

January 2000

## California's Incarcerated Mothers: Legal Roadblocks to Reunification

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### Recommended Citation

Heidi Rosenberg, *California's Incarcerated Mothers: Legal Roadblocks to Reunification*, 30 Golden Gate U. L. Rev. (2000).  
<http://digitalcommons.law.ggu.edu/ggulrev/vol30/iss2/4>

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## COMMENT

# CALIFORNIA'S INCARCERATED MOTHERS: LEGAL ROADBLOCKS TO REUNIFICATION

### I. INTRODUCTION

California is home to the largest women's prison in the world, and has the largest prison system for women in the nation.<sup>1</sup> Between 1980 and 1998, the number of women incarcerated in California prisons has increased from 1,316 to 11,694.<sup>2</sup> More than eighty percent of these incarcerated women are mothers.<sup>3</sup> Due to lack of research conducted in this area, it is difficult to determine where children go when their mothers are incarcerated. However, it has been noted that many children live with relatives, usually their maternal grandmother.<sup>4</sup>

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<sup>1</sup>See Barbara Bloom, Meda Chesney Lind and Barbara Owen, *Women in California Prisons: Hidden Victims of War on Drugs*, CENTER ON JUVENILE AND CRIMINAL JUSTICE REPORT, May 1994, 1.

<sup>2</sup>See UNITED STATES GENERAL ACCOUNTING OFFICE, *WOMEN IN PRISON: ISSUES AND CHALLENGES CONFRONTING U.S. CORRECTIONAL SYSTEMS* 19 (December 1999) [hereinafter GAO STUDY].

<sup>3</sup>See Barbara Owen & Barbara Bloom, *Profiling Women Prisoners: Findings from National Surveys and a California Sample*, 75 *PRISON J.*, June 1, 1995, at 165, 175. This comment focuses on mothers who are incarcerated for non-violent property and drug offenses. When referring to "mothers" this comment is not referring to mothers who are incarcerated for violent offenses, including child abuse or neglect.

<sup>4</sup>See BARBARA BLOOM & DAVID STEINHART, NATIONAL COUNCIL ON CRIME AND DELINQUENCY, *WHY PUNISH THE CHILDREN: A REAPPRAISAL OF THE CHILDREN OF INCARCERATED MOTHERS IN AMERICA* 16 (1993) [hereinafter NCCD].

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Children who are not cared for by a relative are often placed in foster care.<sup>5</sup>

California's treatment of incarcerated mothers has been praised as one of the most progressive in the nation due to the procedural protections afforded them.<sup>6</sup> However, despite these legal safeguards, the California system still has shortcomings. As Judge Sills of the California Court of Appeal so poignantly stated, "[w]hile 'use a gun, go to prison' may well be an appropriate legal maxim, 'go to prison, lose your child' is not."<sup>7</sup>

Because it is often difficult or impossible to meet the legal requirements for reunification,<sup>8</sup> mothers incarcerated in California often face an increased chance of losing their parental rights.<sup>9</sup> Women are currently receiving longer sentences for non-violent offenses,<sup>10</sup> creating obstacles for mothers to comply with the time-frame imposed by state reunification laws.<sup>11</sup> Also, mothers are not receiving adequate reunification services while they are in prison.<sup>12</sup>

The effects of incarcerating mothers are cumulative.<sup>13</sup> Commentators suggest that "policy implications and costs of putting more mothers behind bars reach across generations and implicate social institutions well beyond the courts and the

<sup>5</sup> See NCCD, *supra* note 4, at 16.

<sup>6</sup> See Philip M. Genty, *Procedural Due Process Rights of Incarcerated Parents in Termination of Parental Rights Proceedings: A Fifty State Analysis*, 30 J. FAM. L. 757, 831. See also, On-line Interview with Denise Johnston, Director of The Center for Children of Incarcerated Parents in Pasadena, Cal. (Nov. 6, 1999).

<sup>7</sup> *In re Brittany S. v Sheri W.*, 22 Cal Rptr 2d 50, 51 (1993).

<sup>8</sup> See Paula Dressel, Jeff Porterfield and Sandra Kay Barnhill, *Mothers Behind Bars*, 60(7) CORRECTIONS TODAY (December 1, 1998).

<sup>9</sup> See Ellen Barry, *Women in Prison*, in WOMEN AND THE LAW 18-1, 18-26 (1990). See also, Dressel, *supra* note 8.

<sup>10</sup> See Bloom, *supra* note 1.

<sup>11</sup> See Dressel, note 8.

<sup>12</sup> See NCCD, *supra* note 4, at 42.

<sup>13</sup> See Dressel, *supra* note 8.

correctional system.”<sup>14</sup> Children of incarcerated mothers have an increased likelihood of entering the juvenile justice system themselves.<sup>15</sup> Indeed, almost half of all children in the juvenile justice system have parents who are or have been incarcerated.<sup>16</sup> Overall, California has been unable to adequately meet the demands of the growing number of incarcerated mothers and their children.<sup>17</sup>

Part II of this comment will provide statistical information regarding the increase in the number of mothers incarcerated in the United States. Part II will then use California as an example, providing statistical information and a detailed account of the judicial proceedings that an incarcerated mother must adhere to in order to reunite with her children. It will then provide a case example, using *In re Precious J. v. Contra Costa County Department of Social Services*, which demonstrates how the proceedings actually work.<sup>18</sup> *In re Precious* is a 1996 California case that chronicles the difficulties imposed on a mother and child when a mother is incarcerated, including the problems associated with reunification and visitation.<sup>19</sup> The case also illustrates prevalent loopholes that exist in the California justice system.

Part III of this comment will discuss recommendations proposed in response to the nationwide increase in the number of incarcerated mothers. It will include a study conducted in 1992 by the National Council on Crime and Delinquency (“NCCD”), entitled “Why Punish the Children.”<sup>20</sup> This study describes the alarming national increase in the incarceration of

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<sup>14</sup> See Dressel, *supra* note 8.

<sup>15</sup> See CAL. PENAL CODE § 1174 LEGISLATIVE HISTORY (West Supp. 1999).

<sup>16</sup> See Dressel, *supra* note 8.

<sup>17</sup> See generally, Owen, *supra* note 3, at 182.

<sup>18</sup> See generally, *In re Precious J. v. Contra Costa County Dept. of Social Services*, 50 Cal. Rptr. 2d 385 (Cal. Ct. App. 1996).

<sup>19</sup> See *id.*

<sup>20</sup> See generally, NCCD, *supra* note 4, at 42.

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mothers.<sup>21</sup> It also provides policy recommendations to states to help incarcerated mothers and their children reunite.<sup>22</sup> Part III will then describe California's response to the growing number of incarcerated mothers. It will compare programs implemented in California to the proposed recommendations, and will discern whether California has responded adequately to the needs of incarcerated mothers, their children, and their families. Finally, Part IV will propose changes that California policymakers should consider in order to serve the best interests of incarcerated mothers, their children and society.

## II. BACKGROUND

The number of women incarcerated in the United States has tripled since 1985.<sup>23</sup> In 1995, over 113,000 women were in jails and prisons in this country.<sup>24</sup> More than two-thirds of these incarcerated women were mothers of children under the age of 18.<sup>25</sup> These mothers were primarily young, unmarried women of color.<sup>26</sup> Currently, the majority of women in prison are serving sentences for non-violent drug and property offenses.<sup>27</sup> Many commentators state that this enormous increase in the number of incarcerated women is due to the "war on drugs" which has fueled harsher sanctions, including mandatory sentencing laws.<sup>28</sup>

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<sup>21</sup> See *id.*

<sup>22</sup> See *id.*

<sup>23</sup> See NATIONAL INSTITUTE OF JUSTICE, WOMEN OFFENDERS: PROGRAMMING NEEDS AND PROMISING APPROACHES 1 (August 1998) [hereinafter NIJ, WOMEN OFFENDERS].

<sup>24</sup> See SUSAN GALBRAITH, GAINS, WORKING WITH WOMEN IN THE CRIMINAL JUSTICE SYSTEM 17 (1998) [hereinafter GAINS].

<sup>25</sup> See NIJ, WOMEN OFFENDERS, *supra* note 23.

<sup>26</sup> See NATIONAL INSTITUTE OF JUSTICE, THE WOMEN'S PRISON ASSOCIATION: SUPPORTING WOMEN OFFENDERS AND THEIR FAMILIES 2 (December 1998).

<sup>27</sup> See GAINS, *supra* note 24. Specifically the National Institute of Justice reported that in 1993, nearly 72% of women inmates were serving sentences for drug and property offenses. *Id.*

<sup>28</sup> See NCCD, *supra* note 4, at 14-15.; See also, *supra* note 26, at 1.

In 25 states, including California, there are parental termination or adoption statutes that expressly pertain to incarcerated parents.<sup>29</sup> For incarcerated parents who are confined for significant periods of time, there is a great danger of dissolution of their families through state imposed termination of parental rights and adoption proceedings.<sup>30</sup> This danger is particularly true for incarcerated mothers, who are likely to be the sole caretakers for their children prior to imprisonment.<sup>31</sup>

#### A. THE NEED TO FOCUS ON INCARCERATED MOTHERS

Women in prison have needs that are very different from those of men in prison, in large part because of their social responsibility for their children.<sup>32</sup> The majority of mothers currently incarcerated were the sole caretakers for their children prior to incarceration.<sup>33</sup> Families are more likely to be broken as a result of the mother being incarcerated rather than the father.<sup>34</sup> Generally, when a father goes to prison the mother keeps the family intact.<sup>35</sup> However, when a mother goes to prison the father generally does not remain involved in the caretaking of the children and is not there to keep the family together.<sup>36</sup> While some children live with a relative during their mother's incarceration,<sup>37</sup> many enter the foster care system because no family member is available to care for them.<sup>38</sup>

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<sup>29</sup> See Genty, *supra* note 6, at 761.

<sup>30</sup> See *id.*

<sup>31</sup> See *id.* at 760.

<sup>32</sup> See NIJ, WOMEN OFFENDERS, *supra* note 23.

<sup>33</sup> See Barry, *supra* note 9, at 18-3; See also NIJ, WOMEN OFFENDERS, *supra* note 23.

<sup>34</sup> See NATIONAL INSTITUTE OF JUSTICE, KEEPING INCARCERATED MOTHERS AND THEIR DAUGHTERS TOGETHER 4 (October 1995).

<sup>35</sup> See Barry, *supra* note 9, at 18-14.

<sup>36</sup> See *id.*

<sup>37</sup> See NCCD, *supra* note 4, at 24 (reporting that only 17% of the children went to live with their fathers during the mothers incarceration). See also NIJ, WOMEN OFFENDERS, *supra* note 23 (reporting that only 25% of mothers in prison stated that

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In most cases where children are placed with a relative while the mother is incarcerated, the mother has the opportunity to rebuild the relationship once she is released.<sup>39</sup> However, when her children are placed in foster care, the mother's chance greatly increases that she will be permanently separated from her children due to the juvenile courts termination of her parental rights.<sup>40</sup> Typically, once an incarcerated mother's rights are terminated, she loses all parental rights related to her children. Her children can therefore be adopted without her knowledge or consent.<sup>41</sup>

## B. LOSING CHILDREN TO THE FOSTER CARE SYSTEM

A number of reasons explain why an incarcerated mother has an increased chance of losing permanent custody once her children are placed in the foster care system. First, state laws pertaining to termination of parental rights are aimed at parents who voluntarily abandoned their children.<sup>42</sup> Thus, these laws do not adequately protect the rights of an incarcerated mother who wants to maintain contact with her children.<sup>43</sup> Second, despite reunification efforts required by most states, incarcerated mothers rarely reap the benefits of such services.<sup>44</sup>

1. *Scope of State Laws*

Historically, state laws pertaining to termination of parental rights were aimed at parents who voluntarily abandoned

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their children were living with the father, while 90% of the fathers in prison stated their children were living with the mother).

<sup>38</sup> See Genty, *supra* note 6, at 760.

<sup>39</sup> See Barry, *supra* note 9, at 18-15.

<sup>40</sup> See *id.*

<sup>41</sup> See Genty, *supra* note 6, at 761-762.

<sup>42</sup> See Genty, *supra* note 6, at 763.

<sup>43</sup> See *id.* at 764.

<sup>44</sup> See Ellen Barry, *Reunification Difficult for Incarcerated Parents and Their Children*, July-August 1985 YOUTH L. NEWS 14, 15.

their children.<sup>45</sup> These state laws have not adequately protected mothers who are involuntarily separated from their children because of incarceration.<sup>46</sup> Most incarcerated mothers strive to return to their children after serving their sentences.<sup>47</sup> However, many state laws limit the time that children remain in foster care because of the state interest in finding children permanent homes.<sup>48</sup> In California, for example, the law allows for termination of parental rights when children have been in foster care for twelve months<sup>49</sup> and the parent cannot provide the child with a home and adequate care.<sup>50</sup> Since the average sentence for females for property and drug violations often exceeds one year,<sup>51</sup> incarcerated mothers are often unable to satisfy California's statutory requirement to provide a home for their children within twelve months.<sup>52</sup> Thus, they may lose their parental rights entirely.<sup>53</sup>

## 2. *Non-enforcement of State Laws*

The courts in most states are required by law to make "reasonable efforts" to provide reunification services to parents before terminating their parental rights.<sup>54</sup> This rule is applicable to parents whose children have been in foster care for over

<sup>45</sup> See Genty, *supra* note 6, at 764.

<sup>46</sup> See *id.*

<sup>47</sup> See *id.*

<sup>48</sup> See Barry, *supra* note 44, at 14.

<sup>49</sup> CAL. WELF. & INST. CODE § 366.21(f) (West 1999).

<sup>50</sup> CAL. WELF. & INST. CODE § 366.21(g)(1)(c) (West 1999).

<sup>51</sup> The Cal. Dept. of Corrections (visited May 17, 1999) <http://www.cdc.state.ca.us/>. Reports that the average sentence served for a female offender for a property offense is 15.7 months. The average sentence served for a female offender for a drug offense is 16.4 months. *Id.*

<sup>52</sup> See Barry, *supra* note 44, at 14-15.

<sup>53</sup> See *id.*

<sup>54</sup> See Barry, *supra* note 44, at 15. While no statute in California defines what constitutes "reasonable" reunification services, it has been somewhat clarified by case law. See *In re Monica v. Pamela C.*, 36 Cal. Rptr. 2d 910, 916 (1994) (defining reasonable reunification as the requirement to make "a good faith effort to provide reasonable services responding to the unique needs of each family.").



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twelve months.<sup>55</sup> Despite these requirements, an incarcerated mother whose children are in foster care often does not receive any services from the welfare or social service agencies.<sup>56</sup> For example, social workers rarely visit the incarcerated mother in prison and often submit court reports without any statement from her.<sup>57</sup> In some cases, "counties have made a de facto determination that it is not possible to provide reunification services when a parent is incarcerated."<sup>58</sup>

Further, all states require that mothers be notified of dependency proceedings and permanency planning hearings.<sup>59</sup> However, if incarcerated mothers actually receive notice of these hearings, it is often a few days prior to or after the hearing.<sup>60</sup> While some states, including California, allow the incarcerated mother to be transported to any hearings regarding the custody of her children,<sup>61</sup> she cannot exercise this right if she does not receive adequate notice of the hearing.<sup>62</sup> Thus, it is often impossible for incarcerated mothers to reunite with their children upon release from prison.<sup>63</sup>

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<sup>55</sup> See Barry, *supra* note 44, at 15. See, e.g. CAL. WELF. & INST. CODE § 366.21(f) (West 1999) (providing that "[t]he court shall also determine whether reasonable services have been provided or offered to the or guardian that were designed to aid the parent or guardian to overcome the problems that led to the initial removal and continued custody of the child.").

<sup>56</sup> See Barry, *supra* note 44, at 15.

<sup>57</sup> See *id.* at 16.

<sup>58</sup> See *id.*

<sup>59</sup> See Barry, *supra* note 44, at 15.

<sup>60</sup> See *id.*

<sup>61</sup> See *id.* See, e.g. CAL. PENAL CODE § 2625 which allows for transportation of an incarcerated parent to the Juvenile Court proceeding if possible.

<sup>62</sup> See Barry, *supra* note 44, at 15.

<sup>63</sup> See *id.* at 16.

### C. CALIFORNIA – THE JUDICIAL PROCESS WHEN A MOTHER IS INCARCERATED

California serves as a useful starting point in analyzing the criminal justice system's treatment of the parental rights of incarcerated mothers. First, California has the largest women's prison population in the country.<sup>64</sup> Second, California is said to have one of the most comprehensive systems in its treatment of incarcerated mothers.<sup>65</sup> Third, the statistics relating to incarcerated mothers in California nearly mirrors those of the nation.<sup>66</sup>

#### 1. California's Women Prison Population

Between 1980 and 1998, the number of women inmates in California increased by more than 500 percent, from 1,316 in 1980 to over 11,600 in 1998.<sup>67</sup> The Department of Corrections in California does not keep track of the number of incarcerated women who have children,<sup>68</sup> so it is difficult to determine exactly how many incarcerated women in the state are mothers. However, as of 1995, one study reported that eighty percent of women surveyed in California prisons had at least two children.<sup>69</sup>

Nearly seventy-two percent of women inmates in California are serving sentences for drug or nonviolent property offenses.<sup>70</sup> These statistics indicate that the increase of incarcerated women is not due to an increase in violent offenses among women, but to harsher punishments imposed on women

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<sup>64</sup> See Owen, *supra* note 3, at 166.

<sup>65</sup> See Genty, *supra* note 6, at 828.

<sup>66</sup> See Owen, *supra* note 3, at 181.

<sup>67</sup> See GAO STUDY, *supra* note 2, at 19.

<sup>68</sup> Telephone Interview with employee at the California Department of Corrections, Statistical Center (October 1999) (stating they do not keep such records).

<sup>69</sup> See Owen, *supra* note 3, at 175.

<sup>70</sup> See GAINS, *supra* note 24, at 18.

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for non-violent drug and property offenses.<sup>71</sup> This increase in the incarceration of women stems from the legislative response to the growing problem of drugs in this state.<sup>72</sup> Unfortunately, the legislature's reliance on incarceration, rather than prevention, has led to social costs to the mothers, their children and society as a whole.<sup>73</sup>

## 2. *The California System*

When mothers are incarcerated in California, the juvenile court engages in five proceedings governing the custody of their children.<sup>74</sup> These proceedings are: a detention hearing, jurisdiction hearing, disposition hearing, status review hearings and permanency planning hearing.<sup>75</sup> These proceedings are described more fully below, in the order followed by the juvenile court.

### a. The Detention Hearing

When an incarcerated mother is unable to arrange for the care of her children, the Department of Social Services ("DSS") files a juvenile dependency petition with the juvenile court.<sup>76</sup> The petition must state the reasons why DSS believes the children should be made dependents of the juvenile court.<sup>77</sup> In most cases, DSS claims that the children should be made

<sup>71</sup> See Owen, *supra* note 3, at 182. See also Bloom, *supra* note 1, at 2-3 (also stating that during the last decade violent offenses for women has actually decreased).

<sup>72</sup> See Bloom, *supra* note 1, at 2.

<sup>73</sup> See *id.* at 2-3.

<sup>74</sup> See CAL. RULES OF COURT, CHAPTER EIGHT, CASES PETITIONED UNDER SECTION 300 (West 2000).

<sup>75</sup> See *id.*

<sup>76</sup> See CAL. WELF. & INST. CODE § 300 (West 2000). Section 300(g) of the California Welfare and Institution Code requires an incarcerated parent to arrange for adequate care of her child during her incarceration. If the mother cannot arrange for the care of her child, section 300(g) authorizes the juvenile court to adjudge her child a dependent ward of the court. *Id.* See also CAL. WELF. & INST. CODE § 325 (West 2000) (requiring the social worker to file a petition with the Juvenile Court to commence a dependency proceeding.).

<sup>77</sup> See CAL. WELF. & INST. CODE § 319 (West 2000).

wards of the court because the parents are incarcerated and there is no one to care for the children.<sup>78</sup>

Incarcerated mothers have the right to be notified of detention hearings and to be present at the hearings.<sup>79</sup> However, since this hearing may be scheduled as soon as seventy-two hours after the children have been detained, a mother is often unable to obtain a court order for transportation to the hearing within the time allowed.<sup>80</sup> If the mother has a responsible relative who can attend the hearing, the judge may dismiss the dependency petition and allow the children to be released into the relative's care.<sup>81</sup> If the judge believes the relative will not take adequate care of the children, the judge may decide not to dismiss the petition.<sup>82</sup> If the petition is not dismissed, the judge will set the matter for a jurisdiction hearing.<sup>83</sup>

<sup>78</sup> See LEGAL SERVICES FOR PRISONERS WITH CHILDREN, INCARCERATED PARENTS MANUAL 3 (1996) [hereinafter LSPC MANUAL]

<sup>79</sup> See CAL. PENAL CODE § 2625 (West 1999). Section 2625 provides:  
 [A]ny proceeding brought under Section 300 of the Welfare and Institution Code, where the  
 proceeding seeks to adjudicate the child of a prisoner a dependent child of the court, the superior  
 court of the county in which the proceeding is pending, or a judge thereof, shall order notice of  
 any court proceeding regarding the proceeding transmitted to the prisoner...Upon receipt by the  
 court of a statement from the prisoner or his or her attorney indicating the prisoner's desire to be  
 present during the court's proceedings, the court shall issue an order for the temporary removal of the prisoner from the institution, and for the prisoner's production before the court. *Id.*

<sup>80</sup> See LSPC MANUAL, *supra* note 78, at 4.

<sup>81</sup> See CAL. RULES OF COURT 1446 (West 2000). See also LSPC MANUAL, *supra* note 78, at 4.

<sup>82</sup> See CAL. RULES OF COURT 1446 (West 2000).

<sup>83</sup> See CAL. RULES OF COURT 1442(f) (West 2000). See also LSPC MANUAL, *supra* note 78, at 4 (stating that at the detention hearing if the judge does not dismiss the petition, he or she may either allow the child to return home temporarily with the relative or keep the child in temporary foster care. If the judge allows the child to leave with the relative the jurisdiction hearing must be held within 30 days. If the judge keeps the child in foster care the jurisdictional hearing must be held within 15 days).

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## b. The Jurisdiction Hearing

At the jurisdiction hearing, the judge reviews the dependency petition filed by DSS and decides whether to order the children dependents of the court.<sup>84</sup> In order to grant the petition, the judge must find the allegations made by DSS to be true.<sup>85</sup> Incarcerated mothers have the right to be present at the hearing<sup>86</sup> and to be represented by an attorney.<sup>87</sup> In addition, the mother has the right to present witnesses and evidence at the hearing in order to demonstrate to the judge that her children should be placed with a relative during her incarceration.<sup>88</sup> If the judge grants the petition for dependency, the children become dependents of the court.<sup>89</sup> While the mother does not lose all of her parental rights at this point, any claims made by DSS in the petition for dependency can be used against her in future parental termination proceedings.<sup>90</sup>

## c. The Disposition Hearing

If the judge grants the petition for dependency filed by DSS at the jurisdiction hearing, the mother's children become dependents of the court.<sup>91</sup> Under Welfare and Institutions Code section 361.5(e)(1), courts are required to order reasonable family reunification services when a parent is incarcerated and her children are adjudged dependents of the court.<sup>92</sup> Accord-

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<sup>84</sup> See CAL. RULES OF COURT 1449 (West 2000). See also CAL. WELF. & INST. CODE § 360(d) (West 2000). See also LSPC MANUAL, *supra* note 78, at 4.

<sup>85</sup> See CAL. RULES OF COURT 1450(h) (West 2000). See also LSPC MANUAL, *supra* note 78, at 5.

<sup>86</sup> See CAL. PENAL CODE § 2625 (West 1999).

<sup>87</sup> See CAL. WELF. & INST. CODE § 317 (West 1999). See also CAL. RULES OF COURT 1410(g) (West 2000).

<sup>88</sup> See CAL. RULES OF COURT 1449(b) (West 2000). See also LSPC MANUAL, *supra* note 78, at 5.

<sup>89</sup> See LSPC MANUAL, *supra* note 78, at 5.

<sup>90</sup> See *id.*

<sup>91</sup> See *id.*

<sup>92</sup> See CAL. WELF. & INST. CODE § 361.5(e)(1) (West 2000). Section 361.5(e)(1) provides:

ingly, a disposition hearing must be held to determine what reunification plan will be offered.<sup>93</sup> DSS files a court report for the disposition hearing, recommending a reunification plan for the mothers and their children.<sup>94</sup>

All reunification services are rendered pursuant to the Welfare and Institutions Code and the case law interpreting it. Section 361.5(e)(1) states that the following services may be provided to the mother: contact through collect telephone calls; transportation services, when appropriate; visitation services, when appropriate; and reasonable services to other family members or foster parents who are providing care for the children.<sup>95</sup> Case law has further established that in dependency hearings, absent certain circumstances, visitation must be provided to an incarcerated mother.<sup>96</sup> The judge may also require a mother to attend counseling and parenting classes, and vocational training programs as part of the reunification plan,

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If the parent or guardian is incarcerated or institutionalized, the court shall order reasonable reunification services unless the court determines, by clear and convincing evidence, those services would be detrimental to the child. In determining 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 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 appropriate factors. Reunification services are subject to the applicable time limitations imposed in subdivision (a). Services may include, but shall not be limited to, all of the following:

- (A) Maintaining contact between the parent and child through collect telephone calls.
- (B) Transportation services, where appropriate.
- (C) Visitation services, where appropriate.
- (D) Reasonable services to extended family members or foster parents providing care for the child if the services are not detrimental to the child.

An incarcerated parent may be required to attend counseling, parenting classes, or vocational training programs as part of the service plan if these programs are available. *Id.*

<sup>93</sup> See CAL. RULES OF COURT 1455(a) (West 2000).

<sup>94</sup> See *id.*

<sup>95</sup> See CAL. WELF. & INST. CODE § 361.5(e)(1) (West 2000).

<sup>96</sup> See *In re Dylan v. Jamie T.*, 76 Cal. Rptr. 2d 684, 686 (1998).

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if such programs are available where the mother is incarcerated.<sup>97</sup>

Further, these reunification services shall not exceed a period of twelve months from the time the children enter foster care.<sup>98</sup> However, the legislature recently enacted section 361.5(a)(2), also known as the dependency “fast track,” which requires court-ordered reunification services to be terminated after a period of only six months when the children are under the age of three.<sup>99</sup> These time limits are important for an incarcerated mother because she must meet the requirements set out in the reunification program within these time constraints.<sup>100</sup> Failure to do so may result in termination of the mother’s parental rights at the permanency planning hearing.<sup>101</sup>

#### d. The Status Review Hearings

After the court-ordered reunification program has been implemented, a status review hearing must be held within six months by the juvenile court that ordered the children dependents of the court.<sup>102</sup> At this hearing, the judge reviews the reunification plan established by DSS.<sup>103</sup> The mother must fol-

<sup>97</sup> See CAL. WELF. & INST. CODE § 361.5(e)(1) (West 2000).

<sup>98</sup> See CAL. WELF. & INST. CODE § 361.5(a)(1) (West 2000) (stating “For a child who, on the date of initial removal from the physical custody of his or her parent or guardian, was three years of age or older, court-ordered services shall not exceed a period of 12 months from the date the child entered foster care.”).

<sup>99</sup> See CAL. WELF. & INST. CODE § 361.5(a)(2) (West 2000) (stating “For a child who, on the date of initial removal from the physical custody of his or her parent or guardian, was under the age of three years, court-ordered services shall not exceed a period of six months from the date the child entered foster care.” This section was enacted by the California Legislature in 1996).

<sup>100</sup> See LSPC MANUAL, *supra* note 78, at 9.

<sup>101</sup> See *id.* For a discussion of permanency planning hearings, see *infra* at pp. 19-21.

<sup>102</sup> See CAL. RULES OF COURT 1460(a) (West 2000). If the children are not returned to the mother at the six-month status review hearing, a subsequent twelve-month status review hearing will be held pursuant to Rule 1461.

<sup>103</sup> See CAL. RULES OF COURT 1460 (West 2000). See also CAL. WELF. & INST. CODE § 366.21 (West 2000).

low the court-ordered reunification plan created by DSS.<sup>104</sup> Her failure to comply with the treatment program is deemed prima facie evidence that reunification would be detrimental to her children.<sup>105</sup> An incarcerated mother must show that she made an effort to stay in contact with her children and that she participated in any available court-ordered classes.<sup>106</sup>

At each status review hearing, DSS files a report with the court containing its recommendations for disposition of the case.<sup>107</sup> The court considers this report in making its own determination for disposition.<sup>108</sup> When DSS finds that an incarcerated mother has not met the requirements of the reunification plan, it recommends that the court order the children to be taken away from her at the twelve month status review hearing.<sup>109</sup> Such a recommendation typically leads to the termination of the mother's parental rights.<sup>110</sup>

Therefore, a mother must demonstrate at the status review hearing that she has made efforts to maintain contact with her children and that she is meeting the requirements of the reunification plan.<sup>111</sup> Unfortunately, an incarcerated mother often

<sup>104</sup> See CAL. WELF. & INST. CODE § 366.21(e) (West 2000). See also LSFC MANUAL, *supra* note 78, at 8.

<sup>105</sup> See CAL. WELF. & INST. CODE § 366.21(e) (West 2000) (stating “[t]he failure of the parent or guardian to participate regularly and make substantive progress in court-ordered treatment programs shall be prima facie evidence that return would be detrimental.”).

<sup>106</sup> See CAL. WELF. & INST. CODE § 366.21(e) (West 2000). See also LSFC MANUAL, *supra* note 78, at 8-9.

<sup>107</sup> See CAL. WELF. & INST. CODE § 366.21(e) (West 2000) (providing that “[i]n making its determination, the court shall review and consider the social worker’s report and recommendations...”).

<sup>108</sup> See CAL. WELF. & INST. CODE § 366.21(d) (West 2000).

<sup>109</sup> See LSFC MANUAL, *supra* note 78, at 9.

<sup>110</sup> See *id.* See, e.g., *In re Dylan v. Jamie T.*, 76 Cal. Rptr. 2d 684, 687 (1998) (noting that a parents failure to comply with the reunification plan almost always leads to termination of parental rights. It further noted that when a mother cannot avail herself of reunification services because of her incarceration, it is a “fait accompli” that she will fail to comply with the service plan).

<sup>111</sup> See LSFC MANUAL, *supra* note 78, at 9.



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cannot meet these legal requirements because she lacks the resources to maintain contact with her children and the social services department.<sup>112</sup> In addition, social workers often have difficulty facilitating visits between an incarcerated mother and her children when the prisons are a great distance from where the children live.<sup>113</sup> Therefore, while the burden is on the mother to show that she has fulfilled the requirements of the reunification program, it is often difficult to achieve due to such restrictions. Thus, an incarcerated mother is often at great risk of losing her parental rights at the permanency planning hearing.

## e. Permanency Planning Hearing

The court's determinations at the status review hearing regarding the incarcerated mother's progress weighs heavily on DSS' recommendations to the juvenile court at the permanency planning hearing. At this hearing, the juvenile court determines the permanent plan for the children and decides whether the children should be returned to their mother after release.<sup>114</sup> The court must schedule the permanency planning hearing no later than twelve months after the children enter foster care.<sup>115</sup> In order to terminate the mother's parental rights, the court must determine that DSS provided reasonable reunification services and that the mother has not met the requirements of the reunification program.<sup>116</sup>

If the court determines that reasonable services were provided, but the mother has not met the requirements of the plan, the court may order the termination of reunification

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<sup>112</sup> See NCCD, *supra* note 4, at 42-43. See, e.g., Barry, *supra* note 44, at 16 (stating that prisoners are often limited to collect phone calls which greatly restricts a mother's contact with her child and her child's social worker. Further, many social service departments refuse to accept collect calls, restricting the ability of mothers to maintain contact with the social worker).

<sup>113</sup> See NCCD, *supra* note 4, at 42.

<sup>114</sup> See CAL. WELF. & INST. CODE § 366.21(f) (West 2000).

<sup>115</sup> See *id.*

<sup>116</sup> See *id.*

services and order a hearing to terminate her parental rights.<sup>117</sup> Upon terminating her parental rights, the court may place the children for adoption, appoint a legal guardian for the children, or place them in long-term foster care.<sup>118</sup> Despite the presence of other options, the court's statutorily preferred mandate is to terminate parental rights and to place the children up for adoption.<sup>119</sup>

In theory, the requirement that the court find that DSS provided reasonable reunification services before terminating the mother's parental rights seems to be an adequate safeguard to protect her rights. In practice, however, it has not proven to be adequate at all. Moreover, the California Court of Appeal noted that there has been a trend in the lower courts to terminate the parental rights of incarcerated mothers.<sup>120</sup> The Court of Appeal has increasingly reversed these lower court decisions on a finding that reasonable reunification services were not provided despite the lower courts finding that such services were provided.<sup>121</sup> The appeals process is not

<sup>117</sup> See *id.* See also CAL. WELF. & INST. CODE § 366.26(b)(1)(2)(3)) (West 2000).

<sup>118</sup> See CAL. WELF. & INST. CODE § 366.26(b)(1)(2)(3)) (West 2000).

<sup>119</sup> See CAL. WELF. & INST. CODE § 366.26(b) (West 1999). Section 366.26(b) provides:

At the hearing, that shall be held in juvenile court for all children who are dependents of the

juvenile court, the court, in order to provide stable, permanent homes for these children, shall

review the report as specified in Section 361.5, 366.21, or 366.22, shall indicate that the court

has read and considered it, shall receive other evidence that the parties may present, and then shall make findings and orders in the following order of preference: (1) Terminate the rights of the parent or parents and order that the child be placed for adoption...(2)...identify adoption as the permanent placement goal and order that efforts be made to locate an appropriate adoptive family for the child within a period not to exceed 180 days; (3) Appoint a legal guardian for the child and order that letters of guardianship issue; (4) Order that the child be placed in long-term foster care, subject to the periodic review of the juvenile court under Section 366.3.

*Id.*

<sup>120</sup> See Barry, *supra* note 9, at 18-26. See also *In re Terry E.*, 225 Cal. Rptr. 803, 812 (Cal. Ct. App. 1986).

<sup>121</sup> See, e.g., *In re Precious J. v. Contra Costa County Dept. of Social Services*, 50 Cal. Rptr. 2d. 385 (Cal. Ct. App. 1996). See also, *In re Dylan T. v. Jamie T.*, 76 Cal. Rptr. 684 (Cal. Ct. App. )

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an adequate safeguard either, because it often takes a long time for such cases to get before the Court of Appeal.<sup>122</sup> The California Court of Appeal's decision in *In re Precious J. v. Contra Costa County Department of Social Services* provides an excellent example of a Court of Appeal decision reversing the lower court's finding that reasonable reunification services were provided.<sup>123</sup>

### 3. A California Case Analysis: *In re Precious J. v. Contra Costa County Department of Social Services*

In *In re Precious J. v. Contra Costa County Department of Social Services*, the California Court of Appeal reversed the lower court's decision to terminate an incarcerated mother's parental rights.<sup>124</sup> The Court of Appeal held that reasonable services had not been provided to the incarcerated mother, despite the statutory requirement to provide such services prior to terminating her parental rights.<sup>125</sup>

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(reversing the lower court decision that denied the incarcerated mother any visitation with her child based solely on the child's age). See also, *In re Brittany S. v. Sheri W.*, 22 Cal. Rptr. 2d. 50 (Cal. Ct. App. 1993) (reversing the lower courts decision terminating an incarcerated mother's parental rights where the lower court found reasonable reunification services were provided even though it did not provided for visitation). See also, *In re Jonathan M. v. The Superior Court of Orange County*, 62 Cal. Rptr. 2d. 208 (Cal. Ct. App. 1997) (reversing the lower court decision that reunification services were reasonable where the incarcerated parent was denied visitation with her child based solely on distance limitations arbitrarily set up by the Orange County Social Services Agency).

<sup>122</sup> See, e.g., *In re Monica C. v. Pamela C.*, 36 Cal. Rptr. 2d 910 (Cal. Ct. App. 1994). In this case the mother's rights were terminated after the twelve month review hearing in approximately August of 1993. The mother appealed on the grounds that the lower court erred in finding that reasonable reunification services had been provided. The Court of Appeal reversed the lower court's decision on a finding that the lower court had erred in finding that reasonable reunification services had been provided to the mother. This appeal was decided on December 1, 1994, nearly one and a half years after the mother's rights were wrongly terminated. *Id.*

<sup>123</sup> See *In re Precious J. v. Contra Costa County Department of Social Services*, 50 Cal. Rptr. 2d 385 (Cal. Ct. App. 1996).

<sup>124</sup> See *id.*

<sup>125</sup> See *id.*

### a. Factual Background

Precious was born on June 18, 1993 while her mother, Carmen, was incarcerated at the Central California Women's Facility in Merced County.<sup>126</sup> The alleged father was a merchant seaman whose whereabouts were unknown.<sup>127</sup> On June 21, 1993, the Merced Human Services Agency ("the agency") filed a Juvenile Dependency Petition ("petition") in the Superior Court for Merced County, pursuant to Welfare and Institutions Code Section 300(g).<sup>128</sup> In the petition, the agency claimed that Carmen had several past arrests for petty theft, but did not have a criminal history of drugs, violent crime or child abuse.<sup>129</sup> Because Carmen had no one to take care of her daughter, Precious was taken into custody and placed in temporary foster care.<sup>130</sup> Carmen agreed to cooperate with the agency and to take parenting classes while she remained incarcerated.<sup>131</sup>

#### 1. Jurisdiction Hearing

At the jurisdiction hearing, the superior court found the agency's claims in the petition to be true and, thus, exercised jurisdiction over Precious.<sup>132</sup> The court also found Contra Costa County to be Precious' legal residence and therefore ordered that the case be transferred there.<sup>133</sup> The case was

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<sup>126</sup> See *id.* at 386.

<sup>127</sup> See *id.*

<sup>128</sup> See *In re Precious J.*, 50 Cal. Rptr. 2d at 386. For a discussion of Welfare and Institutions Code § 300(g), see *supra* note 76 and accompanying text.

<sup>129</sup> See *In re Precious J.*, 50 Cal. Rptr. 2d at 386.

<sup>130</sup> See *id.*

<sup>131</sup> See *id.*

<sup>132</sup> See *id.* at 387. See CAL. RULES OF COURT 1450(h) (West 2000) (stating that in order for the Juvenile Court to have jurisdiction, it must find all the allegations in the petition to be true, otherwise the petition will be dismissed).

<sup>133</sup> See *In re Precious J.*, 50 Cal. Rptr. 2d at 387.

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transferred to the Superior Court in Contra Costa County where a disposition hearing was held.<sup>134</sup>

## 2. Disposition Hearing

At the disposition hearing, the Contra Costa County Department of Social Services ("DSS") submitted a report that included Carmen's history of arrests and stated that she was currently incarcerated for parole violation and forgery offenses.<sup>135</sup> Carmen was present at the hearing and was represented by a public defender.<sup>136</sup> The foster mother who cared for Precious also attended and requested that Precious be allowed to stay with her.<sup>137</sup> She expressed her commitment to reunification between Precious and Carmen, and agreed to facilitate visits.<sup>138</sup> However, the court denied the foster mother's request to keep Precious in Merced.<sup>139</sup> Instead, based on reassurances by DSS that it would facilitate visitation, the court found that moving Precious farther from the prison might actually facilitate rather than discourage visitation.<sup>140</sup>

Carmen expressed to the court her desire to see her child and requested that the court order DSS to ensure visitation.<sup>141</sup> DSS assured the court that it would facilitate such visitation.<sup>142</sup> The court then ordered DSS to arrange visitation and adopted a modified version of the DSS' reunification plan.<sup>143</sup> Under this plan, Carmen was required to: First, maintain contact with Precious' caretakers by phone or mail

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<sup>134</sup> See *id.*

<sup>135</sup> See *id.*

<sup>136</sup> See *id.*

<sup>137</sup> See *id.*

<sup>138</sup> See *In re Precious J.*, 50 Cal. Rptr. 2d at 387.

<sup>139</sup> See *id.*

<sup>140</sup> See *id.* The court did not explain why moving Precious would facilitate visitation.

<sup>141</sup> See *id.*

<sup>142</sup> See *id.*

<sup>143</sup> See *In re Precious J.*, 50 Cal. Rptr. 2d at 387.

while incarcerated; Second, set up a clean and stable place for Precious to live upon release from prison; Third, abide by the terms of her parole; Fourth, visit Precious on a schedule set up by DSS; and fifth, keep DSS aware of her whereabouts and notify DSS of any changes in her address or telephone number within five days of the change.<sup>144</sup>

### 3. Status Review Hearing

After several continuances, the court held the status review hearing on June 3, 1994.<sup>145</sup> Carmen was present at the hearing.<sup>146</sup> The DSS report stated that Carmen had contacted DSS two times and informed it that she was attending school, and was taking parenting and substance abuse classes.<sup>147</sup> The DSS report also stated that it found a placement for Carmen in a 90-day drug rehabilitation program upon her release on January 10, 1994.<sup>148</sup> However, at one point, Carmen left the drug rehabilitation program for four hours without permission.<sup>149</sup> As a result, Carmen was placed on restriction and a visit with Precious scheduled for that weekend was canceled.<sup>150</sup> In response to the punishment, Carmen left the program.<sup>151</sup> One week later, Carmen was arrested for petty theft and was subsequently placed in the Alameda County Jail.<sup>152</sup>

At the status review hearing, the court estimated that Carmen would be incarcerated until the end of September 1994.<sup>153</sup> In response, the court warned Carmen that she had

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<sup>144</sup> *See id.*

<sup>145</sup> *See id.* at 388. The court did not explain why there were several continuances.

<sup>146</sup> *See id.*

<sup>147</sup> *See id.*

<sup>148</sup> *See In re Precious J.*, 50 Cal. Rptr. 2d at 388.

<sup>149</sup> *See id.*

<sup>150</sup> *See id.*

<sup>151</sup> *See id.*

<sup>152</sup> *See id.*

<sup>153</sup> *See In re Precious J.*, 50 Cal. Rptr. 2d at 388.

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only two months to work on her reunification plan.<sup>154</sup> The court also ordered DSS to arrange visitation twice a month for one hour per visit.<sup>155</sup>

#### 4. Twelve Month Review Hearing

The court held the twelve-month review hearing on August 5, 1994.<sup>156</sup> At this hearing, DSS recommended termination of reunification services and requested that a termination of parental rights hearing be held pursuant to Welfare and Institutions Code section 366.26.<sup>157</sup> DSS reported that while Carmen had maintained contact with Precious' caretaker, she did not meet the visitation requirement.<sup>158</sup> Carmen contested termination of her parental rights.<sup>159</sup> As a result, the court held a subsequent hearing to address this issue.<sup>160</sup> Because DSS did not notify Carmen of the hearing, she was not present.<sup>161</sup> The court proceeded despite Carmen's absence.<sup>162</sup> Without discussion, the court found that DSS had provided reasonable reunification services to Carmen.<sup>163</sup> The court terminated further reunification services, determining that there was no substantial probability that Carmen would be able to regain custody of

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<sup>154</sup> See *id.*

<sup>155</sup> See *id.*

<sup>156</sup> See *id.*

<sup>157</sup> See *id.*

<sup>158</sup> See *In re Precious J.*, 50 Cal. Rptr. 2d at 388.

<sup>159</sup> See *id.*

<sup>160</sup> See *id.* at 389.

<sup>161</sup> See *id.* Carmen was not notified of the hearing by DSS, although she was notified by her counsel. *Id.*

<sup>162</sup> See *id.*

<sup>163</sup> See *In re Precious J.*, 50 Cal. Rptr. 2d at 389.

Precious within the next six months.<sup>164</sup> A hearing was then set to terminate Carmen's parental rights.<sup>165</sup>

### 5. *Permanency Planning Hearing*

At the hearing to terminate Carmen's parental rights, DSS submitted a report which indicated that Carmen was again arrested in February, 1995.<sup>166</sup> DSS recommended that parental rights be terminated and that Precious be placed for adoption.<sup>167</sup> Carmen was present at the hearing and requested an additional six months of family reunification services.<sup>168</sup> She gave several reasons for her request.<sup>169</sup> First, she had been drug-free since September 1994.<sup>170</sup> Second, she completed parenting classes and had maintained contact with Precious' caretaker by writing once a month.<sup>171</sup> Third, she maintained that she was unable to visit Precious because of illness and lack of transportation.<sup>172</sup> Despite Carmen's pleas for another chance, the court denied her request for additional reunification services and terminated her parental rights.<sup>173</sup> Carmen appealed the Superior Court's order to the California Court of Appeal, First District,<sup>174</sup> which held that Carmen did not receive reasonable reunification services as determined by the lower court.<sup>175</sup>

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<sup>164</sup> *See id.* The court did not discuss why or how it determined that there was no substantial probability of a return to custody if reunification services were continued for another six months. *Id.*

<sup>165</sup> *See id.*

<sup>166</sup> *See id.*

<sup>167</sup> *See id.*

<sup>168</sup> *See In re Precious J.*, 50 Cal. Rptr. 2d at 389.

<sup>169</sup> *See id.*

<sup>170</sup> *See id.*

<sup>171</sup> *See id.*

<sup>172</sup> *See id.*

<sup>173</sup> *See In re Precious J.*, 50 Cal. Rptr. 2d at 389.

<sup>174</sup> *See id.*

<sup>175</sup> *See id.* at 385.



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## b. The Appellate Court's Analysis

On appeal, Carmen requested that the judgment terminating her parental rights be reversed because DSS failed to provide reasonable reunification services.<sup>176</sup> She argued that the services were deficient for two reasons.<sup>177</sup> First, the reunification plan adopted by the Juvenile Court was not adequately tailored to her case.<sup>178</sup> Second, DSS failed to facilitate visitation between Carmen and Precious, particularly during Carmen's incarceration.<sup>179</sup>

1. *Inadequate Reunification Plan*

Carmen argued that the reunification plan established by DSS was inadequate because it did not address her substance abuse problem or provide services to facilitate reunification during the period in which she was incarcerated.<sup>180</sup> The court noted that reasonable reunification services must be provided to incarcerated mothers unless the court determines that it would be detrimental to their children.<sup>181</sup> Reasonable reunification has been construed by case law to mean "a good faith effort to provide reasonable services responding to the unique needs of each family."<sup>182</sup> Therefore, the court explained, the lower court's reunification services for Carmen and Precious were required to be reasonable.<sup>183</sup>

Despite the fact that the service plan did not provide drug rehabilitation for Carmen, the Court of Appeal held that it was not inadequate since Carmen claimed not to have a drug prob-

<sup>176</sup> See *id.* at 389.

<sup>177</sup> See *id.* at 390.

<sup>178</sup> See *In re Precious J.*, 50 Cal. Rptr. 2d at 390.

<sup>179</sup> See *id.* .

<sup>180</sup> See *id.* at 391.

<sup>181</sup> See CAL. WELF. & INST CODE § 361.5(e)(1) (West 1999). See also, *In re Precious J.*, 50 Cal. Rptr. 2d at 389-390.

<sup>182</sup> See *In re Precious J.*, 50 Cal. Rptr. 2d at 390.

<sup>183</sup> See *id.*

lem when the plan was initiated.<sup>184</sup> The court conceded that Carmen could have benefited from counseling and vocational training to address her recurring problem of petty thefts.<sup>185</sup> Although the reunification plan did not address these issues, the court determined that since Carmen consented to the plan at the disposition hearing, she could not now complain that counseling and vocational services were not provided.<sup>186</sup> Therefore, the Court of Appeal held that the reunification plan was not deficient for failing to address these issues.<sup>187</sup>

## 2. Right to Visitation While Incarcerated

Next, Carmen argued that she did not receive reasonable reunification services because DSS did not facilitate visitation while she was incarcerated, as ordered by the court.<sup>188</sup> DSS countered, arguing that it was Carmen who failed to comply with the visitation requirement because it was her responsibility to arrange visitation.<sup>189</sup> DSS further argued that visitation was not frustrated by DSS, but because Carmen was incarcerated and failed to contact DSS about visitation.<sup>190</sup>

The court disagreed with DSS' argument, holding that DSS was responsible for setting up visitation for Carmen and Precious.<sup>191</sup> DSS' failure to do so resulted in unreasonable reunification services.<sup>192</sup> The Court of Appeal found that the reunification plan specifically provided that Carmen was to receive visitation with Precious during her incarceration.<sup>193</sup> However, the court recognized that DSS did not arrange for a single

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<sup>184</sup> See *id.* at 391.

<sup>185</sup> See *id.* at 390.

<sup>186</sup> See *id.* at 392.

<sup>187</sup> See *In re Precious J.*, 50 Cal. Rptr. 2d at 392.

<sup>188</sup> See *id.*

<sup>189</sup> See *id.* at 393.

<sup>190</sup> See *id.*

<sup>191</sup> See *id.*

<sup>192</sup> See *In re Precious J.*, 50 Cal. Rptr. 2d at 394.

<sup>193</sup> See *id.* at 392-393.

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visit, despite the fact that it was ordered to do so.<sup>194</sup> It also stated that DSS never set up a visitation schedule for Carmen to comply with, and that the social worker was incorrect in concluding that visitation would be impossible solely because Carmen was incarcerated.<sup>195</sup>

In concluding, the court noted that if DSS had facilitated visitation as it was ordered to do, Carmen and her daughter may have developed a relationship sufficient to provide Carmen with the motivation she needed to complete her sentence and stay out of jail.<sup>196</sup> The court also stated that lack of visitation not only prejudices the parent's interests at a section 366.36 parental right's termination hearing, but also virtually assures the termination of a meaningful relationship between mother and child.<sup>197</sup> Accordingly, the Court of Appeal ruled that reasonable reunification services were in fact not provided to Carmen and, therefore, reversed the judgment terminating her parental rights.<sup>198</sup>

c. The Court's Conclusion

The Court of Appeal concluded that DSS' failure to provide adequate visitation between Carmen and Precious resulted in unreasonable reunification services.<sup>199</sup> Since such services were not provided to Carmen prior to the termination of her parental rights as required by law,<sup>200</sup> the Court of Appeal reversed the lower court's judgment terminating her parental rights.<sup>201</sup> The Court of Appeal reinstated Carmen's parental rights and ordered the juvenile court to direct DSS to develop a

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<sup>194</sup> See *id.* at 393.

<sup>195</sup> See *id.* at 393-394.

<sup>196</sup> See *id.* at 394.

<sup>197</sup> See *In re Precious J.*, 50 Cal. Rptr. 2d at 394.

<sup>198</sup> See *id.* at 394-395.

<sup>199</sup> See *id.* at 395.

<sup>200</sup> See *id.*

<sup>201</sup> See *id.*

new reunification plan.<sup>202</sup> The Court of Appeal's decision in *Precious* demonstrates that the requirement mandated by Welfare and Institutions Code section 366.21(f), that a court find that reasonable reunification services were provided before terminating a mother's parental rights, is not always an adequate safeguard to protect such rights. While the Court of Appeal did reverse the lower court's decision, it took nearly a year for Carmen's appeal to be heard by the this court.

### III. NATIONAL RECOMMENDATIONS AND CALIFORNIA'S RESPONSE

#### A. NATIONAL RECOMMENDATIONS IN RESPONSE TO THE GROWING NUMBER OF INCARCERATED MOTHERS

The rapid increase in the number of incarcerated mothers has led a growing number of commentators to recommend changes in the criminal justice and welfare systems.<sup>203</sup> While the recommendations are wide-ranging, this comment specifically focuses on three recommendations that will lead to an increased chance of reunification between an incarcerated mother and her children. These recommendations include increased community corrections options for incarcerated mothers, expanded visitation programs and adequate funding for family caregivers.

##### 1. *Increased Options for Incarcerated Mothers*

In 1992, the National Council on Crime and Delinquency ("NCCD") published its research findings regarding

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<sup>202</sup> See *In re Precious J.*, 50 Cal. Rptr. 2d at 395.

<sup>203</sup> See generally NCCD, *supra* note 4. See also GAINS, *supra* note 24. See also NIJ, WOMEN OFFENDERS, *supra* note 23. See also Owen, *supra* note 3, at 165. This comment focuses on increased community corrections options, expanded visitation programs and adequate funding for family caregivers. Other important recommendations include improved health care, vocational training programs in prison, mental health programs and reduced sentencing guidelines.

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children of incarcerated mothers.<sup>204</sup> In order to protect the mother-child relationship while at the same time meet the parenting needs of the children, the NCCD recommends greater use of non-institutionalized community corrections facilities.<sup>205</sup> The NCCD also seeks to avoid unnecessary incarceration when safe and reasonable alternatives exist.<sup>206</sup>

Because most women prisoners are drug and property offenders that pose little public safety risks,<sup>207</sup> many can be safely supervised in community-based programs with their young children.<sup>208</sup> These programs reduce the overall cost to taxpayers by consolidating the cost of imprisonment and foster care into one placement for both the mothers and children.<sup>209</sup> These programs allow eligible mothers to live with their children in residential settings while carrying out their sentences.<sup>210</sup> The programs promote drug treatment, parenting classes, and vocational counseling to help the women overcome their problems, reduce recidivism, and maintain family unity.<sup>211</sup> Further, the mother-child separation inherent in a state prison term is thereby avoided.<sup>212</sup>

To facilitate such programs, the NCCD recommends that lawmakers give judges and/or corrections agencies more sentencing options to help maintain the mother-child relationship

<sup>204</sup> See generally, NCCD, *supra* note 4. The study offered a national agenda for reform, including recommendations for state policy makers to follow regarding the needs of incarcerated mothers and their children. This is the most recent edition of this study. The prior study was done in 1978. *Id.*

<sup>205</sup> See NCCD, *supra* note 4, at 63.

<sup>206</sup> See *id.*

<sup>207</sup> See *id.* at 49.

<sup>208</sup> See *id.*

<sup>209</sup> See *id.*

<sup>210</sup> See Judicial Council of Cal. Advisory Committee Rep., *Achieving Equal Justice for Women and Men in California Courts* 314 (1996) [hereinafter Judicial Council Committee Rep.].

<sup>211</sup> See Judicial Council Committee Rep., *supra* note 210.

<sup>212</sup> See *id.* .

of non-violent female offenders.<sup>213</sup> The NCCD maintains that new sentencing laws are meaningless if there are no community corrections facilities available.<sup>214</sup> Accordingly, the NCCD recommends that “legislators and correctional administrators should acknowledge the benefits of maintaining the mother’s role as primary caretaker in appropriate cases,” and establish or expand community-based facilities that will help to preserve the family.<sup>215</sup>

## 2. *Expanded Visitation Programs*

Visitation between an incarcerated mother and her children is a critical component of a reunification program.<sup>216</sup> One commentator stated that visitation is the most important factor for successful reunification.<sup>217</sup> In addition, family visitation increases the likelihood of successful reunification upon release from prison.<sup>218</sup>

The Bedford Hills Correctional Facility for Women in New York has implemented a notable visitation program for incarcerated mothers and their children.<sup>219</sup> Bedford Hills operates a Parenting Center at the correctional facility which helps mothers maintain contact with their children and arrange visits.<sup>220</sup>

<sup>213</sup> See NCCD, *supra* note 4, at 63.

<sup>214</sup> See *id.* at 58.

<sup>215</sup> *Id.* The NCCD notes that since a majority of incarcerated women are in prison for non-violent offenses and pose little risk to the community, incarcerated mothers could live safely with their children while learning valuable training skills and receiving access to needed substance abuse recovery programs. Such programs will lead to a greater chance of successfully re-entering the community. See *id.* at 48-49.

<sup>216</sup> See Barry, *supra* note 9, at 18-25. Barry noted that “personal contact strengthens the parent-child relationship and serves as an expression of a parent’s desire to recover custody.” *Id.* (citing *Matter of John B.*, 205 Cal. Rptr. 321, 325 (1984)).

<sup>217</sup> See Judicial Council Committee Rep., *supra* note 210, at 318.

<sup>218</sup> See Suzanne Carol Schuelke, *Prison Visitation and Family Values*, 70 MICHIGAN BAR JOURNAL (1998).

<sup>219</sup> See NCCD, *supra* note 4, at 51-52. See also GAINS, *supra* note 24, at 10. Bedford Hills has been praised by the NCCD and others as having one of the nations most progressive visitation programs. See GAINS, *supra* note 24, at 10.

<sup>220</sup> See NCCD, *supra* note 4, at 52.

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The facility houses a Children's Center that has a visiting area designated exclusively for mothers and children.<sup>221</sup> Bedford Hills also provides parenting programs for the mothers, including education on child-rearing and health issues.<sup>222</sup> In addition, mothers learn how to work with the child welfare system and how to improve their chances of successful family reunification.<sup>223</sup>

Unfortunately, very few states operate mother-child programs such as those offered at Bedford Hills in New York.<sup>224</sup> While most prisons allow visitation between an incarcerated mother and her children, problems remain.<sup>225</sup> For example, more than half of the mothers incarcerated in state prisons nationwide reported that they have never had a visit with their minor children.<sup>226</sup> Since women's prisons are usually in remote rural locations, mothers are often incarcerated in facilities at great distances from where their children are living.<sup>227</sup> Therefore, visits are hampered by transportation costs,<sup>228</sup> and are often exhausting for the child.<sup>229</sup> In addition, prisons often have rules restricting contact visits.<sup>230</sup> Where no-contact rules exist, visits are conducted through plastic or glass partitions and telephones must be used to communicate.<sup>231</sup> These prohibitions on touching intensify feelings of separation for the mother and her children.<sup>232</sup>

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<sup>221</sup> *See id.*

<sup>222</sup> *See id.*

<sup>223</sup> *See id.*

<sup>224</sup> *See id.* at 53.

<sup>225</sup> *See* NCCD, *supra* note 4, at 51.

<sup>226</sup> *See* GAO STUDY, *supra* note 2, at 56.

<sup>227</sup> *See* Judicial Council Committee Rep., *supra* note 210, at 316.

<sup>228</sup> *See id.*

<sup>229</sup> *See* NCCD, *supra* note 4, at 51.

<sup>230</sup> *See id.*

<sup>231</sup> *See id.*

<sup>232</sup> *See id.*

Additional problems inhibit visitation between an incarcerated mother and her children. For example, some facilities require permission for visitation, which is used as a behavioral control mechanism.<sup>233</sup> Thus, it is not uncommon for children to travel a long distance only to be denied visitation because their mother committed an infraction after permission was granted for the visit.<sup>234</sup>

To alleviate these problems, the NCCD recommends that policymakers and correctional administrators adopt programs and policies that promote contact between an incarcerated mother and her children.<sup>235</sup> Specifically, it recommends that correctional facilities have child-centered visiting environments that will improve the quality of the mother-child relationship, like those implemented at Bedford Hills.<sup>236</sup> Further, it recommends that prisons should have visiting programs that provide more convenient visiting times to accommodate work and school schedules of caregivers and children.<sup>237</sup> When possible, a mother should be placed in an institution closest to where her children are living.<sup>238</sup>

### 3. Increased Support for Family Caregivers

Many children of incarcerated mothers are spared from the foster care system because they are able to live with a family

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<sup>233</sup> See Dressel, *supra* note 8.

<sup>234</sup> See *id.*

<sup>235</sup> See NCCD, *supra* note 4, at 66.

<sup>236</sup> See *id.*

<sup>237</sup> See *id.*

<sup>238</sup> See *id.* Ellen Barry, Director of Legal Services for Prisoners with Children, has also made recommendations to promote contact and visitation. She states that children should be placed in foster homes close to the prison in order to facilitate visitation. Further, foster parents should be reimbursed by the state for collect phone calls from mothers in prison and for transportation costs incurred by foster parents. See Ellen Barry, *Reunification Difficult for Incarcerated Parents and Their Children*, July-August 1985 YOUTH L. NEWS 16.



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caregiver, usually the maternal grandmother.<sup>239</sup> These family caregivers often endure extreme financial hardships due to low or fixed incomes and few available resources.<sup>240</sup> Further, family caregivers are denied the benefit of foster care payments unless they meet rigid guidelines set up by federal and state foster care regulations.<sup>241</sup>

In response to this growing problem, some states, such as New York, offer Kinship Care programs, designed to assist family caregivers in their efforts to provide needed homes to children of incarcerated parents.<sup>242</sup> Under these programs, family caregivers receive the same foster care benefits as non-family caregivers.<sup>243</sup> The NCCD recommends that all states, like New York, provide family caregivers equal access to foster care benefits just as non-related foster care providers are entitled.<sup>244</sup>

## B. CALIFORNIA'S RESPONSE TO THE GROWING NUMBER OF INCARCERATED MOTHERS

### 1. *Increased Community Corrections Options*

California has enacted two statutes establishing Mother/Infant/Child Residential Programs.<sup>245</sup> The first stat-

<sup>239</sup> See NCCD, *supra* note 4, at 30. See also Ellen Barry, River Ginchild and Doreen Lee, *Legal Issues for Prisoners with Children*, in CHILDREN OF INCARCERATED PARENTS 147, 155 (Gabel & Johnston, Lexington Books, eds., 1995).

<sup>240</sup> See Barry, *supra* note 239, at 155.

<sup>241</sup> See Barry, *supra* note 239, at 156. In general, family caregivers can only receive foster care benefits when the children are placed in their care by order of the juvenile court, and the court renders it a foster care placement. *Id.* See also NCCD, *supra* note 4, at 39 (stating that federal regulations also require that the family caregiver be licensed as a foster home before payments start).

<sup>242</sup> See NCCD, *supra* note 4, at 39.

<sup>243</sup> See *id.*

<sup>244</sup> See *id.* at 64. The NCCD further recommends that caregivers should also receive assistance with facilitating visitation and contact between mothers and children, medical care and other services designed to further the chance of successful reunification upon the mothers release. *Id.*

<sup>245</sup> See GAO STUDY, *supra* note 2, at 59.

ute, entitled the Community Prison Mother Program, became effective in January 1980.<sup>246</sup> The second statute, entitled the Pregnant and Parenting Woman's Alternative Sentencing Program Act, became effective on May 9, 1994.<sup>247</sup> These statutes will be discussed separately.

#### a. The Community Prison Mother Program

According to the California Department of Corrections ("CDC"), 429 women in California gave birth while incarcerated between July 1998 and October 1999.<sup>248</sup> Of these mothers, 145 were placed in the Community Prison Mother Program.<sup>249</sup> The CDC operates the Community Prison Mother Program.<sup>250</sup> The CDC has contracts with six private vendors who provide community-based housing and services that can accommodate 94 mothers and their children under six years of age.<sup>251</sup> To qualify for the program, an incarcerated mother must first, have less than six years of her sentence remaining and second, be pregnant or have been the primary caregiver of her children under six years of age prior to her incarceration.<sup>252</sup>

Before being admitted to the program, a mother is carefully screened.<sup>253</sup> She must have no history of violence or escape, and "must be deemed [a fit parent] with no record of child abuse."<sup>254</sup> Once accepted to the program, the mother is pro-

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<sup>246</sup> See CAL. PENAL CODE § 3411(West 2000). See also GAO STUDY, *supra* note 2, at 59.

<sup>247</sup> See CAL. PENAL CODE § 1174 (West Supp. 1999). See also GAO STUDY, *supra* note 2, at 59.

<sup>248</sup> See GAO STUDY, *supra* note 2, at 60.

<sup>249</sup> See *id.*

<sup>250</sup> See *id.* at 59.

<sup>251</sup> See *id.* The facilities are located in Bakersfield, Oakland (2), Pomona, Salinas and Santa Fe Springs. *Id.* at n.8.

<sup>252</sup> See GAO STUDY, *supra* note 2, at 59.

<sup>253</sup> See *Fewer Participants in Inmate Mother Program Return to Prison*, CORRECTION NEWS (Dept. of Corrections, Cal.), Feb. 1999, at 2.

<sup>254</sup> See *id.*

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vided with parenting classes, substance abuse treatment, employment training and related counseling services.<sup>255</sup> Initially, a mother is restricted to the facility.<sup>256</sup> However, as she progresses she is able to participate in off-site jobs and other activities.<sup>257</sup>

#### b. The Pregnant and Parenting Women's Alternative Sentencing Act

The Pregnant and Parenting Women's Alternative Sentencing Act was enacted in response to California's need for new sentencing alternatives.<sup>258</sup> The California legislature stated that the program was established "for substance abusing female offenders with young children to both hold the women offenders accountable and afford both parent and child an opportunity to establish productive lives."<sup>259</sup> The act authorized the development of community-based residential programs for incarcerated mothers with a history of substance abuse, and their children.<sup>260</sup>

The only program developed under the act to date is known as the Family Foundations Program.<sup>261</sup> The first facility under this program was opened in 1999 in Santa Fe Springs; two additional facilities are scheduled to open in 2000.<sup>262</sup> Each facility will accommodate thirty-five mothers and thirty-five chil-

<sup>255</sup> See GAO STUDY, *supra* note 2, at 59.

<sup>256</sup> See *id.*

<sup>257</sup> See *id.*

<sup>258</sup> CAL. PENAL CODE § 1174 HISTORICAL AND STATUTORY NOTES (West Supp. 1999)(noting that there was a dramatic increase in the number of inmate mothers and that judges lacked sufficient intermediate punishment options for such women. The legislature also noted that these mothers and their children were receiving services from a disjointed network of agencies that were not cost effective. It noted that costs of out-of-home care for children in California totaled \$760,000,000.).

<sup>259</sup> CAL. PENAL CODE § 1174 HISTORICAL AND STATUTORY NOTES (West Supp. 1999).

<sup>260</sup> See GAO STUDY, *supra* note 2, at 59.

<sup>261</sup> See *id.* See also *Fewer Participants in Inmate Mother Program Return to Prison*, CORRECTION NEWS (Dept. of Corrections, Cal.), Feb. 1999, at 2.

<sup>262</sup> See GAO STUDY, *supra* note 2, at 60.

dren<sup>263</sup> and will offer services similar to those provided in the Community Prison Mother Program.<sup>264</sup>

Under the Family Foundations Program, mothers are sentenced directly to the residential facility for periods from one to three years, rather than first going to state prison.<sup>265</sup> A mother's eligibility to enter the program is determined jointly by the probation department, the district attorney, the sentencing judge and the CDC.<sup>266</sup> A mother who does not complete the program is sent to prison to complete her sentence.<sup>267</sup> According to the CDC, there is no waiting list for the Family Foundations Program as of this writing.<sup>268</sup>

### c. Results of the Programs

The results of these programs have proven to be promising. The CDC reported in 1999 that a recent study showed that female inmates who participated in inmate mother programs were one-fifth as likely to return to prison.<sup>269</sup> The study indicated that "[o]f the 132 inmate mothers paroled from the program since June 1997, only 10 percent returned to prison for parole violations during the next 18 months".<sup>270</sup> On the other hand, the recidivism rate for the general population of female inmates is 52 percent.<sup>271</sup>

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<sup>263</sup> See *id.*

<sup>264</sup> See *id.*

<sup>265</sup> See *id.*

<sup>266</sup> See *id.* at n.9.

<sup>267</sup> See GAO STUDY, *supra* note 2, at 60.

<sup>268</sup> See *id.*

<sup>269</sup> See *Fewer Participants in Inmate Mother Program Return to Prison*, CORRECTION NEWS (Dept. of Corrections, Cal.), Feb. 1999, at 2.

<sup>270</sup> See *id.*

<sup>271</sup> See *id.*

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2. *Expanded Visitation Programs*

Mother-child visitation during incarceration is an important factor in increasing the chances of successful reunification upon the mother's release from prison.<sup>272</sup> However, the majority of incarcerated mothers never receive visits from their minor children during their incarceration.<sup>273</sup> As noted earlier, the infrequency or absence of visits is due, in part, to travel expenses associated with these often long distance relationships.<sup>274</sup>

In California, both the women's and men's prisons are guided by the same visitation policies.<sup>275</sup> The CDC requires that all prisons allot at least twelve hours of visitation per week.<sup>276</sup> In addition, California prisons provide for family overnight visits with mothers and their children.<sup>277</sup> However, overnight visitation seldom occurs.<sup>278</sup> In fact, at one prison, the facilities maintained for such visits have been converted to office space for the staff.<sup>279</sup>

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<sup>272</sup> See GAO STUDY, *supra* note 2, at 55. See also Judicial Council of Cal. Advisory Committee Rep., *Achieving Equal Justice for Women and Men in California Courts* 316 (1996) (A report from the Judicial Council of California stated visitation frequency is the factor with the highest positive correlation to successful reunification with incarcerated parents and their children).

<sup>273</sup> See GAO STUDY, *supra* note 2, at 56 (This report includes California prisons) *Id.*

<sup>274</sup> See GAO STUDY, *supra* note 2, at 57. For example, the majority of women offenders are from southern California. Yet, the majority of incarcerated women are located at the two prisons in Chowchilla, which is about 260 miles from Los Angeles and 390 miles from San Diego. *Id.*

<sup>275</sup> See *id.*

<sup>276</sup> See *id.* At the two largest women's facilities the time allowed for visiting is 18 hours per week. These are the Central California Women's Facility and the Valley State Prison for Women, both in Chowchilla, where visitation is allowed on Thursdays and Fridays from 2-8pm and on Saturdays and Sundays from 9-3pm. *Id.*

<sup>277</sup> See GAO STUDY, *supra* note 2, at 56. But see NCCD, *supra* note 4, at 53 (noting that a former warden at the Northern California Women's Facility in Stockton stated that no extraordinary steps are taken to facilitate visits, and there are no overnight visitation programs, nor is there any special visiting area).

<sup>278</sup> See GAO STUDY, *supra* note 2, at 56.

<sup>279</sup> See GAO STUDY, *supra* note 2, at 56.

Currently, the California correctional system has no program for assisting mother-child visitation comparable to the Bedford Hills Correctional Facility established in New York.<sup>280</sup> However, there is a community-based program, called Mothers and Their Children (MATCH), that operates a Children's Center at the San Francisco County Jail.<sup>281</sup> MATCH is run by community volunteers who arrange visits between mothers detained in the jail and their children, and help them utilize outside community services.<sup>282</sup>

### 3. Increased Support for Family Caregivers

Until recently, California denied all family caregivers the benefit of foster care payments.<sup>283</sup> However, a new state law, entitled the Kinship Guardianship Assistance Payment Law (Kin-GAP), went into effect in January, 2000.<sup>284</sup> This law grants some family caregivers the same amount of money as non-related foster parents.<sup>285</sup> However, the Kin-GAP law is limited.<sup>286</sup> In order for family caregivers to receive such benefits, the children must have already been adjudged dependents by the juvenile court.<sup>287</sup>

Thus, only those relatives who take children out of foster care and become the legal guardians will receive foster care

<sup>280</sup> See NCCD, *supra* note 4, at 53.

<sup>281</sup> See *id.*

<sup>282</sup> See *id.* at 53-54.

<sup>283</sup> See *King v. McMahon*, 186 Cal. App. 3d 648(1986) (holding that non-relative caregivers were not entitled to foster care payments).

<sup>284</sup> See CAL. WELF. & INST. CODE § 11370 (West Electronic Supp. 2000).

<sup>285</sup> See Laura Hamburg, *To Grandparents' House They Go*, S.F. CHRON., Jan. 9, 2000, at 1.

<sup>286</sup> See *id.*

<sup>287</sup> CAL. WELF. & INST. CODE § 11363 (West Electronic Supp. 2000) (requiring that "Aid in the form of Kin-GAP shall be provided under this article on behalf of any child under 18 years of age who has been adjudged a dependent child of the juvenile court pursuant to Section 300 and for whom a guardianship with a kinship guardian has been established as the result of the implementation of a permanent plan pursuant to Section 366.26"). See also Laura Hamburg, *To Grandparents' House They Go*, S.F. CHRON., Jan. 9, 2000, at 1.

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payments.<sup>288</sup> As a result, the new Kin-GAP law will not assist family caregivers who take custody of children immediately upon the mother's incarceration if the children have not been declared dependents of the juvenile court.<sup>289</sup>

IV. REFORMING THE LAWS PERTAINING TO INCARCERATED MOTHERS

California, as home to the nation's largest prison system for women, should be a leader in providing the most progressive programs for reunifying incarcerated mothers and their children. Currently, California's laws are not adequately tailored to meet the reunification needs of these mothers and their children. To increase the chances of successful reunification, California should enhance existing programs and should tailor termination of parental rights proceedings to include provisions that specifically pertain to incarcerated parents.

A. CALIFORNIA SHOULD ENHANCE EXISTING PROGRAMS TO INCREASE THE CHANCES OF SUCCESSFUL REUNIFICATION

The California Legislature has conceded that an incarcerated mother has special needs relating to her children.<sup>290</sup> The legislature has further stated that programs must be established to serve these needs.<sup>291</sup> The legislature noted that "without intervention, children of incarcerated women have a significantly increased likelihood of entering the child welfare

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<sup>288</sup> See Laura Hamburg, *To Grandparents' House They Go*, S.F. CHRON., Jan. 9, 2000, at 1.

<sup>289</sup> Letter from Wesley A. Beers, Acting Deputy Director Children and Family Services Division, Cal. Dept. of Social Services, to All County Welfare Directors (January 10, 2000) (stating that "The Kin-GAP Program is available only to those children exiting the juvenile court dependency system on or after January 1, 2000 to live with a relative legal guardian. To be eligible for the program, the child must have lived with the relative at least 12 consecutive months, the relative guardianship must be established pursuant to Welfare and Institutions Code 366.26, and the juvenile court dependency for the child must be dismissed."). *Id.*

<sup>290</sup> See CAL. PENAL CODE § 1174 LEGISLATIVE HISTORY (West 1999).

<sup>291</sup> See *id.*

and juvenile justice system, becoming school dropouts, substance abusers and pregnant as adolescents.”<sup>292</sup>

In order to serve these special needs, the legislature has made notable attempts to provide such services to incarcerated mothers and their children to increase the likelihood of successful reunification. These services include the residential community corrections programs,<sup>293</sup> visiting programs<sup>294</sup> and the new Kin-GAP legislation.<sup>295</sup> However, there remains much room for improvement.

### 1. Residential Community Corrections Options

The residential programs for incarcerated mothers and their children established by the legislature have proven effective in reducing recidivism and promoting successful family reunification.<sup>296</sup> However, these programs are rarely filled to capacity because of the CDC’s overly restrictive rules of eligibility.<sup>297</sup> In fact, there is currently no waiting list for the Family Foundations Program.<sup>298</sup> On February 27, 2000, the CDC reported that while the Prisoner Mother Program has a capacity for 94 mothers, only 76 were enrolled in the program.<sup>299</sup> Further, while the Family Foundations Program has a capacity

<sup>292</sup> See *id.*

<sup>293</sup> See CAL. PENAL CODE § 3411(West 2000). See also CAL. PENAL CODE § 1174 (West Supp. 1999).

<sup>294</sup> See GAO STUDY, *supra* note 2, at 57(At Central California Women’s Facility and the Valley State Prison for Women, both in Chowchilla, visitation is allowed on Thursdays and Fridays from 2-8pm and on Saturdays and Sundays from 9-3pm).

<sup>295</sup> See CAL. WELF. & INST. CODE § 11370 (West Electronic Supp. 2000).

<sup>296</sup> See *Fewer Participants in Inmate Mother Program Return to Prison*, CORRECTION NEWS (Dept. of Corrections, Cal.), Feb. 1999, at 2. *Id.*

<sup>297</sup> See NCCD, *supra* note 4, at 48. See also, *e.g.*, *In re Monica v. Pamela C.*, 36 Cal. Rptr. 2d 910, 912 (1994) (stating that the incarcerated mother was denied admission to the mother-infant program because the program only accommodated 94 mothers and therefore, admission was subject to a rigorous screening process).

<sup>298</sup> See GAO STUDY, *supra* note 2, at 60.

<sup>299</sup> See The California Department of Corrections, *Population Reports File* (last modified February 27, 2000) <http://www.cdc.state.ca.us/>.



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for 35 mothers, only 19 were enrolled.<sup>300</sup> Considering the large number of incarcerated mothers and the few placements the programs accommodate, the lack of any waiting lists indicates that the rules for eligibility are overly restrictive. These overly restrictive rules result in underutilized programs that would otherwise greatly aid the reunification process.<sup>301</sup> Further, these restrictive rules are contrary to the legislative intent to reunify incarcerated mothers and their children.<sup>302</sup>

Therefore, the legislature should investigate whether the programs are in fact being underutilized due to overly restrictive CDC eligibility requirements. If the legislature finds this to be true, it should establish new rules of eligibility to ensure that such programs are available to as many incarcerated mothers and their children as possible.

Furthermore, these programs should be more accessible to mothers who do not have a history of substance abuse.<sup>303</sup> For example, in *In re Precious J.*, Carmen was an ideal candidate for a Mother-Infant residential program.<sup>304</sup> She gave birth to Precious while incarcerated,<sup>305</sup> and could easily have been placed in such a program. The court never mentioned why Carmen was not placed in a residential program with her newborn daughter. However, as the Court of Appeal noted, Carmen was incarcerated for petty thefts, and denied having a substance abuse problem.<sup>306</sup> Had Carmen admitted to having a substance abuse problem at the outset, she might have been

<sup>300</sup> See *id.*

<sup>301</sup> See NCCD, *supra* note 4, at 48.

<sup>302</sup> See CAL. PENAL CODE § 1174 HISTORICAL AND STATUTORY NOTES (West Supp. 1999). The legislature stated that "It is essential that California establish new sentencing alternatives for substance abusing female offenders with young children to both hold the women offenders accountable and afford both parent and child an opportunity to establish productive lives." *Id.*

<sup>303</sup> See *id.*

<sup>304</sup> See *In re Precious J. v. Contra Costa County Dept. of Social Services*, 50 Cal. Rptr. 2d 385 (Cal. Ct. App. 1996).

<sup>305</sup> See *id.* at 386.

<sup>306</sup> See *id.* at 391.

eligible for a Mother-Infant Program. However, because she maintained that she did not have a substance abuse problem, Carmen was denied the opportunity to utilize a program designed to keep incarcerated mothers and their children together. As a result, Carmen was denied an adequate chance to reunify with her child.

*In re Precious J.* serves as just one example of why Mother-Infant Programs should be an available option to all incarcerated mothers, regardless of the type of non-violent offense she committed. The type of non-violent offense should not be an eligibility requirement for these programs because they are too restrictive and only hinder the reunification process. The legislature has noted the importance of the reunification process; it should therefore ensure that mothers are eligible for residential corrections programs regardless of whether they are incarcerated for petty thefts or drug offenses.

## 2. Visitation Programs

Visitation is an important part of the reunification process and should therefore be facilitated to the fullest extent possible. While the California women's prisons allow visitation, they do not facilitate visits to the fullest extent possible.<sup>307</sup> Because visitation is important to the reunification process, the CDC should establish children's visiting centers at the prisons. Ideally, it should create a program similar to the Bedford Hills Center established in New York by correctional administrators.<sup>308</sup> The program at Bedford Hills helps incarcerated mothers arrange visits with their children and also provides a relaxed environment for these visits.<sup>309</sup>

However, there are less expensive programs that could be implemented by the CDC, such as the MATCH (Mothers and

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<sup>307</sup> See NCCD, *supra* note 4, at 53 (noting that a former warden at the Northern California Women's Facility in Stockton stated that no extraordinary steps are taken to facilitate visits, and there are no overnight visitation programs, nor is there any special visiting area).

<sup>308</sup> See *id.* at 51-52.

<sup>309</sup> See *id.* at 52.

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Their Children) program, run by volunteers at the San Francisco County Jail.<sup>310</sup> This program helps arrange visits between detained mothers and their children.<sup>311</sup> Either program would help facilitate visitation between incarcerated mothers and their children and would, thus, increase the likelihood of successful reunification. Therefore, such programs should be established to ensure that visits occur as regularly and as frequently as possible. In addition to children centers, the CDC and/or the legislature should facilitate visitation by providing funding for transportation costs.<sup>312</sup>

### 3. *Increased Support for Family Caregivers*

Reunification is more likely to be successful when children are placed with relatives during the mother's incarceration.<sup>313</sup> Accordingly, California should promote placements with family caregivers by expanding the Kinship Guardianship Assistance Program (Kin-GAP)<sup>314</sup> to include foster care payments to all family caregivers, regardless of whether the children have been adjudged dependents of the juvenile court. By expanding foster care payments to all relative caregivers, increased funding will reduce the financial hardships that so many family caregivers face when they take on the responsibility of caring for the children of incarcerated mothers.<sup>315</sup>

Furthermore, additional funding will promote contact between an incarcerated mother and her children. Visitation is often hampered due to high transportation costs as the mother is often incarcerated at a great distance from where her children live.<sup>316</sup> Further, a mother's only means of keeping in con-

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<sup>310</sup> See *id.* at 53.

<sup>311</sup> See *id.* .

<sup>312</sup> See Barry, *supra* note 44, at 16.

<sup>313</sup> See Barry, *supra* note 9, at 18-15.

<sup>314</sup> See CAL. WELF. & INST. CODE § 11363 (West Electronic Supp. 2000).

<sup>315</sup> See Ellen Barry, River Ginchild and Doreen Lee, *Legal Issues for Prisoners with Children*, in CHILDREN OF INCARCERATED PARENTS 147, 155 (Gabel & Johnston, Lexington Books, eds., 1995).

<sup>316</sup> See Judicial Council Committee Rep., *supra* note 210, at 316.

tact with her children is often by collect telephone calls, which caregivers may be unable to accept due to the expense.<sup>317</sup> Thus, increased funding would provide family caregivers with added resources needed to facilitate visits and communication between an incarcerated mother and her children.

The legislative history of the Kin-GAP law, reveals an intent to promote family preservation and reduce involvement of child welfare services when it is in the best interest of the children.<sup>318</sup> Unfortunately, the current law has the opposite effect. For example, requiring that children first be a part of the child welfare system before family caregivers can obtain equal funding<sup>319</sup> does nothing more than increase children's involvement in the system. If family caregivers cannot afford to take care of these children without increased funding, they will be forced to have the children first declared dependents of the juvenile court in order to obtain increased funding provided by Kin-GAP. Thus, more children will be forced into the child welfare system than is necessary. Therefore, the best way to promote family preservation and reduce involvement in the child welfare system is to provide equal funding to all family caregivers without requiring that children first be subjected to juvenile court proceedings.

#### B. CALIFORNIA'S TERMINATION OF PARENTAL RIGHTS PROCEEDINGS SHOULD HAVE SPECIFIC PROVISIONS PERTAINING TO INCARCERATED PARENTS

The Welfare and Institutions Code does not adequately protect the rights of an incarcerated mother to receive reasonable reunification services. There are only a few provisions in the

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<sup>317</sup> See Barry, *supra* note 44, at 16.

<sup>318</sup> See CAL. WELF. & INST. CODE § 11370 (West Electronic Supp. 2000).

<sup>319</sup> CAL. WELF. & INST. CODE § 11363 (West Electronic Supp. 2000) (requiring that "Aid in the form of Kin-GAP shall be provided under this article on behalf of any child under 18 years of age who has been adjudged a dependent child of the juvenile court pursuant to Section 300 and for whom a guardianship with a kinship guardian has been established as the result of the implementation of a permanent plan pursuant to Section 366.26"). See also Laura Hamburg, *To Grandparents' House They Go*, S.F. CHRON., Jan. 9, 2000, at 1.

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code that specifically pertain to incarcerated parents, such as section 361.5(e)(1) which requires the court to provide reasonable reunification services.<sup>320</sup> However, most of the laws pertain to all parents, whether incarcerated or not. Historically, laws created regarding termination of parental rights were aimed at parents who voluntarily abandoned their children,<sup>321</sup> No provisions have been created for mothers who, by virtue of their incarceration, are involuntarily removed as the caretakers of their children.

Welfare and Institutions Code section 361.5(a) serves as an excellent example of a law that does not adequately protect the rights of incarcerated mothers. Under section 361.5(a)(1), incarcerated mothers are required to meet the goals of the reunification plan within twelve months, the same legal time-frame imposed upon parents who are not incarcerated.<sup>322</sup> Further, under section 361.5(a)(2), mothers of children under the age of three have only six months to meet the goals of the reunification plan.<sup>323</sup> This requirement creates an obvious obstacle for those mothers who are sentenced for periods exceeding one year. These mothers are physically unable to assume responsibility for their children due to their incarceration,<sup>324</sup> and are thus prejudiced by laws purporting to provide adequate reunification services to all parents.

To remedy this situation, California laws should provide mothers with individualized time-frames that coincide with the length of their sentences. As noted earlier, most incarcerated mothers were the sole caretakers of their children prior to

<sup>320</sup> See CAL. WELF. & INST. CODE § 361.5(e)(1) (West 2000).

<sup>321</sup> See Genty, *supra* note 6, at 764.

<sup>322</sup> See CAL. WELF. & INST. CODE § 361.5(a)(1) (West 2000).

<sup>323</sup> See CAL. WELF. & INST. CODE § 361.5(a)(2) (West 2000) (stating that “[f]or a child who, on the date of initial removal from the physical custody of his or her parent or guardian, was under the age of three years, court-ordered services shall not exceed a period of six months from the date the child entered foster care. This section was enacted by the California Legislature in 1996.) *Id.*

<sup>324</sup> See Ellen Barry, River Ginchild and Doreen Lee, *Legal Issues for Prisoners with Children*, in CHILDREN OF INCARCERATED PARENTS 147, 152 (Gabel & Johnston, Lexington Books, eds., 1995).

their incarceration.<sup>325</sup> It is these mothers, in particular who need an individualized time-frame. Thus, if a mother is sentenced to 20 months in prison, she should receive an equal amount of time to meet the goals of the reunification plan. Although special limitations would need to be made for mothers who receive extensive sentences, such limitations would pose few obstacles since the majority of women in California receive sentences between one to two years for property and drug offenses.<sup>326</sup>

This individualized time-frame should be included in Welfare and Institutions Code section 361.5(e)(1).<sup>327</sup> As established by California case law, the reasonable reunification services stated in section 361.5(e)(1) requires that “a good faith effort” be made to provide services responsive to the unique needs of each family.<sup>328</sup> Thus, by enacting such a provision, the legislature would be responding to the unique needs of incarcerated mothers and their children by making a good faith effort to provide attainable reunification goals.

## V. CONCLUSION

The failure of California’s legal system to adequately provide reunification services will have lasting effects on incarcerated mothers, their children, families and society. California, as home to the nation’s largest number of incarcerated mothers, should lead the nation in providing services that will promote family reunification. Incarcerated mothers should not necessarily receive lesser sentences for their offenses, but vi-

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<sup>325</sup> See Barry, *supra* note 9, at 18-3; See also NATIONAL INSTITUTE OF JUSTICE, WOMEN OFFENDERS: PROGRAMMING NEEDS AND PROMISING APPROACHES 1 (August 1998).

<sup>326</sup> See The Cal. Dept. of Corrections Website (visited May 17, 1999) <<http://www.cdc.state.ca.us/>>

<sup>327</sup> See CAL. WELF. & INST. CODE § 361.5(e)(1) (West 1999).

<sup>328</sup> See *In re Monica v. Pamela C.*, 36 Cal. Rptr. 2d 910, 916 (1994) (defining reasonable reunification as the requirement to make “a good faith effort to provide reasonable services responding to the unique needs of each family.”).

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able alternatives must be established to promote successful reunification with their children upon release. These alternatives include residential placement options with their children, expanded visitation programs, increased funding for family caregivers and laws that are adequately tailored to meet the requirement of reasonable reunification services.

While it is often easy for people to say that incarcerated mothers have committed a crime and must therefore suffer the consequences, it is not an adequate solution. As these mothers suffer the consequences of their acts, so do their children. Incarcerated mothers and their children have unique needs that lawmakers must acknowledge by revising existing laws in California.

The legislature has noted that incarcerating mothers has a detrimental impact not only on these mothers, but also on their children and will lead to generations of problems.

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