



Policy Report | 22 August 2018 | D'Adre Cunningham |

Arranging for Temporary Care of Minor Children during Parental Incarceration

The Challenge

Incarcerated parents need the option of making responsible and appropriate caregiving arrangements for the care of their own minor child(ren) when they are not available. There is currently no state law authorizing parents to designate another person with the care of one's own minor children *due to parent's need to be temporarily absent*.¹ Those arrangements when made are mostly emergent, voluntary, flexible, and temporary. These caregiving arrangements once entered into should be respected as if the parent was caring for the child.² To meet this need, incarcerated parents currently rely upon legal instruments that are not explicitly endorsed or protected by the law.³ Some incarcerated parents try to access the permanent legal arrangements offered by our legal framework, but they find these methods are costly or not effective at meeting their family's needs on an emergent and temporary basis.⁴

The Solution

Incarcerated parents use of power of attorney instruments to confer to another person their parental caregiving rights and obligations for their minor children during their temporary absence should be protected by the UPAA. The Washington Defender Association's Incarcerated Parents Project(WDA-IPP) proposes that Washington's Uniform Power of Attorney Act ("UPAA") be amended to provide for the use of power of attorney instruments to effectuate temporary child custody, care, and child-rearing arrangements for minor children with incarcerated parents (and other parents who are temporarily absent from their children).⁵

Background

Almost 30,000 people were incarcerated in Washington in 2016, and just over 104,000 people on probation or parole in Washington State.⁶ The average length of stay in the custody of the Washington State Department of Corrections (DOC) is 24 months,⁷ while those incarcerated in Washington's county and local jails could serve sentences in total confinement locally for up to 364 or 365 days.⁸ The best national data suggests that half of all people incarcerated in state prisons are parents of minor children.⁹ Current efforts by courts and court stakeholders to provide legal assistance to incarcerated parents primarily on setting up permanent caregiving arrangements.

Washington State: The Solution

Washington State does allow a parent to use a power of attorney instrument to designate another person as a caregiver for a minor child under limited circumstances.¹⁰ By enacting the Uniform Power of Attorney Act (“UPAA”),¹¹ the Washington State Legislature outlined circumstances, under which a parent could designate a temporary caregiver but failed to include parents needing to be temporarily absent due to parental incarceration. The UPAA provides:

(2) A principal may further nominate a guardian or guardians of the person, or of the estate or both, of a minor child, whether born at the time of making the durable power of attorney or afterwards, to continue *during the disability of the principal*, during the minority of the child or for any less time by including such a provision in his or her power of attorney.¹²

Unfortunately, the term *disability* as used in this provision is not explicitly defined in the UPAA, but a legal term communicating the principal’s status of “incapacity.”¹³ The UPAA only defines the term *incapacity* under this chapter:

"Incapacity" means inability of an individual to manage property, business, personal, or health care affairs because the individual:

(a) Has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance; or

(b) Is:

(i) An absentee, as defined in chapter 11.80 RCW; or

(ii) Outside the United States and unable to return.¹⁴

As a result, incarcerated parents appear to be excluded from the individuals who can effectively use a power of attorney instruments to confer to another person their parental caregiving rights and obligations for their minor children during their *temporary* absence.

To fix this problem, WDA-IPP recommends the UPAA be amended as follows:

(1) Add to the definition of incapacity at RCW 11.125.020 (5)(b) to include “(iii) incarcerated”; and

(2) Change the word “nominate” to “designate” at RCW 11.125.410(2); and

(3) Add as the last sentence to RCW 11.125.410(2) as follows “The power of attorney under RCW 11.125.410(2) shall not affect the rights of the parent of the child in any proceeding concerning custody of the child or the allocation of parental rights and responsibilities for the care of the child. The terms “incapacity” and “disability” are legal terms used to effectuate certain rights and privileges under this Act only and shall not be construed to be given legal effect or legal meaning in any other proceedings concerning the custody of the child.”

¹ See RCW 11.125.410(2)(requiring disability of the parent to confer temporary care of minor children to another).

² The State remains able to fulfill any statutory obligation of child protection with these arrangements in place, since parents may be held accountable for their child’s maltreatment at the hands of others.

³ RCW 11.125.410(2)(allows for temporary arrangements but with limitations); see Chapter RCW 26.33 (adoption of minor children); RCW 11.88.080 (guardianship of minor child upon death or incapacity of surviving parent);

Chapter RCW 13.36 (guardianship of minor children found dependent under Title 13); and RCW 26.10 (child custody proceedings over minor children with someone other than a parent).

⁴ Non-parental custody orders and elements have been changed by judicial precedence and make it nearly impossible if properly entered for a formerly incarcerated parent to undo upon return to the community.

⁵ Other examples of circumstances that might constitute temporary parental absence are, but should not be limited to: military deployment, intensive or emergent medical or behavioral health treatment, and employment-related travel, like contract nursing and long-haul truck driving.

⁶ Kaeble, Danielle and Lauren Glaze. Correctional Populations in the United States, 2015: Bureau of Justice Statistics: U.S. Department of Justice Office of Justice Programs Bureau of Justice Statistics, December 2016.

⁷ DOC work session to 2017-2018 Senate Human Services and Corrections Committee;

<https://www.tvw.org/watch/?eventID=2018011186>. Orientation PowerPoint-page 6:
<https://app.leg.wa.gov/CMD/Handler.ashx?MethodName=getdocumentcontent&documentId=urlc-41BwvQ&att=false>.

⁸ Gross misdemeanors carry a maximum of 364 days of total confinement; while certain felonies under the Sentencing Reform Act may carry a high end standard range of 12 months. See RCW 9.92.020 (gross misdemeanors, sentence not otherwise defined); RCW 9A.20.020 (2)(SRA gross misdemeanor).

⁹ Glaze, Lauren and Laura Maruschak. Parents in Prison and Their Minor Children. United States Department of Justice, Office of Justice Programs, Bureau of Justice Statistics. August 2008, revised March 2010, 1. The same study found that three out of four (75%) women incarcerated in U.S. state prisons are mothers. Id. at 2. National, state, and local corrections facilities have not historically tracked the number of parents in their custody at any given time.

¹⁰ RCW 11.125.410(2).

¹¹ See Chapter RCW 11.125.

¹² RCW 11.125.410(2)(emphasis added).

¹³ Revised Code of Washington 11.125.040 governing the termination of the power of attorney instrument:

The authority conferred under a power of attorney created prior to January 1, 2017, and also for a power of attorney created on or after January 1, 2017, terminates upon the incapacity of the principal unless the writing contains the words “This power of attorney shall not be affected by disability of the principal,” or “This power of attorney shall become effective upon the disability of the principal,” or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's incapacity.

RCW 11.125.040.

¹⁴ RCW 11.125.020(5).