2) to advise clients with
8 minor children as to the consequences of arrest and conviction on their custodial and
9 parental rights and on how to obtain further assistance in avoiding those consequences;

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11 (b) developing models for training lawyers about the collateral effects of arrest and
12 conviction on their parenting rights that can be distributed to bar associations; and

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14 (c) establishing programs to provide criminal defendants and prisoners with no cost or
15 low cost legal assistance on family law issues, including the avoidance of foster care
16 through kinship care and guardianship arrangements.

17
18 FURTHER RESOLVED, That the American Bar Association urges Congress to eliminate
19 restrictions that prohibit recipients of Legal Services Corporation funds from providing legal
20 assistance to prisoners on family law issues.

REPORT¹

These resolutions would strengthen the ability of criminal defendants and prisoners to obtain assistance on family law issues.

THE INITIAL RESOLVED CLAUSE

The resolved clause is designed as a preemptive measure against the dangers posed by arrest and subsequent conviction to the physical welfare of minor children and to the parent-child relationship. This Resolution naturally follows from A.B.A. Resolution 103E, approved in 2007, which “urges federal, state, territorial and local governments to assist defense counsel in advising clients of the collateral consequences of criminal convictions during representation.”²

The arrest and subsequent conviction of a parent triggers a set of events that poses dangers to the physical welfare of minor children and to the parent-child relationship. In many jurisdictions, arresting police officers have no obligation to locate the arrestee’s children unless there is evidence of child abuse, neglect, or abandonment.³ Arresting officers may not ask the arrestees whether they have children and arrestees may not voluntarily divulge this information because of a realistic fear that their children will be placed in foster care and that their parental rights will be terminated.⁴ Once arrested, parents may have no access to a telephone or information on the processing of their case,

¹ Report written by Jane H. Aiken and Zathrina Zasell G. Perez .

² 103E (CJS, Comm. Effective Sanctions, NLADA, SC on Immigration, SC on Substance Abuse, IR&R) *Approved MY 2007*

RESOLVED, That the American Bar Association urges federal, state, territorial and local governments to assist defense counsel in advising clients of the collateral consequences of criminal convictions during representation.

FURTHER RESOLVED, That the American Bar Association urges federal, state, territorial, and local governments to encourage prosecutors to inform themselves of the collateral consequences that may apply in particular cases.

FURTHER RESOLVED, That the American Bar Association urges federal, state, territorial and local governments to authorize and fund public defender services, legal aid services, and/or other legal service providers, to provide offenders with appropriate assistance in removing or neutralizing the collateral consequences of a criminal record.

FURTHER RESOLVED, That the American Bar Association urges federal, state, territorial and local governments to require prison officials to ensure that prisoners are informed prior to release about the process for removing or neutralizing the collateral consequences of a criminal record, and to require probation and parole officials similarly to advise persons under their supervision about this process.

³ CLARE M. NOLAN, PREPARED FOR THE CAL. RESEARCH BUREAU, CHILDREN OF ARRESTED PARENTS: STRATEGIES TO IMPROVE THEIR SAFETY AND WELL-BEING 7-8, 12-13 (2003), *available at* <http://www.library.ca.gov/crb/03/11/03-011.pdf> .

⁴ *Id.* at 8, 12-13; Myrna S. Raeder, *A Primer on Gender-Related Issues that Affect Female Offenders*, CRIMINAL JUSTICE 8, Spring 2005; Jeremy Travis, *Families and Children*, FED. PROBATION, Jun. 2005, at 35; ANNIE E. CASEY FOUND. & THE WOMEN’S PRISON ASS’N, PARTNERSHIPS BETWEEN CORRECTIONS AND CHILD WELFARE: COLLABORATION FOR CHANGE, PART TWO 15 (2001) [hereinafter *Partnerships*].

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thus hindering them from calling friends and relatives to make care arrangements for their children.⁵ District attorneys may or may not collect information on the children of the persons they prosecute.⁶ Also, court officials usually do not know whether the defendant has a child in foster care and parental status is usually not a factor in sentencing.⁷ In extreme cases, this lack of information may result in children being left completely alone to care for themselves or with unreliable caregivers.⁸ When this occurs, it risks the children's physical wellbeing and also can lead to the parent's loss of custodial rights. If the local child welfare agency removes the children and places them in foster care, the ASFA timeline that can lead to the termination of parental rights is triggered.⁹

Subsections (a), (b) and (c)

This Resolution urges the training of criminal defense counsel to ascertain whether their clients have minor children and if so, the location of the children.¹⁰ It also urges the training of criminal defense counsel to advise clients with minor children on the consequences of arrest and conviction on their custodial and parental rights and on how to obtain further assistance in avoiding those consequences. These measures will have positive consequences for the defense, the client, and the children. They will allow the client to focus on assisting counsel with her defense rather than focusing on the welfare of her children or on the possible loss of her custodial or parental rights.¹¹ They also will “ensure that [the client] does not face child endangerment charges if no one is at home or someone unreliable is watching the children.”¹² Subsection (c) urges the ABA to develop training materials for lawyers to help them appropriately counsel their clients about the effect of their arrest and/or incarceration on their relationship with their children.

⁵ Partnerships, *supra* note 4, at 15.

⁶ TIMOTHY ROSS, ET AL., VERA INST. OF JUSTICE, *HARD DATA ON HARD TIMES: AN EMPIRICAL ANALYSIS OF MATERNAL INCARCERATION, FOSTER CARE, AND VISITATION 1-2* (2004), available at http://www.vera.org/publication_pdf/245_461.pdf; Catherine J. Ross, *The Tyranny of Time: Vulnerable Children, “Bad” Mothers, and Statutory Deadlines in Parental Termination Proceedings*, 11 VA. J. SOC. POL'Y & L. 176 (2004), *supra* note 2, at 14 (“According to some advocates, many local district attorneys collect little or no information on the families of incarcerated women during adjudication and sentencing.”).

⁷ *Id.* at 14-15; see also Raeder, *Primer*, *supra* note 4, at 15 (noting that, in practice, the family ties departure is awarded only where the sentence is one that “either results in no incarcerative sentence or one that is sufficiently short so that the departure is not viewed as benefiting the mother more than the child”).

⁸ NOLAN, *supra* note 3, at 8; Partnerships, *supra* note 1, at 9.

⁹ ASFA § 103.

¹⁰ See generally Raeder, *Primer*, *supra* note 3, at 8 (urging defense counsel “to find out if the female defendant has minor children, and, if so, their location”).

¹¹ Raeder, *Primer*, *supra* note 3, at 8.

¹² *Id.*

Subsection (d)

This Resolution also urges establishing programs to provide criminal defendants and prisoners with no cost or low cost legal assistance on family law issues.¹³ Prisoners face a number of family law issues during their incarceration but may not have anywhere to turn. For example, incarcerated parents can avoid the placement of their children in foster care by using kinship and guardianship arrangements.¹⁴ The execution of these arrangements, however, requires legal assistance.¹⁵ Additionally, if an inmate's child is in the care of a family member or friend, a notarized power of attorney may be necessary for medical and school purposes.¹⁶ Legal assistance here is important because the incarcerated parent will have difficulty finding a notary in her correctional facility.¹⁷ Legal assistance also is needed to prevent termination of parental rights. Although the Supreme Court has held that a state is not constitutionally required to provide a parent with an attorney in termination proceedings,¹⁸ a majority of the states appoint an attorney for court appearances in such proceedings.¹⁹ However, such appointment occurs long after many of the steps the parent needed to take in order to prevent termination already have past.²⁰ In these circumstances, family-related legal assistance is important to prevent the improvident severance of the parent-child relationship.

THE FURTHER RESOLVED CLAUSE

Currently Legal Services' funding includes a restriction on providing free legal services to prisoners. Although Congress is considering a bill that would increase funding for Legal Services Corporation (LSC) and remove some of the restrictions, it retains the prohibition on legal services to prisoners.²¹ This further resolved clause asks the ABA to support legislation that would remove the ban on LSC providing legal services to prisoners. Incarcerated parents need legal services to ensure the safety and wellbeing of their children. Providing legal services to them improve the lives of the children they left behind and increases the likelihood of a successful re-entry.²²

¹³ *Id.* at 19 (urging local bar associations and laws schools to provide pro bono services to incarcerated women on parental rights matters).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Raeder, *Primer*, *supra* note 3, at 8.

¹⁷ *Id.*

¹⁸ *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981).

¹⁹ Raeder, *Primer*, *supra* note 3, at 19.

²⁰ *Id.*

²¹ The bill is called The Civil Access to Justice Act of 2009. A summary, text and status of the bill can be found at <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:SN00718:@@L&summ2=m&>.

²² Zealand, Elise, *Protecting The Ties That Bind From Behind Bars: A Call For Equal Opportunities For Incarcerated Fathers And Their Children To Maintain The Parent-Child Relationship*. 31 COLUMBIA J. LAW & SOC. PROB. 247-281(1998).

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Respectfully submitted,

Charles Joseph Hynes
Chair, Criminal Justice Section
February 2010

GENERAL INFORMATION FORM

Submitting Entity: American Bar Association Criminal Justice Section

Submitted By: Charles Joseph Hynes, Chair

1. Summary of Recommendation(s).
The recommendation urges bars, bar associations and law schools to expand initiatives to assist criminal defendants and prisoners in avoiding undue consequences of arrest and conviction on their parental rights. It also supports legislation that would allow Legal Services to provide prisoners with legal assistance on family law issues and other constitutionally guaranteed rights.
2. Approval by Submitting Entity.
The recommendation was approved by the Criminal Justice Section Council at its Fall meeting on November 7, 2009.
3. Has this or a similar recommendation been submitted to the ABA House of Delegates or Board of Governors previously?
Related resolutions were approved in November 1987 and August 2007. See #4, below.
4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

At the 2007 Midyear Meeting, the ABA approved a resolution urging governments to assist defense counsel in advising clients of the collateral consequences of criminal convictions during representation; to authorize and fund public defender services, legal aid services, and/or other legal service providers; to provide offenders with appropriate assistance in removing or neutralizing the collateral consequences of a criminal record; and to ensure that prisoners are informed prior to release about the process for removing or neutralizing the collateral consequences of a criminal record.

In August 1990, the ABA opposed legislation that would amend the Legal Services Corporation Act by, among other things, depriving the poor of lawyers to assert basic statutory and constitutional rights.

In November 1987, the ABA approved a resolution urging judicial systems and bar associations to work to ensure that competent attorneys be appointed for every indigent parent at all stages of protection proceedings, and that all attorneys receiving such appointments have sufficient training or experience to provide effective legal representation to parents.

The previously-approved policies would be enhanced by the proposed resolution which would emphasize the necessity of training defense attorneys so that they

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can provide clients appropriate advice regarding their parental rights and the undue consequences of arrest and conviction on those rights, and would promote removal of legal barriers to providing such advice through Legal Services.

5. What urgency exists which requires action at this meeting of the House?

According to the U.S. Department of Justice Bureau of Justice Statistics, in 1999 an estimated 721,500 State and Federal prisoners were parents to 1,498,800 children under age 18. Twenty-two percent of all minor children with a parent in prison were under 5 years old. <http://www.ojp.usdoj.gov/bjs/abstract/iptc.html> Since the number of prisoners continues to increase, so does the number of affected families and family law problems. Time is particularly important when impressionable children are involved, and since there is no reason not to act on the proposed resolution at this meeting, it is important to do so.

6. Status of Legislation. (If applicable.)

S. 718 introduced by Sen. Harkin on March 26 2009 and H.R. 3764, introduced by Rep. Scott on October 8, 2009 would allow for use of Legal Services Corporation funds for “litigation related to an incarcerated individual’s ability to reenter society successfully” among other matters.

7. Cost to the Association. (Both direct and indirect costs.)

None.

8. Disclosure of Interest. (If applicable.)

Not applicable.

9. Referrals. (List entities to which the recommendation has been referred, the date of referral and the response of each entity if known.)

Concurrently with the submission of this report to the ABA Policy Administration Office for calendaring on the February 2010 House of Delegates agenda it is being circulated to the following:

Individual Rights and Responsibilities Section
Health Law Section
Family Law Section
Standing Committee on Legal Aid & Indigent Defendants
Coalition for Justice
Council on Mental and Physical Disability Law
Commission on Youth at Risk
Young Lawyers Division
Legal Education and Admissions to the Bar

10. Contact Person. (Prior to the meeting. Please include name, address, telephone number and email address.)

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11. Contact Person. (Who will present the report to the House. Please include email address and cell phone number.)

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EXECUTIVE SUMMARY

A. Summary of Recommendation.

The recommendation urges bars, bar associations and law schools to expand initiatives to provide criminal defendants and prisoners quality legal assistance that will help them avoid undue consequences of arrest and conviction regarding their parental rights. It also urges Congress to allow Legal Services' to provide prisoners with legal assistance on family law issues and other constitutionally guaranteed rights.

B. Issue Recommendation Addresses.

Arrest and conviction often adversely affect both the arrested, convicted, or incarcerated parent and the parent's child or children. This recommendation seeks to reduce those adverse affects, including avoidance of unwarranted foster care.

C. How Proposed Policy Will Address the Issue.

The proposed policy addresses the issue by calling for training that will help defense counsel recognize, and advise their clients about, collateral consequences of arrest and conviction on parental rights and family law issues.

D. Minority Views or Opposition.

No opposition to this recommendation is known to exist at this time.