

Collateral Consequences of Battered Woman's Arrest or Conviction in Child Custody

**By: Rebecca Shiemke
Michigan Poverty Law Program**

**BISC-MI Conference
November 5, 2010**

TOPICS

Before and after conviction:

- Custody and parenting time
- Child support
- Parental termination
- Telephonic participation
- Strategies to help survivors with criminal records

Before Conviction/Incarceration

Strategies:

- Investigate effect of guilty plea
 - Effect on maintaining or establishing custody of children
 - Does survivor qualify for deferral for first-time offenders of DV, or other expungement

Before Incarceration...

- Provide for care of children
 - If less than 6 months, sign Power of Attorney or Kinship Care Authorization
 - If more that 6 months:
 - POA extended every 6 months
 - Limited Guardianship

Avoid Parental Rights Termination

Parental Rights can be terminated if:

- Serious crime against child
- Child in foster care 15 out of last 22 months unless compelling reason not to terminate
- Parent in prison 2+ years and did not provide for child's care and custody
- Parent did not provide for child's care and custody, and there is no reasonable expectation that parent will provide proper care/custody within reasonable time (which may be shorter than 2 years)

Actions to Take Where Parent is Facing Prison Time

Parent should give someone legal authority to care for her children. Best option depends on individual circumstances. Two options are:

1. Parental Power of Attorney
"Temporary Authorization of Kinship Care"
Good for 6 months at a time – no court required
2. Guardianship
Requires court order
Guardian must file reports with court

But, for long term incarceration, guardianship has pit falls.

- Limited guardianship is preferred – if parent complies with plan, guardian cannot seek custody or refuse to return child.
- Full guardianship gives guardian standing to file for custody.
- Consider power of attorney, but extend every 6 months.

Before Incarceration...

Address outstanding child support orders

- Advise FOC of incarceration
- File motion to suspend order during incarceration

How Support is Calculated

- Child support amount is calculated based on parents' income, number of children & number of overnights with each parent.
- If payer owes back support, FOC will collect both current and back support.

Child Support

- If support isn't addressed while incarcerated:
 - \$28,000 is the average arrearage for prisoners
 - It is nearly impossible to reduce the amount after release

Problems If Back Support is Owed

- Up to 50% of wages may be taken to pay support after release.
- An arrearage can increase the risk of losing parental rights.
- Arrearages result in loss of driver's and occupational licenses, bench warrants and re-incarceration.

Actions to Take Before Incarceration

- Request reduction or cancellation of child support payments ASAP
- Tell the FOC that you will be incarcerated
- Do this BEFORE incarceration
- Self-help kits available

Actions to Take if Current Support Amount is Too High

- Ask for support review from FOC.
- File motion to reduce support.

Action to Take if Back Support is Owed: Find Out to Whom Arrears are Owed

- Once the child support is owed, payer is legally required to pay it unless the other party agrees to forgive the debt.
- Only the party to whom the debt is owed can forgive that debt.
 - Only the state can forgive debt owed to the state.
 - Only the other parent can forgive debt owed to him or her.

Strategies to Reduce Total Back Child Support that is Owed

- If owed to the state, client may be able to:
 - Ask for an “incarceration credit” from the Friend of the Court
 - Make reasonable payments for 2+ years, and get rest of debt forgiven
 - Make an agreement to pay off a lump sum and get rest of debt forgiven
- If owed to the other parent, other parent can forgive part or all of back support owed.

Strategies to Reduce the Amount Coming Out of Client's Paycheck

- Client can file motion to reduce amount paid each week on an arrearage: this reduces weekly payment but does not decrease the total amount owed.
- Client can ask for a support review from FOC.

Child Support and Disability Payments

- SSI cannot be garnished for child support.
 - Contact Legal Aid for help.
- SSD (social security disability), pensions and other benefits can be garnished for child support. However, individuals has only several hundred dollars left a month, it may be possible to get support payments reduced.

Establishing Custody (or Parenting Time) After Conviction

- To establish or modify custody, Courts must consider the "best interests of the child" by applying 12 best interest factors. MCL 722.23
- Domestic violence is only one factor.
- Criminal convictions are relevant.

Michigan's Best Interest Factors for Custody Decisions MCL 722.23

a. Love, affection, other emotional ties existing between the parties involved & the child	b. Capacity, disposition of parties to give child love, affection & guidance, & to continue the education & raising of the child in his / her religion or creed	c. Capacity, disposition of parties to provide the child with food, clothing, medical care & other material needs.
d. Length of time child has lived in a stable, satisfactory environment, & desirability of maintaining continuity	e. Permanence, as a family unit, of the existing or proposed custodial home or homes	f. Moral fitness of the parties
g. Mental & physical health of the parties	h. Home, school, & community record of the child	i. Child's reasonable preference, if the child is old enough to express one
j. Willingness/ability to facilitate, encourage the child's close, continuing relationship with the other party	k. Domestic violence, regardless of whether directed against or witnessed by the child	l. Any other factor the court considers relevant in a particular case

Barriers to Custody After Conviction

Understand how a conviction may impact custody under the best interest factors:

- Lack of stable housing
- Lack of stable employment
- Lack of moral fitness
- Existence of a PPO or other "evidence" of domestic violence

Overcoming Barriers...

2 Strategies:

- Although 1 of the 12 factors – moral fitness – applies to criminal activity, try to limit impact.
- Identify opposing party as the DV perpetrator and show how perpetrator's domestic violence affects all 12 factors.

Who is the Perpetrator?

- Identify survivor as the DV survivor and opposing party as the perpetrator.
 - She committed a crime, but she is not a batterer.
 - Look at the definition of "domestic violence."
 - She has no history of controlling behavior; he does.

Parenting Time

May be easier to obtain, even with a conviction:

- Shall be granted in accordance with the best interests of the child.
- Strong relationship with both parents is presumed to be in a child's best interests.

MCL 722.27a

Parenting Time (cont)

Child has a right to parenting time unless there is clear and convincing evidence it would "endanger the child's physical, mental or emotional health."

If a parent is convicted of criminal sexual against the parent's child, the court shall not grant parenting time with the child or child's sibling, unless the other parent and child or sibling (if of sufficient age) consent to the parenting time.

MCL 722.27a(3), (5)

Parenting Time (cont)

Court can consider many factors in determining frequency, duration and time.

If requested, court must order parenting time in specific terms.

- Every other weekend from Fri 6pm to Sun 6pm
- Alternating holidays (list them) in even/odd numbered years.

Right to Participate in Proceedings

Incarcerated parent may have the right to telephonic participation in court proceedings affecting their children.

- Must be incarcerated under the jurisdiction of Michigan DOC; not county jail.
- Other parent must give court notice of parent's incarceration.
- Court must issue order requesting DOC allow parent to participate by phone.

MCR 2.004

Questions:

Rebecca Shiemke
Michigan Poverty Law Program
(734) 998-6100 ext 127
rshiemke@lsscm.org
www.mplp.org
www.michiganlegalaid.org
