

## CHAPTER 33

### RIGHTS OF INCARCERATED PARENTS\*

#### A. Introduction

This Chapter discusses the childcare and custody rights of incarcerated parents. As a parent in prison, you may fear that your child will not be cared for, that you will lose your child, or that your relationship with your child will suffer while you are incarcerated. This Chapter describes how the law provides parents in prison with various tools to prevent these things from happening, focusing mainly on New York law.

This Chapter is divided into seven parts. First, this Chapter discusses how your child will be cared for while you are in prison. **Part B** discusses private placement. **Part C** discusses voluntary and involuntary foster care, including the procedures involved, the placement and planning process, your rights during foster care proceedings, the obligations you have, the obligations that the Department of Services (DSS)<sup>1</sup> has, and how your child will be returned to you after release. Then, this Chapter will discuss how the government may be able to take away your parental rights. **Part D** explains involuntary termination of your parental rights, details how you can defend yourself against involuntary termination, and lists the steps you should take while your child is in foster care to make sure that your parental rights are not terminated. Then, **Part E** discusses the procedure for voluntarily terminating your parental rights and putting your child up for adoption. **Part F** discusses challenges that are unique to incarcerated fathers, explaining the extra steps fathers in prison must take in order to protect their rights. Finally, **Part G and H** explain your right to an attorney in different proceedings.

Before reading the rest of this Chapter, you should be aware that federal laws regulate the rights of incarcerated parents whose children are in the child welfare system (but not incarcerated parents whose children are under private custody or guardianship). The Adoption and Safe Families Act (ASFA)<sup>2</sup> makes it much harder for incarcerated parents to keep their parental rights. Different states have passed laws applying ASFA in different ways, so it is important for you to know the ASFA laws that apply in your state. In New York, some important laws applying ASFA include:

- (1) In some cases, the state no longer has to try to reunite children in foster care with parents who are incarcerated;<sup>3</sup>
- (2) Unless certain exceptions apply, the state must file to “terminate” (get rid of) parental rights<sup>4</sup> for: (1) children who have been in foster care for fifteen out of the last twenty-two

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<sup>1</sup> According to the State of New York, the 58 Departments of Social Services throughout the state are responsible for all publicly funded social services and cash assistance programs. Families qualify for DSS assistance based on income and other criteria. DSS assistance includes subsidies for childcare costs. *About ACS*, N.Y.C. ADMIN. FOR CHILDREN’S SERVS., available at <http://www.nyc.gov/html/acs/html/about/about.shtml> (last visited Oct. 13, 2023).

<sup>2</sup> The full text of ASFA can be found at 42 U.S.C. §§ 670–679(c). Several provisions of the Act have been amended in part or repealed in part since 1997. For further information on the history of AFSA and other federal child welfare laws, please see U.S. Dept. of Health & Human Servs., *Major Federal Legislation Concerned with Child Protection, Child Welfare, and Adoption*, CHILD WELFARE INFO. GATEWAY (current through May 2019), available at <http://www.childwelfare.gov/pubs/otherpubs/majorfedlegis.pdf> (last visited Oct. 10, 2023).

<sup>3</sup> N.Y. SOC. SERV. LAW § 358-a(3)(b) (McKinney 2022).

<sup>4</sup> Termination of parental rights is when the state permanently ends your rights as a parent and either takes on those rights itself or grants them to another person through adoption.

- months, (2) children who have been abandoned, or (3) children with parents who have been convicted of certain violent crimes;<sup>5</sup>
- (3) People with certain criminal convictions or who live with an adult who has a criminal record cannot be foster parents.<sup>6</sup>

All of these provisions will be discussed more fully below. As a parent in prison, you may find yourself in one of three situations:

- (1) Your child is living with friends or family members who receive no state supervision or funding other than welfare.
  - a. This practice is known as “private placement” and will be discussed in Part B of this Chapter. ASFA does not apply to these placements.
- (2) You chose to place your child in foster care.
  - a. Again, your child may be living with foster parents who are relatives or persons unrelated to you. The state will supervise and provide funding to these foster parents for the care of your child. This practice is known as “voluntary placement” and will be discussed in Part C of this Chapter. If your child is in foster care and you would like to put him or her up for adoption, your options are discussed in Part E of this Chapter.
- (3) Your child was taken from your home by either the Office of Children & Family Services (a New York State agency) or by the Administration for Children’s Services (a New York City agency)<sup>7</sup> and placed in foster care.
  - a. Your child may be living with foster parents who are relatives or persons unrelated to you. Again, the state will supervise and provide funding to these foster parents for your child’s care. This practice is known as “involuntary foster care” and will be discussed in Part C below.

New York law generally supports parents who want to take custody of their children after being in jail. The law states that it is desirable for a child to “be returned to the birth parent because the child’s need for a normal family life will usually best be met in the [natural] home, and . . . parents are entitled to bring up their own children unless the best interests of the child would be thereby endangered.”<sup>8</sup> However, the law will only prioritize your parental rights if you show interest and

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<sup>5</sup> N.Y. SOC. SERV. LAW § 384-b(3)(i)(i) (McKinney 2010). The formula used to determine how long your child has been placed in foster care may depend on where you and your child are located. In New York, the Department will start counting from sixty days after either the date of a family court judge determined that the child was “abused or neglected” or the date the child was removed from the home, whichever comes earlier. N.Y. SOC. SERV. LAW § 384-b(3)(i)(iii) (McKinney 2010). This means that the amount of time counted for ASFA purposes may be different than the amount of time your child has actually spent under the custody of the Department. For example, if your child was placed under custody of the Department upon your incarceration, the State will not start counting your child as “entered into foster care” until sixty days after that. So starting from the date of your incarceration, you may have up to seventeen months before the State will begin proceedings. Note that other states may calculate the time period that a child has been in foster care somewhat differently, so you should always be sure to determine what the law says in your state. For more information on legal research, see *JLM* Chapter 2, “Introduction to Legal Research.”

<sup>6</sup> N.Y. SOC. SERV. LAW § 378-a(2)(e) (McKinney 2010).

<sup>7</sup> The Office of Children and Family Services (OCFS) is the state agency responsible for supervising and managing foster care in New York State. The Administration for Children’s Services (ACS) handles these duties in New York City, while county departments of social services manage foster care for areas outside of New York City. For simplicity, this Chapter uses “DSS” (Department of Social Services) to refer to all local child protective agencies that are responsible for foster care placement. Each county in New York has a social services department. See *County Departments of Social Services*, OFF. OF CHILD. & FAM. SERVS., available at <http://www.ocfs.state.ny.us/main/localdss.asp> (last visited Oct. 21, 2023); *About ACS*, N.Y.C. ADMIN. FOR CHILDREN’S SERVS., available at <http://www.nyc.gov/html/acs/html/about/about.shtml> (last visited Oct. 21, 2023). For questions about foster care generally, you can call (800) 345-KIDS, a free phone number for OCFS. Also refer to the end of this Chapter for more contact information for OCFS and county-specific DSS offices.

<sup>8</sup> N.Y. SOC. SERV. LAW § 384-b(1)(a)(ii) (McKinney 2010); see also *In re Natasha RR*, 42 A.D.3d 762, 763, 839 N.Y.S.2d 623, 624 (3d Dept. 2007) (stating that this law seeks to return child to natural parent “if at all possible and responsible”).

involvement in your child's welfare and a commitment to parenting upon your release.<sup>9</sup> Evidence of involvement in your child's life may include letter writing, telephone calls, visits with your child, and efforts to communicate and cooperate with your caseworker.<sup>10</sup>

### **B. Private Placement with a Relative or Friend**

Many incarcerated parents try to place their child in the home of a relative or friend without involving the foster care system. This practice is called "private placement." Private placement is the best way for parents in prison to keep their parental rights because the strict ASFA rules only apply to children in foster care, not those in private placements. The main advantage of private placement is that your child will be cared for by someone you know and trust. It also allows your child to live in familiar surroundings, which can decrease the trauma that a child may feel from being separated from his parent.

If you want a relative or friend (sometimes called a "caretaker") to care for your child, you should, if possible, write up an agreement that you and your relative or friend sign. The agreement should include three important points:

- (1) You are agreeing to give temporary custody of your child to that person while you are in prison;
- (2) Your child will be returned to you when you are released; and
- (3) The caretaker (the relative or friend) will bring your child to visit you in prison.

This agreement will allow your child's caretaker (relative or friend) to register the child for school, get public assistance, and receive medical care for the child. It will also help make sure you get custody of your child back when you are released from prison. Note that you may have to fill out paperwork or releases in order to legally allow the caretaker to register your child for school and other public services.

If you know someone who is willing to care for your child but does not have the money to do so, he may be eligible to receive public assistance, food stamps, and Medicaid if he assumes custody or guardianship of your child. Your child can also be placed with a close relative through the Department of Social Services (DSS), a practice called "kinship foster care." Under this arrangement, your child will be considered in foster care even though he is living with a relative. This arrangement, which is different from a private placement, is discussed in Part C(2) of this Chapter.

Granting custody or guardianship to someone through private placement does not mean that you are permanently giving up your parental rights. It only means that you are giving permission for someone else to care for and be responsible for your child for a temporary period until you can care for him yourself. It is worth checking with each agency that provides public benefits to find out what paperwork you must fill out in order for the caretaker to receive assistance both for himself and for your child.

### **C. Foster Care**

If private placement with your relatives or friends is not possible, you may choose to apply through DSS to have your child placed in foster care. You must make sure that someone will be caring for your

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<sup>9</sup> The law exempts prolonged stays in foster care from mandatory termination of parental rights if "the parent or parents are incarcerated, or participating in a residential substance abuse treatment program, or the prior incarceration or participation of a parent or parents in a residential substance abuse treatment program is a significant factor in why the child has been in foster care for fifteen of the last twenty-two months, provided that the parent maintains a meaningful role in the child's life." N.Y. SOC. SERV. LAW § 384-b(3)(1)(i) (McKinney 2010); *see also In re Lindsey B.*, 16 A.D.3d 1078, 1078, 791 N.Y.S.2d 261, 262 (4th Dept. 2005) (finding that a father's incarceration was not a defense to an abandonment petition where father made no effort to communicate with daughter or learn of her whereabouts despite contacting others by mail and phone during his incarceration); *In re Elizabeth Susanna R.*, 11 A.D.3d 619, 620, 783 N.Y.S.2d 641, 642 (2d Dept. 2004) (quoting *Matter of Jose Andres M.*, 8 A.D.3d 385, 385, 777 N.Y.S.2d 700, 701 (2d Dept. 2004)) (stating that "a parent's incarcerated status does not excuse him or her from establishing or maintaining contact with his or her child").

<sup>10</sup> N.Y. SOC. SERV. LAW § 384-b(3)(1)(v) (McKinney 2010).

child while you are in prison. If you do not arrange for the care of your child during your incarceration, “permanent neglect proceedings” (which is a case about your custody rights) can be initiated against you, and you might lose the right to have custody, visit your child, and even to parent your child.<sup>11</sup> Foster care is a way of providing for children whose parents cannot care for them. The state has legal custody of children in foster care, which means that the state takes responsibility for the children. The state may hire a private foster care agency that will work with you and your child to find a placement in foster care. Foster care is not supposed to be a permanent solution; it is meant to help families through difficult times and to make sure that children are living in safe and healthy environments.

There are several different ways children can be placed in foster care. When the parent or parents themselves choose to place their children in foster care, it is called “voluntary placement.” When a judge orders the child to be placed in foster care because the child’s previous caretakers were abusive or neglectful, it is called “involuntary placement.” Children may be placed with relatives (“kinship foster care”), with an agency-approved foster family, in a group home, or in a residential facility. All foster care parents receive funding and supervision either directly from DSS or from any separate foster care agency involved in their case.

### 1. Voluntary Placement

If you cannot arrange for your child to be cared for by family or friends or if you are not satisfied with the care your child is receiving, you may choose to place your child in foster care. Furthermore, under New York law, your child may have to be placed in foster care if you become “unavailable” due to “arrest, detainment, or imprisonment.”<sup>12</sup>

You do not permanently give up your parental rights by placing your child in foster care. You are still legally your child’s parent. It does not mean that you are giving up or abandoning your child, and it does not show that you are unfit as a parent. It only means that you are temporarily unable to provide your child with the care you think he needs. If you fulfill your foster care obligations and if you are released within a relatively short time, you will have a good chance of getting your child back after your release.

However, if you are going to be in prison for more than twelve months, then placing your child in foster care may create a risk of involuntary termination of your parental rights. You should seriously consider your decision to place your child in foster care because ASFA generally requires the state to file for termination of parental rights for children who have been in foster care for fifteen out of the last twenty-two months.

In summary, if you are able to privately place your child with a friend or relative, this may be the best way for you to protect your parental rights. It is important to consider all of your options carefully before placing your child in foster care for fifteen months or longer.

#### (a) Initial Placement Process

To arrange for your child’s placement in foster care, you should first contact the Department of Social Services (DSS).<sup>13</sup> Either you or someone you have entrusted with the care of your child can transfer your child to a foster care arrangement.<sup>14</sup> However, if possible, you should be the one to contact DSS, because if a relative or friend places your child in foster care for you, the agency might only communicate with that person. Remember, a foster care arrangement made by someone else does

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<sup>11</sup> See Part D(1)(b) of this Chapter for a discussion of permanent neglect.

<sup>12</sup> N.Y. COMP. CODES R. & REGS. tit. 18, § 430.10(c). This section states that children must be removed from their homes and placed in foster care when removal is essential for securing proper care, nurturance, or treatment. It explains that one circumstance where foster care placement may be essential to ensuring proper care, nurturance, or treatment is when the parents of the child are arrested, detained, or imprisoned.

<sup>13</sup> Contact the Department of Social Services (DSS) for the county in which your child is living, or the Administration for Children’s Services (ACS) if your child lives in New York City. See the end of this Chapter for contact information for ACS and all other New York counties.

<sup>14</sup> N.Y. SOC. SERV. LAW § 384-a(1) (McKinney 2010).

not affect your rights and obligations as a parent.<sup>15</sup> DSS must consult with you regarding your child. If you are not being contacted, inform DSS and/or the foster care agency that you are the parent and tell them that you wish to make the decisions about your child's care.

When you make contact with DSS, a caseworker will arrange to meet with you to explain the process of placing your child in the custody of DSS and the available foster care options. He will also ask you to sign a Voluntary Placement Agreement,<sup>16</sup> which is a contract between you and DSS that places your child in foster care.<sup>17</sup> By signing the Agreement, you agree to temporarily transfer the custody and care of your child to the Commissioner of DSS. Read the form carefully because it will state what DSS must do for your child while he or she is in foster care. The Agreement should list the responsibilities of DSS, as well as your obligations while your child is in foster care.<sup>18</sup> The Agreement must say that the agency may be required to file for termination of parental rights if your child remains in foster care for fifteen out of the most recent twenty-two months.<sup>19</sup>

The Agreement is a standard form, which means it is the same for everyone. If you want to add something to the agreement that you feel is important, you have the right to suggest changes.<sup>20</sup> For instance, you may wish to add any or all of the following:

- (1) The date your child will be released from foster care (perhaps the date of your release from prison);
- (2) A request that your children, if you have more than one, be kept together;
- (3) A request that your child remain in his current school;
- (4) A request that your child be kept near the home neighborhood; and/or
- (5) The minimum number of hours per month that you wish to visit with your child.

You should strongly consider adding these items to the Agreement form because DSS is obligated to try to provide your child with the care established in the form.<sup>21</sup> You should be aware that DSS might resist making changes to the standard form. If you want the Agreement changed to fit your child's needs, you need to speak with your caseworker about it.

It is very important to ask for a copy of the final Agreement that you sign so you can look back at it when necessary. You should keep your own personal file, which should include a copy of the Agreement and any other letters between you and DSS.

During your first visit with your caseworker, you may also be asked to sign a Designation of Religious Preference for Children.<sup>22</sup> On this form, you may state whether you want your child to be placed with an independent foster care agency affiliated with a particular religion. You can state whether you want your child to receive religious training while in foster care. If you write down a religious preference and say that you want your child to be cared for by a family of that religion, DSS must either:

- (1) place your child with a family practicing that religion;
- (2) show that your child's faith will be protected in the family in which he is placed; or

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<sup>15</sup> N.Y. SOC. SERV. LAW § 384-a(1) (McKinney 2010).

<sup>16</sup> You can obtain a New York City Voluntary Placement Agreement Form by writing to the Administration for Children's Services (ACS), 150 Williams Street, 18th Floor, New York, New York 10038, or by calling ACS at (212) 619-1309. The website for ACS is [www.nyc.gov/html/acs/home.html](http://www.nyc.gov/html/acs/home.html) (last visited Oct. 13, 2023).

<sup>17</sup> N.Y. SOC. SERV. LAW § 384-a(2) (McKinney 2010).

<sup>18</sup> These obligations are described in Part C(5) of this Chapter.

<sup>19</sup> N.Y. SOC. SERV. LAW § 384-a(2)(c)(ix) (McKinney 2010).

<sup>20</sup> N.Y. SOC. SERV. LAW § 384-a(2)(a) (McKinney 2010).

<sup>21</sup> If you believe that the care your child is receiving in foster care does not satisfy the requirements set forth in the Voluntary Placement Agreement, you should first tell your caseworker. Then you or your lawyer, if you have one, should petition the family court judge who signed your child's placement order to review the care the agency is providing for your child and to order the agency to follow the Agreement. *See* N.Y. SOC. SERV. LAW § 384-a(2)(a) (McKinney 2010) (requiring adherence to the placement order).

<sup>22</sup> The New York City Designation of Religious Preference for Children (Form CM-309) is similar to forms used throughout the state. You can get the appropriate form from the agency handling your case.

- (3) show why finding a placement with such a family was not “practicable” or “in the best interests of the child.”<sup>23</sup>
- a. This means that if DSS does not place your child with a family practicing your chosen religion, DSS must be able to prove that it was practically impossible to find such a family or they must be able to give a good reason why it would be better for your child not to be in such a family. If DSS does not place your child in such a family and fails to give a good reason, you can demand that they place your child with a family that practices your religion.

Your caseworker may ask you to sign a form in which you agree that you will be legally responsible for some of the costs of maintaining your child.<sup>24</sup> You must write down on this form whether or not you can contribute to your child’s expenses while they are in foster care. Even though you are in prison, you still have a duty to financially support your child. However, DSS may take your situation into consideration and decide not to require you to contribute to your child’s expenses because you are in prison and probably have little or no income.<sup>25</sup>

You and the caseworker will develop a plan to help keep a close relationship between you and your child. This plan, which includes the rights and obligations of both you and the agency, is discussed in Part C(5) of this Chapter.

Finally, DSS should provide you with a list of lawyers or legal services groups to help you in placing your child. One source of help may be Prisoners’ Legal Services.<sup>26</sup> Unfortunately, it is extremely unlikely that you will be able to find a free lawyer to help you with a voluntary placement before the 358a Hearing stage of your case (discussed in the following Subsection). Because of this, do not be afraid to take as much time and ask as many questions as you need to in order to understand the forms that DSS will make you fill out. You will probably be the person making the decisions for the voluntary placement of your child.

#### (b) Court Approval of the Placement: 358a Hearing

The next step in voluntary placement is court approval. New York state law requires a family court judge to review and approve every voluntary placement of a child in foster care lasting longer than thirty days.<sup>27</sup> This proceeding is called a “358a hearing” because it is required by Section 358a of the Social Services Law. DSS is responsible for filing a petition with the court asking for approval of the placement.<sup>28</sup> The petition will include a notice “in conspicuous print”—which means it must be clear, obvious, and not in very small print—stating that if a child remains in foster care for fifteen of twenty-two months, the agency may be required to file for a termination of parental rights.<sup>29</sup>

The judge must give you notice of the hearing.<sup>30</sup> In order to be present at the hearing, you should write a letter, similar to the one shown in Appendix A of this Chapter, asking the court to instruct the prison to bring you to the hearing.<sup>31</sup>

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<sup>23</sup> N.Y. COMP. CODES R. & REGS. tit. 18, § 430.11(c)(2)(iii).

<sup>24</sup> N.Y. SOC. SERV. LAW § 384-a(2)(c)(viii) (McKinney 2010).

<sup>25</sup> N.Y. SOC. SERV. LAW § 384-a(2)(c)(v)(D) (McKinney 2010).

<sup>26</sup> See Appendix IV of the JLM for addresses of legal services organizations.

<sup>27</sup> N.Y. SOC. SERV. LAW § 358-a(1)(a) (McKinney 2022).

<sup>28</sup> N.Y. SOC. SERV. LAW § 358-a(1)(a) (McKinney 2022).

<sup>29</sup> N.Y. SOC. SERV. LAW § 358-a(2)(a) (McKinney 2022).

<sup>30</sup> N.Y. SOC. SERV. LAW § 358-a(4)(a) (McKinney 2022).

<sup>31</sup> N.Y. SOC. SERV. LAW § 358-a(3)(e)(ii) (McKinney 2022) (stating that a parent has a right to be physically present at his child’s 358-a hearing).

Your caseworker may ask you to sign a waiver of your right to attend.<sup>32</sup> A waiver means that you formally agree to give up a particular right.<sup>33</sup> You do not have to waive your rights.<sup>34</sup> Sometimes, people choose to waive rights as part of a deal with the state because they get something from the state in return for signing the waiver. If you do choose to sign a waiver of your right to attend the hearing, the court does not have to make sure that you can attend the hearing.<sup>35</sup> Generally, signing a waiver is not a good idea because you give up the valuable opportunity to inform the judge of your problems or ask questions during the voluntary placement process.<sup>36</sup> However, you should discuss this with your caseworker.

You have a right to a lawyer for the hearing. If you cannot afford your own lawyer, the judge will assign you a free lawyer when you are brought to court for the hearing.<sup>37</sup> If you are using your own lawyer, make sure to contact him in advance about the proceeding. A lawyer is meant to be your voice during these proceedings, so if you have any questions or requests or if you are concerned about something, be sure to ask your lawyer.

At the hearing, the court is supposed to ensure that your child will be put in foster care only if the “best interest and welfare of the child will be promoted by the removal of such child from such home.”<sup>38</sup> This means that foster care is appropriate only when a child would not otherwise receive proper care, nurturing, or treatment.<sup>39</sup> DSS must try to find relatives who can take care of your child.<sup>40</sup> This arrangement, called “kinship foster care,” is not the same as the private placement discussed in Part B of this Chapter. Kinship foster care is explained in Part C(2) of this Chapter. Apart from trying to find relatives who can care for your child, DSS must try to find and record information about your child’s other parent, any person to whom you had been married at the time of the conception or birth of your child, and any other person who would be entitled to a notice of a proceeding to terminate parental rights if such a hearing were to take place.<sup>41</sup>

The judge must also verify that you knowingly and voluntarily signed the Voluntary Placement Agreement.<sup>42</sup> If you have any questions or problems regarding the placement process or the Agreement, you should make them known at this hearing.

If you have had any problems with the foster care agency, you should talk with the judge about that at the hearing. Such problems might include the following situations:

- (1) the agency refuses to add your requests to the Voluntary Placement Agreement;
- (2) there have not been enough (or any) visits between you and your child;
- (3) the agency has broken many of its promises; or
- (4) it is difficult for you to communicate with the agency (for example, if the caseworker does not return your calls, the prison will not allow you to make calls, etc.).

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<sup>32</sup> N.Y. SOC. SERV. LAW § 358-a(5) (McKinney 2022).

<sup>33</sup> *Waiver*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>34</sup> N.Y. SOC. SERV. LAW § 358-a(5) (McKinney 2022).

<sup>35</sup> N.Y. SOC. SERV. LAW § 358-a(5) (McKinney 2022).

<sup>36</sup> N.Y. SOC. SERV. LAW § 358-a(5) (McKinney 2022).

<sup>37</sup> N.Y. FAM. CT. ACT § 262(a)(iv) (McKinney 2008). Please note that the Family Court Act is contained in the Judiciary Court Acts volume of McKinney’s. See Part H of this Chapter for more on your right to counsel.

<sup>38</sup> N.Y. SOC. SERV. LAW § 358-a(5) (McKinney 2022); N.Y. SOC. SERV. LAW § 358-a(1)(a) (McKinney 2022).

<sup>39</sup> N.Y. COMP. CODES R. & REGS. tit. 18, § 430.8(a)(2) (2023) ; N.Y. COMP. CODES R. & REGS. tit. 18, § 430.10(c) (2023).

<sup>40</sup> N.Y. SOC. SERV. LAW § 384-a(1-a) (McKinney 2010).

<sup>41</sup> N.Y. SOC. SERV. LAW § 384-a(1-b) (McKinney 2010).

<sup>42</sup> N.Y. SOC. SERV. LAW. § 358-a(3)(a) (McKinney 2022).

If you signed a waiver and do not attend a 358a hearing, the judge will review the papers submitted by DSS, including the Voluntary Placement Agreement, and will generally approve the Agreement as you signed it.<sup>43</sup>

(c) Court Review of Placement—Permanency Hearings

(i) *Automatic Review*

Once a placement has been approved in the 358a hearing described above, the agency is required to check in with the family court from time to time in order to review your child's situation in foster care. The agency must report to the family court within eight months of the date your child was removed from his home and then every six months after that.<sup>44</sup> The court may order a review at any time.<sup>45</sup> Also, you can ask the court for a review at any time.<sup>46</sup> If a court decides for any of the reasons listed in the statute<sup>47</sup> that the agency does not have to make "reasonable efforts" to reunite your family, then it will order a review called a "permanency hearing" within thirty days.<sup>48</sup> See Part D(5)(a) of this Chapter for a discussion of "reasonable efforts."

These reviews are called permanency hearings because they decide on a permanent plan for your child.<sup>49</sup> A permanent plan considers the following:

- (1) whether your child will be returned to you, placed with a relative, or released for adoption;
- (2) the health, well-being, and status of the child;
- (3) the status of the parent; and
- (4) what services have been provided to reunite the family, where appropriate.<sup>50</sup>

The state is authorized to seek an alternative permanent placement if you are unable to provide a normal family home for your child, and continued foster care is not appropriate.<sup>51</sup>

The court must notify you at least fourteen days before each of these hearings, and you have a right to attend.<sup>52</sup> As with the 358a hearing, you must ask the judge to order the prison to take you to the permanency hearing. You or your lawyer, if you have one, should write to the judge as soon as you know when your hearing is scheduled in order to request such an order. Information on getting to court is included in Part G of this Chapter. Also, see the sample letter included in Appendix A of this Chapter.

At the hearing, explain to the judge any problems you have with the foster care your child is receiving.<sup>53</sup> By law, the judge has to look at what is in the "best interests" of the child, so if there is a

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<sup>43</sup> N.Y. SOC. SERV. LAW § 358-a(5) (McKinney 2022).

<sup>44</sup> N.Y. FAM. CT. ACT § 1089(a)(2)–(3) (McKinney 2023).

<sup>45</sup> See N.Y. FAM. CT. ACT § 1088 (McKinney 2023) (providing the family court with the express power to rehear the case whenever it deems rehearing necessary or desirable).

<sup>46</sup> See N.Y. FAM. CT. ACT § 1088 (McKinney 2023) (providing the family court with the power to rehear the case when any party to the case makes a motion to do so).

<sup>47</sup> N.Y. SOC. SERV. LAW § 358-a(3)(b) (McKinney 2022).

<sup>48</sup> N.Y. SOC. SERV. LAW § 358-a(3)(b) (McKinney 2022).

<sup>49</sup> N.Y. FAM. CT. ACT § 1012(k) (McKinney 2023).

<sup>50</sup> See N.Y. FAM. CT. ACT § 1089(c) (McKinney 2023) for a full description of what needs to be included in the permanency plan.

<sup>51</sup> N.Y. SOC. SERV. LAW § 384-b(1)(a)(iv) (McKinney 2010).

<sup>52</sup> N.Y. FAM. CT. ACT § 1089(b)(1)(i) (McKinney Supp. 2023).

<sup>53</sup> Although you may wait until your court appearance to voice your complaints, you should try to write out any problems you have with your child's foster care ahead of time. You can discuss your concerns with your lawyer, if you have one. You may mail the concerns to the judge, DSS, or the child's attorney. You should also take a copy of the list of complaints you have made to court. You or your lawyer should mention your complaints in court so that they are not overlooked.



problem, you should try to explain how your child’s “best interests” are not being provided for.<sup>54</sup> The judge can order DSS to provide a variety of services for you and your child, including arranging additional visits.<sup>55</sup>

(ii) *Requested Review*

After the initial permanency hearing, you may request an additional permanency hearing to address problems that arise between scheduled hearings and that cannot be resolved with your caseworker.<sup>56</sup> For example, changes in the child’s health or in the safety of their environment might be a basis for such a request. You do not need to wait for another scheduled hearing to complain about your child’s foster care.

In order to request a permanency hearing, you must explain, in a motion to the court: (1) why you need a new hearing, (2) the type of problem you are having, (3) the steps you have taken to resolve the problem, and (4) what changes you believe are necessary.<sup>57</sup> You may also file a motion to force the agency to obey court orders or to live up to agreements it has made with you.<sup>58</sup>

## 2. Kinship Foster Care

DSS will sometimes approve close relatives for kinship guardianship.<sup>59</sup> The technical name for this arrangement is “approved emergency relative foster home.”<sup>60</sup> If you have a relative who would like to care for your child, you may be able to arrange for kinship foster care. Under this program, your child will live with your relative. However, unlike in the private placement described above in Part B, DSS has legal custody of children in kinship foster care, just as it does in any other foster care arrangement.

ASFA has made it more difficult for people with certain kinds of criminal records to be approved as foster parents. The ASFA restrictions may affect your decision to place your child in kinship foster care because they may prevent the relatives you choose from becoming foster parents. In New York, a criminal history check must be performed on potential foster parents and on anyone over eighteen who is living in the home before the home can be certified as a foster home.<sup>61</sup> The criminal history check will also be repeated every time the foster parents apply for re-certification.<sup>62</sup> Someone who applies to be a foster parent can be denied for several reasons, including:

- (1) A felony conviction at any time involving child abuse or neglect, spousal abuse, a crime against a child including child pornography, a violent crime including rape, sexual assault, or homicide;<sup>63</sup> or

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<sup>54</sup> The court must determine how to protect the best interests of the children placed in the state’s care by a voluntary placement agreement. *See, e.g.,* *Nicholson v. Scopetta*, 3 N.Y.3d 357, 376–381, 820 N.E.2d 840, 850–854, 787 N.Y.S.2d 196, 206–210 (2004) (determining whether the removal of the child was in the child’s “best interests,” according to the legislative requirement).

<sup>55</sup> N.Y. FAM. CT. ACT § 1089(d)(2)(viii)(F) (McKinney 2023).

<sup>56</sup> N.Y. FAM. CT. ACT § 1088 (McKinney 2023).

<sup>57</sup> N.Y. FAM. CT. ACT § 1089(c) (McKinney 2023).

<sup>58</sup> N.Y. FAM. CT. ACT § 1089(d)(2)(viii)(F) (McKinney 2023); N.Y. FAM. CT. ACT § 255 (McKinney 2008).

<sup>59</sup> A relative may be approved as a foster parent if DSS believes that living with him is the best way to maintain continuity in the child’s environment. N.Y. FAM. CT. ACT § 1089-a(a)(i) (McKinney 2023).

<sup>60</sup> This arrangement is approved by N.Y. SOC. SERV. LAW § 375 (McKinney 2010). “Approved emergency relative foster home” is defined in N.Y. COMP. CODES R. & REGS. tit. 18, § 443.1(g) (2023).

<sup>61</sup> N.Y. SOC. SERV. LAW § 378-a(2)(a) (McKinney 2010).

<sup>62</sup> N.Y. SOC. SERV. LAW § 378-a(2)(a) (McKinney 2010); *see also Requirements to Become a Foster Parent*, OFFICE OF CHILDREN AND FAMILY SERVICES, <https://ocfs.ny.gov/programs/fostercare/requirements.php> (last visited Oct. 16, 2023).

<sup>63</sup> N.Y. SOC. SERV. LAW § 378-a(2)(e)(1)(A) (McKinney 2010).

- (2) A felony conviction within the past five years for physical assault, battery, or a drug-related offense.<sup>64</sup>

A prospective foster parent's application can be put on hold while the agency waits to receive additional information for the following reasons:

- (1) The foster parent has a charge for an above-listed crime that has not been resolved yet;<sup>65</sup> or
- (2) The foster parent has a felony conviction that may be for an above-listed crime, but it is unclear whether such a crime was involved.<sup>66</sup>

If a prospective foster parent has been convicted of one or more of the crimes listed above, the foster care agency will remove any foster child living with the foster parent.<sup>67</sup> Requests to become a foster parent can also be denied if:

- (1) the prospective foster parent has a criminal history consisting of crimes other than those specified above;<sup>68</sup> or
- (2) any other person over eighteen living in the proposed foster home has a criminal history (including a criminal charge or conviction).<sup>69</sup>

If either of these factors are found, the agency will check the safety of the home. When checking the safety of the home, the agency will consider whether the person who committed the crime lives there, the amount of contact that person has with the child, and the nature of the charge.<sup>70</sup> Removing the child may be required to protect the child's health and safety.<sup>71</sup>

A disadvantage of kinship foster care in comparison with private placement is that DSS will be involved in your relationship with your child. For example, DSS could decide to have your child removed from your relative's home to another foster home. It also means that you will not be able to simply ask your relative to return your child when you are released from prison, but must instead petition DSS to get custody of your child again.<sup>72</sup> Also, DSS may attempt to terminate your parental rights so that your relative or another person can adopt the child.<sup>73</sup>

One advantage of kinship foster care is that your child's caretaker is eligible for the same foster care payments available to unrelated foster care parents.<sup>74</sup> You and the potential kinship foster parent should consult DSS together about the available funds. Another advantage is that the court can order DSS to support you with services, including providing regular visitation, parenting training, counseling for you or your child, and other services.<sup>75</sup> If you are an incarcerated parent, DSS's duty to you is generally limited to services offered by your facility, although your child is entitled to any services offered by the agency.<sup>76</sup>

<sup>64</sup> N.Y. SOC. SERV. LAW § 378-a(2)(e)(1)(B) (McKinney 2010).

<sup>65</sup> N.Y. SOC. SERV. LAW § 378-a(2)(e)(2)(A) (McKinney 2010).

<sup>66</sup> N.Y. SOC. SERV. LAW § 378-a(2)(e)(2)(B) (McKinney 2010).

<sup>67</sup> N.Y. SOC. SERV. LAW § 378-a(2)(h) (McKinney 2010).

<sup>68</sup> N.Y. SOC. SERV. LAW § 378-a(2)(e)(3)(A) (McKinney 2010).

<sup>69</sup> N.Y. SOC. SERV. LAW § 378-a(2)(e)(3)(B) (McKinney 2010).

<sup>70</sup> N.Y. SOC. SERV. LAW § 378-a(2)(h) (McKinney 2010).

<sup>71</sup> N.Y. SOC. SERV. LAW § 378-a(2)(h) (McKinney 2010).

<sup>72</sup> Petitioning for return of your child is discussed in Part D(4) of this Chapter.

<sup>73</sup> Involuntary termination of parental rights is discussed in Part D of this Chapter.

<sup>74</sup> Before relatives can get such payments, the DSS Commissioner must complete a foster care certification study of the relative's home. But, in an emergency, a relative can receive funds immediately. The caretaker can also receive Medicaid for the child but cannot get other forms of public assistance because foster care payments would replace them. N.Y. SOC. SERV. LAW §§ 458-b, 458-c, 458-d (McKinney 2003).

<sup>75</sup> N.Y. FAM. CT. ACT § 1089(d)(2)(viii)(F) (McKinney 2023).

<sup>76</sup> N.Y. SOC. SERV. LAW § 384-b (McKinney 2010).

DSS should support your wishes for your child to be in kinship foster care because it is obligated to search for a relative to take care of your child.<sup>77</sup> If you disapprove of a particular relative that DSS is considering, you can tell the judge your concerns and ask that your child be placed with a different family member. At the hearing, you will have to convince the judge that the placement DSS wishes to make is not in the best interests of your child or that the individual being considered is unfit to care for your child. If you can arrange for the relative of your choice to attend the court hearing, the judge may have an opportunity to meet him.

### 3. Involuntary Placement

In some circumstances, your child may be placed in foster care without your consent. This is known as “involuntary placement.” Involuntary placement can occur before you are incarcerated or as a result of your incarceration. If you do not consent in writing to the removal of your child and a preliminary hearing has not yet been held, your child can be removed only if there is an *immediate* danger to his health or life. In such an emergency, the court may order removal without a hearing, or DSS may remove your child before receiving a court order.<sup>78</sup>

Involuntary placement does not mean that your child has been permanently taken from you. However, in order to avoid termination of your parental rights, you must fulfill certain obligations and demonstrate that you have taken some responsibility for your child. The state also has a duty to make “diligent efforts”<sup>79</sup> to foster a close relationship between you and your child and to help you fulfill your duties as a parent so that you can get custody of your child back. ASFA has created some exceptions to the state’s duty to show “diligent efforts.” These obligations, rights, and exceptions are discussed below in Part C(5)(a) of this Chapter.

#### (a) Preliminary Hearing

DSS must petition the family court to hold a “preliminary hearing” where the judge will decide whether your child must be temporarily removed from your home. The judge will look to see if there is an immediate risk to your child’s health or life.<sup>80</sup> This hearing must be held the day after the petition is filed.<sup>81</sup> If your child has already been removed, the judge will determine whether the child should remain in care outside of the home by looking to see if there is an immediate risk to your child’s health or life.<sup>82</sup> As in voluntary foster care placements, the state must search for a suitable relative to take your child into his or her care.<sup>83</sup> The court can order DSS to locate your child’s other parent and any relatives and to inform them of the procedure for seeking custody or becoming foster parents of your child.<sup>84</sup>

DSS must try to notify you of the petition and proceedings, and you are allowed to attend them.<sup>85</sup> However, the judge may proceed with the hearing even if you are not present.<sup>86</sup> If your child is

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<sup>77</sup> New York state law requires that the state attempt to locate adequate living arrangements with a relative or friend of yours before it places your child with strangers. N.Y. SOC. SERV. LAW § 384-a(1-a) (McKinney 2010) (in the context of voluntary placement); N.Y. FAM. CT. ACT § 1017 (McKinney 023) (in the context of involuntary placement); N.Y. COMP. CODES R. & REGS. tit. 18, § 430.10(b)(2) (2019).

<sup>78</sup> N.Y. FAM. CT. ACT §§ 1022(a), 1024(a) (McKinney 2023).

<sup>79</sup> See Subsection C4(a) of this Part for examples of what DSS must do in order to meet the “diligent efforts” standard.

<sup>80</sup> N.Y. FAM. CT. ACT § 1027(b)(i) (McKinney 2023).

<sup>81</sup> N.Y. FAM. CT. ACT § 1027(a)(i) (McKinney 2023).

<sup>82</sup> N.Y. FAM. CT. ACT § 1027(b)(i) (McKinney 2023).

<sup>83</sup> N.Y. FAM. CT. ACT § 1017 (McKinney 2023).

<sup>84</sup> N.Y. FAM. CT. ACT § 1017 (McKinney 2023).

<sup>85</sup> N.Y. FAM. CT. ACT §§ 1023, 1027(a)(iv) (McKinney 2023).

<sup>86</sup> N.Y. FAM. CT. ACT § 1027(b) (McKinney 2023).

removed, a date will be set for a “permanency hearing.”<sup>87</sup> It is important for you to note this date, which will be included in the court’s order removing your child.

(b) Fact-Finding Hearing

After the preliminary hearing, the court will hold a full hearing to decide whether or not your child was neglected or abused, or is at risk of being neglected or abused.<sup>88</sup> This part of the case is called the “fact-finding hearing.”<sup>89</sup> Since you will not be in the home while you are in prison, the state can easily show that your child is at risk of neglect, unless you have arranged for a relative or a friend to take care of your child in your absence.

The judge must make sure that you are present at the hearing or that every reasonable effort has been made to notify you of it.<sup>90</sup> If you choose not to appear, the court will proceed without you.<sup>91</sup> If you do not have money to retain a lawyer, the judge must appoint a free lawyer to represent you at this hearing (and the later dispositional and permanency hearings) and must also appoint a lawyer to represent your child.<sup>92</sup>

To ensure you will be at the hearing, you or your lawyer should ask the judge to order the prison, using an Order to Produce, to bring you to court that day. Appendix A has a sample letter requesting that the judge submit an Order to Produce to your prison. If, because of your incarceration, you cannot be at the hearing on the day it is scheduled, you or your lawyer should explain that to the judge. The judge should change the date to make sure you can be there.

(c) Dispositional Hearing

If the court makes a finding of abuse or neglect, it will hold another hearing, called the “dispositional hearing.” This hearing may take place directly after the fact-finding hearing,<sup>93</sup> but it usually happens after an adjournment (when the court postpones the hearing until a later date). You and your lawyer have the right to participate in the dispositional hearing, and the judge cannot proceed without proof that the agency actually notified you of the hearing. After hearing the case, the judge can make one of several rulings: return your child to you, adjourn the case for several months with the intention of dismissing the case later, or order placement of your child in foster care.<sup>94</sup>

The judge should inform you that if you fail to maintain contact with your child or fail to plan for your child’s future, your parental rights may be terminated. Your duties as the natural parent are discussed in Part C(5)(a) of this Chapter, and termination of parental rights is discussed in Part D of this Chapter.

Also, at the dispositional hearing or at the permanency hearing, (discussed in the following Subsection), the court can order the foster care agency to make “diligent efforts” to “encourage and strengthen the parental relationship.”<sup>95</sup> For example, the judge can order the agency to arrange visits between you and your child by bringing your child to visit you. You or your lawyer should ask the judge

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<sup>87</sup> N.Y. FAM. CT. ACT § 1027(h) (McKinney 2023); *see also* Subsection C3(d) below, “Permanency Hearings.”

<sup>88</sup> A child is “neglected” if he has suffered or is in danger of suffering physical, mental, or emotional harm because the parent cannot or will not provide the proper care. N.Y. FAM. CT. ACT § 1012(f)(i) (McKinney 2023). A child is “abused” when the parent causes, allows, or creates a risk of serious emotional or physical injury that is likely to cause death or serious physical harm, and the parent does not do so accidentally. A child is also considered abused when a parent commits or allows to be committed a sex offense against the child. N.Y. FAM. CT. ACT § 1012(e) (McKinney 2013).

<sup>89</sup> N.Y. FAM. CT. ACT § 1044 (McKinney 2023).

<sup>90</sup> N.Y. FAM. CT. ACT § 1041 (McKinney 2023).

<sup>91</sup> N.Y. FAM. CT. ACT § 1042 (McKinney 2023). If you did not willfully refuse to appear at the hearing, you may, within one year, petition the court for a rehearing, which the court should grant.

<sup>92</sup> N.Y. FAM. CT. ACT §§ 249, 262 (McKinney 2008).

<sup>93</sup> N.Y. FAM. CT. ACT § 1047(a) (McKinney 2023).

<sup>94</sup> N.Y. FAM. CT. ACT § 1052(a) (McKinney 2023).

<sup>95</sup> N.Y. FAM. CT. ACT § 1089(d)(2)(viii)(F) (McKinney 2023).

to order this visitation because visiting with your child will strengthen your relationship and will help your case when you ask that your child be returned to you. The judge can also order the agency to assist you with housing, employment, counseling, medical care, psychiatric treatment, and any other appropriate services that your prison facility can provide.

The judge will make a dispositional order, which must include:

- (1) a description of the visitation plan;<sup>96</sup>
- (2) a statement that you have the right to attend planning conferences (with a lawyer) about your child's foster care and that you should be told when those meetings will occur;<sup>97</sup> and
- (3) a notice that if your child remains in foster care for fifteen of the most recent twenty-two months, the agency may be required to file a termination of your parental rights.<sup>98</sup>

You have a right to a copy of this order, so remember to ask for a copy if one is not provided to you.<sup>99</sup>

#### (d) Permanency Hearings

The agency that has custody of your child must conduct a permanency hearing within eight months of your child's removal from his home.<sup>100</sup>

The purpose of a permanency hearing is to determine the long-term plans for your child.<sup>101</sup> The court will also examine whether you and the agency have been following the plan for your child and whether the plan should be adjusted because of changed circumstances.<sup>102</sup> In considering whether extension of placement is in the best interest of your child, the court will look at the permanency goal.<sup>103</sup> As a result of the ASFA, the statute was changed to allow alternative permanent plans to be made for the child, like placement with a "fit and willing relative."<sup>104</sup>

As the natural parent, you are a necessary party to the hearing, and you have a right to be present and to have the court appoint a lawyer to represent you.<sup>105</sup> It is very important to attend the permanency hearing. The permanency hearing should be scheduled during the original hearing when your child was ordered removed,<sup>106</sup> but you must be re-notified of the date of the permanency hearing at least fourteen days in advance.<sup>107</sup> You should also receive a copy of the agency's permanency hearing

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<sup>96</sup> N.Y. FAM. CT. ACT § 1089(d)(2)(vii)(A) (McKinney 2023).

<sup>97</sup> N.Y. FAM. CT. ACT § 1089(d)(2)(vii)(B) (McKinney 2023).

<sup>98</sup> N.Y. FAM. CT. ACT § 1089(d)(2)(vii)(D) (McKinney 2023).

<sup>99</sup> N.Y. FAM. CT. ACT § 1089(e) (McKinney 2023).

<sup>100</sup> N.Y. FAM. CT. ACT § 1089(a)(2) (McKinney 2023). The statute states that the permanency hearing must take place "no later than six months from the date which is sixty days after the child was removed from his or her home . . . [and] shall be completed within thirty days of the scheduled date certain." Adding the six months and 60 days means that the hearing must happen within eight months from the day your child was removed from your home.

<sup>101</sup> N.Y. FAM. CT. ACT § 1089(a) (McKinney 2023).

<sup>102</sup> N.Y. FAM. CT. ACT § 1089(c)(5)(i) (McKinney 2023).

<sup>103</sup> N.Y. FAM. CT. ACT § 1089(c)(1) (McKinney 2023).

<sup>104</sup> N.Y. FAM. CT. ACT § 1089(c)(1)(iv) (McKinney 2023).

<sup>105</sup> N.Y. FAM. CT. ACT § 1090(b) (McKinney 2023).

<sup>106</sup> N.Y. FAM. CT. ACT § 1089(a)(2) (McKinney 2023).

<sup>107</sup> N.Y. FAM. CT. ACT § 1089(b)(1)(i) (McKinney 2023); *see also In re Frederick W.*, 120 Misc. 2d 335, 342, 465 N.Y.S.2d 828, 833 (Fam. Ct. Queens County 1983) (requiring dismissal of agency's petition to extend the placement of the child where the agency failed to give notice to parent).

report,<sup>108</sup> a document that includes an update on your child's well-being and on the agency's recommendation for your child's future placement.<sup>109</sup>

If you are released from prison and want your child back immediately, or before the next permanency hearing, you should request that the agency return your child. If the agency does not fulfill your request within thirty days, you can ask the court to terminate your child's placement.<sup>110</sup> However, this motion does not mean that the court will return your child immediately. The court may first have a hearing to determine whether your child should be returned.<sup>111</sup>

#### 4. Working with Foster Care Agencies

##### (a) Placement with an Agency

Soon after your child enters the foster care system, DSS may transfer the responsibility for the case to an authorized private foster care agency. This transfer is often done in New York City cases, but is not usually done in the rest of New York state. The transfer does not mean your child will be physically moved; it only means that an agency other than DSS will supervise the placement.

If your child is placed with a private agency, you should be told the name of that agency as well as the agency caseworker assigned to your child. Until you receive this notice, you should maintain contact with the caseworker from DSS so you can take care of your responsibilities.<sup>112</sup> If you do not hear from the new caseworker, write to DSS and the new agency to let them know. You should show them that you are concerned about your child's well-being and that you want to be kept informed about your child's whereabouts. The more interest and concern you show for your child, the less likely it is that DSS will seek, or that the court will approve, termination of your parental rights. It may also make the foster care agency more open to using one of the ASFA exceptions to the requirements for terminating parental rights. Termination of parental rights is discussed fully in Part D of this Chapter.

##### (b) Development of a Service Plan

When you are assigned a caseworker from DSS or a private agency, the caseworker should contact you to arrange a meeting to discuss your child's service plan. However, this is not usually done while you are incarcerated, so you should request a meeting in writing. It may be possible to arrange a conference by telephone. You should also try to keep the agency caseworker informed about programs you are participating in while you are incarcerated, such as drug treatment or parenting skills classes.

If you and the caseworker are able to meet, you will develop a plan for your child's time in foster care.<sup>113</sup> It is more likely, though, that the agency will develop the plan in your absence. If you voluntarily placed your child in foster care, the Voluntary Agreement Form might be the basis for this plan. The plan:

- (1) will include guidelines for the treatment your child will receive;

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<sup>108</sup> N.Y. FAM. CT. ACT § 1089(b)(1)(i) (McKinney 2023); *see also In re Three Children Free for Adoption*, 138 Misc. 2d 584, 586, 525 N.Y.S.2d 135, 137 (Fam. Ct. Delaware County 1988) (dismissing petition for a permanency hearing as it would require the notice of parents even for children freed from adoption); *In re Frederick W.*, 120 Misc. 2d 335, 342, 465 N.Y.S.2d 828, 833 (Fam. Ct. Queens County 1983) (dismissing petition to extend placement of child for failure to serve parent with petition).

<sup>109</sup> N.Y. FAM. CT. ACT § 1087(e) (McKinney 2023); *see also In re Three Children Free for Adoption*, 138 Misc. 2d 584, 585, 525 N.Y.S.2d 135, 136 (Fam. Ct. Delaware County 1988) (stating that an argument that parents are not entitled to notice "flies directly in the face of case law and of the plain and unambiguous language of the statute").

<sup>110</sup> N.Y. FAM. CT. ACT § 1062 (McKinney 2023). You or your lawyer should go to the Petition Room at the family court. Someone there will help you put your case on the court calendar, which will schedule a hearing to determine whether your child will be returned to you.

<sup>111</sup> N.Y. FAM. CT. ACT § 1064 (McKinney 2023).

<sup>112</sup> *See* N.Y. SOC. SERV. LAW § 384-a(2)(c)(v) (McKinney 2010) (describing parents' obligations when they have a child in foster care).

<sup>113</sup> N.Y. COMP. CODES R. & REGS. tit. 18, § 428.6 (2023).

- (2) will state that a termination of parental rights proceeding may be filed against you by the agency if your child remains in foster care for fifteen out of the last twenty-two months;<sup>114</sup>
- (3) will outline the agency's program for helping to reunite you and your child;
- (4) should describe the care and services your child will receive while in foster care;
- (5) should state how often you will receive visits from your child;<sup>115</sup>
- (6) will state what you need to do to get your child back; and
- (7) will list your obligations for working to achieve a permanent home for your child.<sup>116</sup>

It is not always easy to get a copy of the plan. You should request it in writing. If the agency still does not provide you with the service plan for your family, you should inform the DSS case manager immediately in writing, as well as the judge at the next permanency hearing. When you get a copy of the plan, be sure to keep it for your records.

### 5. Rights and Obligations under Voluntary or Involuntary Foster Care

Both you and the agency have obligations (things you must do) toward each other and toward your child. If you do not fulfill your obligations, the agency may go to court to try to terminate your parental rights, which means that someone else could adopt your child without your consent. In a termination of parental rights proceeding where the agency accuses you of permanent neglect, the agency will first have to prove that it fulfilled its own obligations before the judge will consider ending your parental rights.

#### (a) The Department of Social Services' ("DSS") Obligations

DSS has certain responsibilities when it takes custody of your child. As previously discussed, its first obligation is to try to find a home for your child with a relative.<sup>117</sup> Again, if you know someone who can take good care of your child and whom your child likes, you can suggest this person or family member to DSS.

If DSS cannot find family members with whom your child might be able to live, it must do the following:

- (1) Place your child in a setting that allows for the least disruption of the child's life as possible;<sup>118</sup>
- (2) Keep a record of your child's progress;<sup>119</sup>
- (3) Provide a caseworker who will regularly meet with you, your child, and your child's foster parents and who, with your help, will write a plan for the care of your child;<sup>120</sup>
- (4) Demonstrate compliance with the plan;<sup>121</sup> and

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<sup>114</sup> N.Y. SOC. SERV. LAW § 384-a(2)(c)(ix) (McKinney 2010).

<sup>115</sup> N.Y. SOC. SERV. LAW § 384-a(2)(c)(iv) (McKinney 2010).

<sup>116</sup> N.Y. SOC. SERV. LAW § 384-a(2)(c)(v) (McKinney 2010).

<sup>117</sup> N.Y. SOC. SERV. LAW § 384-a(1-a)(a) (McKinney 2010); N.Y. Comp. Codes R. & Regs. tit. 18, § 430.10(b)(2) (2023) (describing standards for necessary activities prior to placement including search for a relative or family friend); N.Y. FAM. CT. ACT § 1017(1)(a) (McKinney 2023) (describing DSS obligations for placing children and locating relatives).

<sup>118</sup> N.Y. COMP. CODES R. & REGS. tit. 18, § 430.11(c)(1)(i) (2023) (suggesting that the child be able to stay in touch with the "persons, groups and institutions" with which the child was involved before, where possible). Similarly, the child's setting should be the "least restrictive and most homelike" as possible. N.Y. COMP. CODES R. & REGS. tit. 18, § 430.11(d)(1) (2023).

<sup>119</sup> N.Y. COMP. CODES R. & REGS. tit. 18, § 428.3(b)(1)(vi) (2023).

<sup>120</sup> N.Y. COMP. CODES R. & REGS. tit. 18, § 428.6 (2023).

<sup>121</sup> N.Y. COMP. CODES R. & REGS. tit. 18, §§ 428.1, 430.12(c)(1)(ii)(c) (2023).

- (5) Provide reasonable care for and supervision of the child during the course of the placement.<sup>122</sup>

More importantly, in most cases, DSS has a general legal obligation to make what the law calls “diligent efforts” to encourage a relationship between you and your child,<sup>123</sup> although there are some exceptions created by ASFA. “Diligent efforts” include:

- (1) Keeping you informed of your child’s progress;<sup>124</sup>
- (2) Making arrangements with your correctional facility for your child to visit you in the facility;<sup>125</sup> and
- (3) Providing or suggesting counseling or other services to resolve problems that may prevent your child’s eventual return to you.<sup>126</sup>

The exact meaning of “diligent efforts” will depend on the individual case. The agency may be required to maintain regular contact with you and inform you that failure to contact and plan for your child may result in a termination of your parental rights.<sup>127</sup> In one case, the court found that an agency did not make diligent efforts when it did not help parents satisfy agency requirements for the return of their child. Although the parents did not fulfill the agency’s plan, which included finding a suitable home, having the means to support the child, and going to family counseling, the court held the agency should have made efforts to address problems, such as poverty, that kept the parents from fulfilling the agency requirements.<sup>128</sup> In another case, an agency did not satisfy its statutory requirement when it failed to offer counseling to a child’s incarcerated father, made no effort to help the father get visitation rights, and made no attempt to involve the father in his child’s life.<sup>129</sup>

In defining “diligent efforts” the highest court of New York has said that the foster care agency must make “meaningful efforts” to:

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<sup>122</sup> See *Andrews v. Cnty. of Otsego*, 112 Misc. 2d 37, 39, 446 N.Y.S.2d 169, 171 (Sup. Ct. Otsego County 1982) (holding that a county with custody of a foster care child has a continuing obligation to protect the child’s health, safety, and welfare and can be held liable for negligent placement or supervision of a child).

<sup>123</sup> N.Y. SOC. SERV. LAW § 384-b(7)(f) (McKinney 2010); see also *In re Sheila G.*, 61 N.Y.2d 368, 385, 389, 462 N.E.2d 1139, 1148, 1150, 474 N.Y.S.2d 421, 430, 432 (1984) (explaining that the agency must make “affirmative, repeated, and meaningful efforts to assist” a parent before initiating a parental rights termination proceeding and approving dismissal of permanent neglect petition filed by foster care agency where father had made visits regularly, established paternity, and developed a plan to take custody of the child, but the agency did not fulfill its “diligent efforts” requirement); *In re Ericka M.*, 285 A.D.2d 986, 986–987, 727 N.Y.S.2d 234, 235 (4th Dept. 2001) (dismissing petition for termination of parental rights because agency did not show, by clear and convincing evidence, that it made “diligent efforts” to strengthen the parent-child bond); *In re Jamie M.*, 96 A.D.2d 737, 737, 465 N.Y.S.2d 339, 340 (4th Dept. 1983) (finding that the agency failed to make “diligent efforts” to help parents solve the very problems requiring removal of the children and causing the termination proceedings), *aff’d*, 63 N.Y.2d 388, 472 N.E.2d 311, 482 N.Y.S.2d 461 (1984).

<sup>124</sup> N.Y. SOC. SERV. LAW § 384-b(7)(f)(4) (McKinney 2010); see also *Matter of Gerald BB. v. Sheila CC.*, 51 A.D.3d 1081, 1084, 857 N.Y.S.2d 314, 318 (3d Dept. 2008) (holding that DSS satisfied the requirement to keep parents informed as to child’s progress as “written reports” were “routinely sent to the mother charting her children’s progress while they were in foster care,” and finding “that efforts were repeatedly made by members of DSS to involve the mother in discussions regarding plans for the children’s future”).

<sup>125</sup> N.Y. SOC. SERV. LAW § 384-b(7)(f)(5) (McKinney 2010). The agency is also responsible for making arrangements to transport your child to and from the facility to visit with you. N.Y. SOC. SERV. LAW § 384-b(7)(f)(5) (McKinney 2010); see also *Matter of Gerald BB. v. Sheila CC.*, 51 A.D.3d 1081, 1084, 857 N.Y.S.2d 314, 318 (3d Dept. 2008) (finding that DSS met its burden as they “arranged for [the mother], while incarcerated, to have visits with the children”).

<sup>126</sup> N.Y. SOC. SERV. LAW § 384-b(7)(f)(5) (McKinney 2010) (requiring the agency to coordinate with the prison to provide “rehabilitative services to resolve or correct the problems other than incarceration itself which impair the incarcerated parent’s ability to maintain contact with the child”).

<sup>127</sup> See *In re Shannon U.*, 210 A.D.2d 752, 753–754, 620 N.Y.S.2d 851, 852 (3d Dept. 1994) (holding that agency was found to satisfy its duty because it had maintained regular contact with parents by phone, mail, home visits, and meetings and had arranged visits, counseling, and parenting classes).

<sup>128</sup> See *In re Jamie M.*, 63 N.Y.2d 388, 394–395, 472 N.E.2d 311, 314, 482 N.Y.S.2d 461, 464 (1984) (dismissing petition for termination of parental rights because the agency failed to show diligent efforts in addressing the unemployment and financial instability of parents).

<sup>129</sup> See *In re Jennifer Ann W.*, 198 A.D.2d 881, 882, 605 N.Y.S.2d 698, 699 (4th Dept. 1993).



- (1) provide you with counseling for any problem, such as drug or alcohol abuse, that might be an obstacle to your child's eventual return to you;
- (2) help you find housing or employment;
- (3) help you plan for your child's future; and
- (4) provide opportunities for you and your child to have regular, meaningful visits.<sup>130</sup>

Until the agency has demonstrated "some attempt" to assist you in these ways, a termination of parental rights should not be granted.<sup>131</sup>

However, ASFA has changed the Department of Social Services' obligation to make reasonable attempts to preserve the family in some circumstances. In New York, the law states that if an incarcerated parent has failed more than once to cooperate with the agency's efforts to assist the parent in planning for the future of the child or with the agency's efforts to plan and arrange visits, while they are incarcerated, then the agency will not have to present evidence that it made "diligent efforts."<sup>132</sup>

Additionally, the law states that in making determinations involving reasonable or diligent efforts, "the health and safety of children" is the most important concern.<sup>133</sup> Efforts should be made to prevent the removal of the child or to make it possible for the child to return home safely.<sup>134</sup>

Reasonable efforts to prevent the removal of a child or to reunite a child with the birth family are **not** required in the following situations:<sup>135</sup>

- (1) when a court has determined that the parent has subjected the child to aggravated circumstances, defined in New York as severe or repeated abuse;<sup>136</sup>
- (2) when a court has determined that a parent has committed a serious act of violence, including murder or voluntary manslaughter, against one of the parent's children;<sup>137</sup> attempted, conspired, or solicited to commit such murder or voluntary manslaughter;<sup>138</sup> or committed assault or aggravated assault on a child under eleven years old, resulting in serious bodily harm to the child or another child of the parent;<sup>139</sup> or

<sup>130</sup> *In re Sheila G.*, 61 N.Y.2d 368, 384–385, 462 N.E.2d 1139, 1147–1148, 474 N.Y.S.2d 421, 429–430 (1984).

<sup>131</sup> *In re Jamie M.*, 63 N.Y.2d 388, 394–395, 472 N.E.2d 311, 314, 482 N.Y.S.2d 461, 464 (1984).

<sup>132</sup> N.Y. SOC. SERV. LAW § 384-b(7)(e)(ii) (McKinney 2010); *see also* Matter of Heart Share Human Servs. of N.Y., 28 Misc. 3d 1107, 1124, 906 N.Y.S.2d 472, 486 (Fam. Ct. Queens County 2010), *reversed in part on other grounds*, Matter of Charle Chiedu E., 87 A.D.3d 1140, 930 N.Y.S.2d 456 (App. Div.) (recognizing three statutory exceptions to the diligent efforts requirements).

<sup>133</sup> N.Y. SOC. SERV. LAW § 384-b(1)(a) (McKinney 2010).

<sup>134</sup> N.Y. SOC. SERV. LAW § 384-b(1)(a)(iii) (McKinney 2010).

<sup>135</sup> N.Y. SOC. SERV. LAW § 358-a(3)(b) (McKinney 2022).

<sup>136</sup> N.Y. SOC. SERV. LAW § 358-a(12) (McKinney 2022). Severe abuse is defined to include a conviction for (1) committing or soliciting murder or manslaughter of another child, of the parent, or another child for whom the parent is legally responsible; (2) assault against a child less than eleven years old; and (3) conviction for an above crime in any other jurisdiction. N.Y. SOC. SERV. LAW § 384-b(8)(a)(iii) (McKinney 2010). Repeated abuse is defined to include (1) a finding of abuse of the child; (2) a finding of abuse, within the past five years, of that child or any other child for whom the parent is or was legally responsible; and (3) a finding that diligent efforts by the agency to encourage the parental relationship and to rehabilitate the parent have been unsuccessful and are "unlikely to be successful in the foreseeable future." N.Y. SOC. SERV. LAW § 384-b(8)(b) (McKinney 2010).

<sup>137</sup> N.Y. SOC. SERV. LAW § 358-a(3)(b)(2) (McKinney 2022). Convictions for these offenses can occur in jurisdictions other than New York as long as (1) the offense includes all the essential elements of the New York crime, and (2) the victim of such offense was the child or another child of the parent. N.Y. SOC. SERV. LAW § 358-a(3)(b)(5) (McKinney 2022).

<sup>138</sup> N.Y. SOC. SERV. LAW § 358-a(3)(b)(3) (McKinney 2022). Convictions for these offenses can occur in jurisdictions other than New York as long as (1) the offense includes all the essential elements of the New York crime, and (2) the victim of such offense was the child or another child of the parent. N.Y. SOC. SERV. LAW § 358-a(3)(b)(5) (McKinney 2022).

<sup>139</sup> N.Y. SOC. SERV. LAW § 358-a(3)(b)(4) (McKinney 2022). Convictions for these offenses can occur in jurisdictions other than New York as long as (1) the offense includes all the essential elements of the New York crime, and (2) the victim of such offense was the child or another child of the parent. N.Y. SOC. SERV. LAW § 358-a(3)(b)(5) (McKinney 2022).

- (3) when the parent's rights to one of the child's siblings (including half-siblings) have been terminated involuntarily.<sup>140</sup>

If the agency decides not to make reasonable efforts to reunite your family, it must file a motion in court, and the judge will decide whether the agency can avoid making such efforts.<sup>141</sup> You should be notified of and given a copy of the motion.

(b) Your Obligations as a Parent

Like DSS, you must meet certain obligations while your child is in foster care. If you fail to satisfy these requirements, DSS may claim that you have abandoned or permanently neglected your child and may ask a court to terminate your parental rights.<sup>142</sup> New York law states that a parent who wishes to be reunited with a child in foster care has the following obligations:

- (1) To visit with the child;<sup>143</sup>
- (2) To plan for the future of the child;<sup>144</sup>
- (3) To consult with the foster agency about the child's foster care plan;<sup>145</sup>
- (4) To contribute financially to the support of the child, if the parent is able;<sup>146</sup>
- (5) To inform the agency of the parent's address every six months, even if it remains the same, and to inform the agency immediately of any change of name or address;<sup>147</sup> and
- (6) To cooperate with the agency.<sup>148</sup>

The courts that interpret these requirements look at both "the particular facts and [the] totality of circumstances."<sup>149</sup> This means the court will look at the facts of your particular case as a whole when deciding whether to terminate your parental rights. Because the judge is supposed to look at the "totality of the circumstances" of your situation, he might decide not to terminate your parental rights even if you have not met all the obligations listed above. Also, the law says that, at the very least, an incarcerated parent has to "cooperate with [the agency] in its efforts to . . . plan for the future of the child."<sup>150</sup> If an incarcerated parent on more than one occasion fails to cooperate or has failed to inform the agency of his address for six months, the agency does not have to continue making diligent efforts to preserve the family, including providing for visitation.<sup>151</sup>

If you want to retain your parental rights, you should make every effort to fulfill your obligations. In a termination proceeding, DSS has the burden of proof to show, by clear and convincing evidence, that you failed to fulfill your obligations.

(i) *Visiting with Your Child*

The law recognizes that incarcerated parents may have a difficult time arranging to visit with their children and planning for their children's futures. It will not be held against you if you cannot

<sup>140</sup> N.Y. SOC. SERV. LAW § 358-a(3)(b)(6) (McKinney 2022); N.Y. SOC. SERV. LAW § 358-a(3)(d) (McKinney 2022).

<sup>141</sup> N.Y. SOC. SERV. LAW § 358-a(1) (McKinney 2022).

<sup>142</sup> N.Y. SOC. SERV. LAW §§ 384-a(2)(c)(vi), 384-b(4)(b), 384-b(7)(a), 384-b(4)(d) (McKinney 2010).

<sup>143</sup> N.Y. SOC. SERV. LAW §§ 384-a(2)(c)(v)(A), 384-b(5), 384-b(7)(b) (McKinney 2010).

<sup>144</sup> N.Y. SOC. SERV. LAW § 384-a(2)(c)(v)(B), 384-b(7)(a) (McKinney 2010). For a definition of planning for the future of the child, see N.Y. SOC. SERV. LAW § 384-b(7)(c) (McKinney 2010) and the discussion in Part D(4)(b)(ii) below.

<sup>145</sup> N.Y. SOC. SERV. LAW § 384-a(2)(c)(v)(C) (McKinney 2010).

<sup>146</sup> N.Y. SOC. SERV. LAW § 384-a(2)(c)(v)(D) (McKinney 2010).

<sup>147</sup> N.Y. SOC. SERV. LAW §§ 384-a(2)(c)(v)(E), 384-b(7)(e)(i) (McKinney 2010).

<sup>148</sup> See N.Y. SOC. SERV. LAW §§ 384-a(2)(c)(v), 384-b(5), 384-b(7) (McKinney 2010).

<sup>149</sup> *In re Orlando F.*, 40 N.Y.2d 103, 111, 351 N.E.2d 711, 716, 386 N.Y.S.2d 64, 68 (1976) (holding that finding of permanent neglect and termination of parental rights was appropriate where the mother stayed in contact with son, but failed to plan for his future by not getting stable housing for three years).

<sup>150</sup> N.Y. SOC. SERV. LAW § 384-b(7)(e)(ii) (McKinney 2010).

<sup>151</sup> N.Y. SOC. SERV. LAW § 384-b(7)(e) (McKinney 2010).

visit with your child as often as you would like or if the agency does not provide you with visits.<sup>152</sup> Remember, though, that regular visits are one of the most effective ways to maintain a healthy relationship with your child and to avoid termination of your parental rights. Visitation and other parental contacts, such as letters and phone calls, are generally seen as being in the best interests of the child.

Not visiting with your child can be proof of abandonment or permanent neglect and can lead to termination of your parental rights.<sup>153</sup> For example, one court held that a parent who failed to substantially maintain contact with her children during a period of over one year had not lived up to her foster care obligations.<sup>154</sup> You should try very hard to maintain contact with your child. Whether your child is in the custody of a relative, a friend, your ex-spouse, or in foster care, that person should bring your child to visit you.<sup>155</sup> Your parental rights are at stake, so make sure that you continuously try to visit with your child even if the foster parents or agency are making it difficult for you to see your child. If the judge sees that you did all that you could to try and maintain contact with your child, that will help you regain custody of your child when you are released. Some prisons have programs to help incarcerated people keep in contact with their children.<sup>156</sup> You should look into any such programs available at your facility and tell your caseworker that you and your child wish to participate in the programs.

The foster care agency is required by law to make “diligent efforts” to encourage frequent and regular visits between you and your child.<sup>157</sup> The agency usually has to provide visits every other week if the permanency plan for the child is returning the child to you (or “reunification”).<sup>158</sup> The agency must do whatever it can to help make sure you get to meet with your child, including providing you with financial assistance or help arranging transportation.<sup>159</sup> A court may even order that you be allowed to visit with your child in a different facility if that will make it easier for your child to visit you, but this will usually be a day trip with a guard and not a permanent transfer.<sup>160</sup> Prison officials do not have to set up visits between you and your child outside of your correctional facility unless it is “reasonably feasible” (not very difficult or inconvenient) and is in the best interests of your child.<sup>161</sup>

Because prisons generally restrict visitation hours, it may be difficult for a caseworker to arrange for your child to meet with you in prison. However, logistical difficulties are not an excuse for caseworkers to stop arranging visits. The law *requires* the caseworker to set up visits. It also requires jail officials to cooperate with the caseworker to arrange the visits.<sup>162</sup>

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<sup>152</sup> N.Y. SOC. SERV. LAW §§ 384-b(7)(e)(i), 384-b(7)(f)(5) (McKinney 2010).

<sup>153</sup> N.Y. SOC. SERV. LAW §§ 384-b(5), 384-b(7)(a), (McKinney 2010).

<sup>154</sup> *See In re Comm’r. of Soc. Serv.*, 84 Misc. 2d 253, 258–259, 376 N.Y.S.2d 387, 393 (Fam. Ct. Ulster County 1975) (explaining that a parent’s failure to maintain continuous contact with the child can result in the termination of parental rights); *see also In re I.R.*, 153 A.D.2d 559, 561, 544 N.Y.S.2d 216, 217–218 (2d Dept. 1989) (explaining that incarceration alone does not excuse a parent from maintaining contact with his child).

<sup>155</sup> *See Wise v. Del Toro*, 122 A.D.2d 714, 714–715, 505 N.Y.S.2d 880, 881 (1st Dept. 1986) (reversing denial of visitation to an incarcerated father because he did not have the opportunity to present evidence and because incarceration alone does not make visitation inappropriate); *R.J. v. D.J.*, 133 Misc. 2d 883, 887, 508 N.Y.S.2d 838, 841 (Fam. Ct. Broome County 1986) (holding that frequent visits were unnecessary because of the stress to the mother who had to take the child to visits).

<sup>156</sup> You may, for example, be eligible to apply for the Family Reunion Program (“FRP”) if it is offered by your correctional facility. *See* N.Y. COMP. CODES R. & REGS. tit. 7, § 220.2 (1998).

<sup>157</sup> N.Y. SOC. SERV. LAW § 384-b(7)(f)(5) (McKinney 2010).

<sup>158</sup> N.Y. COMP. CODES R. & REGS. tit. 18, § 430.12(d)(1)(i) (2006).

<sup>159</sup> N.Y. COMP. CODES R. & REGS. tit. 18, § 430.12(d)(1) (2006).

<sup>160</sup> *See In re Gadson*, 124 Misc. 2d 1024, 1026–1027, 478 N.Y.S.2d 498, 500 (Fam. Ct. Onondaga Cnty. 1984) (permitting visitation at a facility different from the one where parent was incarcerated because it was in the best interests of the children, the alternate facility allowed for meaningful visitation, and transportation was feasible).

<sup>161</sup> N.Y. SOC. SERV. LAW § 384-b(7)(f)(2) (McKinney 2010).

<sup>162</sup> N.Y. SOC. SERV. LAW § 384-b(7)(f)(5) (McKinney 2010); N.Y. CORRECT. LAW § 619 (McKinney 2014).

In very specific cases, the court might prevent you from being able to visit with your child. A court can also determine that visitation is harmful to the child's welfare and order that no visits occur. In New York, "[t]he denial of visitation to a natural parent is a drastic remedy and should be done only where there are compelling reasons and substantial evidence that such visitation is detrimental to the children's welfare."<sup>163</sup> This means there has to be an extremely important reason why visits would be harmful to your child, and the agency must be able to prove that such a reason actually exists and that it is truly harmful. Also, if visitation is not permitted, then the lack of visits cannot be used against you as the basis for a permanent neglect or abandonment proceeding.<sup>164</sup>

(ii) *Planning for Your Child*

Courts recognize that your ability to participate in your child's upbringing is limited because you are incarcerated. Nevertheless, they still require that you think ahead and have a plan to care for your child.<sup>165</sup> This may include finding a home for your child among friends or relatives or preparing yourself for reunification. Planning ahead will demonstrate that you care about your child and have an interest in being a parent.

Your plan might include the following:

- (1) How you will support yourself and your child after your release (for example, by getting public assistance or finding a job);
- (2) Where you and your child will live;
- (3) Where your child will go to school;
- (4) How you will provide for your child's medical needs (for example, with Medicaid);
- (5) What kind of religious upbringing, if any, you want for your child;
- (6) Who will watch your child if you are out of the house; and
- (7) How you will provide for any special needs your child may have.<sup>166</sup>

To prepare yourself as a parent, you should take part in any parenting courses available at your institution, attend vocational training classes to improve your chances of getting a job, and join drug or alcohol rehabilitation classes if necessary or ordered by a court. In general, you should do your best to participate in any programs that your caseworker suggests.

If you are incarcerated for an extended period of time, the court may not think arranging long-term foster care (as opposed to adoption) is an acceptable plan for your child's future. Courts have terminated the parental rights of incarcerated people who made long-term foster care arrangements for their children when the parent would not get out of prison until the children were over 18.<sup>167</sup> If you are in this situation, the government has the authority to terminate your parental rights. See Part D

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<sup>163</sup> *Parker v. Ford*, 89 A.D.2d 806, 807, 453 N.Y.S.2d 465, 466 (4th Dept. 1982) (holding that petitioner father, despite alcohol abuse, was improperly denied supervised visitation, where there was no evidence that supervised visitation would be detrimental to the child's welfare). *But see Sullivan Cnty. Dept. of Soc. Serv. v. Richard C.*, 260 A.D.2d 680, 682–683, 687 N.Y.S.2d 470, 472 (3d Dept. 1999) (denying visitation between father and child where psychologist and child's therapist recommended that visits be suspended until child developed the strength to deal with family problems, since child consistently showed regression after contact with father).

<sup>164</sup> N.Y. SOC. SERV. LAW § 384-b(7)(f)(5) (McKinney 2010).

<sup>165</sup> *See, e.g.,* N.Y. SOC. SERV. LAW § 384-b(4)(d), (7)(a), (7)(c), (7)(e)(ii), (7)(f)(1) (McKinney 2010).

<sup>166</sup> *See Philip M. Genty, Protecting the Parental Rights of Incarcerated Mothers Whose Children are in Foster Care: Proposed Changes to New York's Termination of Parental Rights Law*, 17 *FORDHAM URB. L.J.* 1, 6 (1988) (discussing the special needs of incarcerated parents and noting that "the parent retains certain parental rights and duties," including "visitation, planning for the future of the child, dictating the child's religious upbringing, and choosing the child's healthcare and schooling").

<sup>167</sup> *In re Gregory B.*, 74 N.Y.2d 77, 90, 542 N.E.2d 1052, 1058, 544 N.Y.S.2d 535, 541 (1989) (upholding termination of parental rights for incarcerated parents who made arrangements for long-term foster care until children were no longer minors); *In re "Female" V.*, 21 A.D.3d 1118, 1119, 803 N.Y.S.2d 636, 637–638 (2d Dept. 2005) (upholding termination of parental rights for an incarcerated father who, among other things, "was unable to provide any 'realistic and feasible' alternative" to having his children remain in foster care until they became adults or he was released from prison) (quoting N.Y. SOC. SERV. LAW § 384-b(7)(c) (McKinney 2010)).

below for a longer discussion of what happens when the government tries to permanently terminate your parental rights.

(iii) *Contact with Your Child and the Foster Care Agency*

In addition to visiting with your child whenever you can, you should stay in touch by sending letters, birthday and holiday cards, and gifts to your child. If your child is too young to read, draw a picture or send a note that someone else can read aloud to them. These actions will show the court that you are interested in and planning for your child's future and that you have made an effort to fulfill your parental obligations.

You should also contact your caseworker regularly, both to inform him of your progress in prison and to ask about your child. If you do not tell the agency about your current address for six months or more, the agency is no longer required to try as hard to facilitate the relationship between you and your child.<sup>168</sup> Keep track of all your communication with your child and with your caseworker, including making copies of letters and cards and keeping a list of phone calls you make. Keeping accurate records is very important because if the agency ever petitions to terminate your parental rights, you will have proof that you were, in fact, fulfilling your obligations.

## 6. Assuming Care of Your Child After Release

If you voluntarily place your child in foster care, your Voluntary Placement Form may include a specific release date for your child. In that case, the agency must return the child to you on that date unless you have a court order which says otherwise.<sup>169</sup> If you will still be incarcerated on the release date specified in the Voluntary Placement Form, you should inform your caseworker. A new release date can be chosen, and your child can remain in foster care until then.<sup>170</sup>

If you wish to have your child returned earlier than the date listed on the Voluntary Placement Form, you must send a written request to the agency stating the new requested date of return and your reasons for wanting to change the date.<sup>171</sup> The agency may return your child, or they have ten days to deny your request.<sup>172</sup> If your request is denied, you can challenge the denial in court.<sup>173</sup>

If the Placement Form does not say a specific release date, you can request the return of your child at any time by writing a letter to the agency. The agency must return your child to you within twenty days or get a court order to keep them in foster care. If the agency does get this court order, it will probably bring neglect proceedings against you.<sup>174</sup> Generally, the agency will have to prove that you would not be able to provide for your child—meaning that your child would be at risk of neglect or abuse—before it can get an order extending your child's foster care.

If you did not voluntarily place your child in foster care, but were forced to do so by the state (meaning you did it “involuntarily”), you may file a motion with the court to end the involuntary placement.<sup>175</sup> However, cannot go straight to the court to ask for your child back. You must first apply to the agency asking them to terminate the foster care placement. Once they deny your request, then you can file the motion with the court.

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<sup>168</sup> N.Y. SOC. SERV. LAW § 384-b(7)(e)(i) (McKinney 2010).

<sup>169</sup> N.Y. SOC. SERV. LAW § 384-a(2)(a) (McKinney 2010).

<sup>170</sup> See N.Y. SOC. SERV. LAW § 384-a(3) (McKinney 2010) (describing how to amend a Voluntary Placement Form).

<sup>171</sup> N.Y. SOC. SERV. LAW § 384-a(2)(a) (McKinney 2010). Reasons for changing the date of your child's release from foster care might include, for example, a shorter prison sentence than originally anticipated or your decision to place your child with a relative or friend.

<sup>172</sup> N.Y. SOC. SERV. LAW § 384-a(2)(a) (McKinney 2010).

<sup>173</sup> N.Y. SOC. SERV. LAW § 384-a(2)(a) (McKinney 2010); see also N.Y. SOC. SERV. LAW § 358-a(8) (McKinney 2022) (pointing out that any order by a family court can be appealed pursuant to Article 11 of the Family Court Act).

<sup>174</sup> N.Y. SOC. SERV. LAW § 384-a(2)(a) (McKinney 2010).

<sup>175</sup> See N.Y. FAM. CT. ACT § 1062 (McKinney 2023).

Regardless of whether your child was placed in foster care voluntarily or involuntarily, you may be eligible for assistance from DSS once you are released from prison and have regained custody of your child. After your release, DSS must provide supportive and rehabilitative services, called “preventive services,” to you and your family if there is a serious risk that you will not be able to care for your child and that the child will be put in foster care again.<sup>176</sup> You should discuss getting additional assistance with your DSS caseworker *before* your release from prison. If you fail to do this and realize that you need additional assistance after returning home, you can still discuss it with your caseworker because your caseworker must meet with you at least three times after your child is released from foster care.<sup>177</sup>

If you need housing after your release from prison, you may be eligible for a housing subsidy from DSS of up to \$300 every month for up to three years. DSS gives this subsidy to parents when the main reason their child is being kept in foster care is that the parent cannot find adequate housing.<sup>178</sup> If you need help paying for housing, ask your caseworker about the subsidy and explain that you want to apply for it.

#### D. Involuntary Termination of Parental Rights

There are a few different people who can start court proceedings to convince a court that terminating your parental rights and placing your child up for adoption is the best solution for your child. These people include DSS, foster parents, a relative with care or custody of your child, or your child's legal guardian.<sup>179</sup> New York law says that the state cannot terminate your parental rights just because you are in prison.<sup>180</sup> The law also recognizes that incarcerated parents have special circumstances that judges should consider when looking at a parent's efforts to maintain contact with and plan for their children.<sup>181</sup> However, ASFA has made it easier for the state to terminate your rights as a parent.

If you do not consent to giving your child up for adoption, a court **may** terminate your parental rights **only** if it finds that *at least one* of the following things is true:

- (1) You have abandoned your child for a period of at least six months immediately prior to the date on which the termination petition was filed,<sup>182</sup>
- (2) You permanently neglected your child,<sup>183</sup>

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<sup>176</sup> You may be eligible for any of the services described in N.Y. COMP. CODES R. & REGS. tit. 18, § 423.2 (2023), which include daycare, housekeeper/chore services, psychiatric counseling, and parent training services. *See also* N.Y. SOC. SERV. LAW § 409 (McKinney 2010) (defining preventive services); N.Y. SOC. SERV. LAW § 409-a (McKinney 2010) (detailing the duties of social services officials to provide preventative services); N.Y. SOC. SERV. LAW § 384-a(2)(c)(iv)–(vii) (McKinney 2010) (describing the terms for transfer of care and custody of children).

<sup>177</sup> N.Y. COMP. CODES R. & REGS. tit. 18, § 423.4(h) (2014).

<sup>178</sup> N.Y. SOC. SERV. LAW § 409-a(5)(c) (McKinney 2010).

<sup>179</sup> N.Y. SOC. SERV. LAW § 384-b(3)(b) (McKinney 2010).

<sup>180</sup> N.Y. SOC. SERV. LAW § 384-b(2)(b) (McKinney 2010) (stating that the term parent “shall include an incarcerated parent unless otherwise qualified”). *But see In re Love Russell J.*, 7 A.D.3d 799, 800–801, 776 N.Y.S.2d 859, 859 (2d Dept. 2004) (finding that termination of parental rights due to permanent neglect was proper against an incarcerated father whose only plan for his children's welfare was extended placement in foster care, especially when he had been warned by the agency that this plan was insufficient).

<sup>181</sup> *See* N.Y. SOC. SERV. LAW § 384-b(7)(a) (McKinney 2010); *see also In re Custody & Guardianship of Sasha R.*, 246 A.D.2d 1, 7–8, 675 N.Y.S.2d 605, 609 (1st Dept. 1998) (discussing how the New York legislature acknowledged that incarcerated parents have “special circumstances” that should be taken into account when evaluating the parent's efforts to meet the statutory contact and planning requirements) (citing *In re Gregory B.*, 74 N.Y.2d 77, 89, 542 N.E.2d 1052, 1057, 544 N.Y.S.2d 535, 540–541 (1989)).

<sup>182</sup> N.Y. SOC. SERV. LAW § 384-b(4)(b) (McKinney 2010). Under New York state law, a parent abandons a child when he shows “an intent to forego his or her parental rights and obligations . . . by his or her failure to visit the child and communicate with the child or agency, although able to do so and not prevented or discouraged from doing so by the agency.” N.Y. SOC. SERV. LAW § 384-b(5)(a) (McKinney 2010).

<sup>183</sup> N.Y. SOC. SERV. LAW § 384-b(4)(d) (McKinney 2010). A parent permanently neglects a child when he

- (3) You cannot and will not be able to provide proper care because of mental illness or intellectual disability (which used to be called mental retardation),<sup>184</sup> or
- (4) You have severely or repeatedly abused your child.<sup>185</sup>

Under ASFA in New York, if *any of the following* are true, the foster care agency **must** file for termination of parental rights:

- (1) Your child has been in foster care for fifteen of the most recent twenty-two months;<sup>186</sup>
- (2) The child has been determined by a court to be abandoned;<sup>187</sup>
- (3) You have been convicted of certain crimes, such as conspiring, soliciting, attempting, or committing murder or manslaughter of another of your children for whom you are legally responsible,<sup>188</sup> or attempting or committing assault on a child under eleven years of age who is a child of the parent (you) or a child for whom you are legally responsible;<sup>189</sup> or
- (4) You have been convicted of any of the above crimes in another jurisdiction.<sup>190</sup>

The State is still required to prove its case in order to actually terminate your rights. But even if any of the four conditions above apply to you (where the agency is required to file under ASFA), the agency does **not** need to file for termination proceedings if any of the following things are also true:

- (1) Your child is being cared for by a relative;<sup>191</sup>
- (2) The agency has documented in the plan a compelling reason that filing a petition to terminate parental rights would not be in the best interest of the child;<sup>192</sup> or
- (3) The agency has not provided you) with adequate reunification services in cases where those services are part of the reasonable efforts requirement.<sup>193</sup>

When the foster care agency alleges in a petition that your case falls into one of the four categories listed above and files for termination of parental rights (where the agency is required to file under ASFA), the court will first hold a fact-finding hearing to see if the agency's allegation is true. Then, in all cases involving permanent neglect or severe or repeated abuse, it will hold a "dispositional hearing."<sup>194</sup> In the dispositional hearing, the judge will decide whether terminating your parental rights is in your child's best interest. In cases of abandonment or mental illness, dispositional hearings are not required, and your parental rights may be terminated automatically if the court finds there is abandonment or mental illness in the fact-finding hearing. However, the court may still choose to hold a dispositional hearing in those instances.

One possible compromise in a proceeding to terminate parental rights is a "suspended judgment" for one year.<sup>195</sup> A suspended judgment means that the court will monitor the situation for a year and

"continuously or repeatedly" fails for a period of either one year, or fifteen out of the most recent twenty-two months, "to maintain contact with or plan for the future of the child, although physically and financially able to do so . . ." N.Y. SOC. SERV. LAW § 384-b(7)(a) (McKinney 2010).

<sup>184</sup> N.Y. SOC. SERV. LAW § 384-b(4)(c) (McKinney 2010).

<sup>185</sup> N.Y. SOC. SERV. LAW § 384-b(4)(e) (McKinney 2010). See Part C(5)(a) of this Chapter for a definition of severe and repeated abuse. Under N.Y. SOC. SERV. LAW § 384-b(8)(b)(ii)(A) (McKinney 2010), repeated abuse that will lead to the termination of parental rights also includes a parent committing or "knowingly" allowing a felony sex offense to be committed against his child.

<sup>186</sup> N.Y. SOC. SERV. LAW § 384-b(3)(l)(i) (McKinney 2010).

<sup>187</sup> N.Y. SOC. SERV. LAW § 384-b(3)(l)(i) (McKinney 2010).

<sup>188</sup> N.Y. SOC. SERV. LAW § 384-b(8)(a)(iii)(A)–(B) (McKinney 2010).

<sup>189</sup> N.Y. SOC. SERV. LAW § 384-b(8)(a)(iii)(C) (McKinney 2010).

<sup>190</sup> N.Y. SOC. SERV. LAW § 384-b(8)(a)(iii)(D) (McKinney 2022).

<sup>191</sup> N.Y. SOC. SERV. LAW § 384-b(3)(l)(i)(A) (McKinney 2022).

<sup>192</sup> N.Y. SOC. SERV. LAW § 384-b(3)(l)(i)(B) (McKinney 2022). Compelling reasons are defined in N.Y. SOC. SERV. LAW § 384-b(3)(l)(ii) (McKinney 2022).

<sup>193</sup> N.Y. SOC. SERV. LAW § 384-b(3)(l)(i)(C) (McKinney 2010).

<sup>194</sup> N.Y. SOC. SERV. LAW § 384-b(3)(e) (McKinney 2010); N.Y. FAM. CT. ACT § 623 (McKinney 2009). See Part C(3)(c) of this Chapter for information on dispositional hearings.

<sup>195</sup> N.Y. FAM. CT. ACT § 633(b) (McKinney 2023); *see also* Comm'r. of Soc. Serv. v. Rufelle C., 156 Misc. 2d 410,

then determine what to do before entering the actual judgment. That year is similar to being on probation. The court will require you to satisfy certain conditions. For example, the court may require you to communicate and visit with your child regularly, enroll in counseling programs, and cooperate with the agency in planning for your child's future. If you do not comply with the conditions of the order, the court may take back the suspended order and terminate your parental rights.

### 1. DSS-Initiated Termination Proceedings

Most termination proceedings against incarcerated parents charge the parent with abandonment or permanent neglect. These terms have specific legal meanings which are explained below.

#### (a) Abandonment

“Abandonment” means that that for a period of six months before the termination petition was filed, you failed to communicate and visit with your child<sup>196</sup> even though you were able to do so and the agency never told you *not* to visit or communicate.<sup>197</sup> If the agency wants to terminate your parental rights for abandonment, they will have to show that you did these things. However, in order to prove abandonment, the agency does not have to show that it attempted to help you meet with your child.<sup>198</sup> So, it is good to keep your own records of your attempts to communicate with the child and with the agency. This way you will have evidence to support you if the agency says things that are not true, such as that you never tried to see your child.

#### (b) Permanent Neglect

Under New York law, a parent “permanently neglects” his child who is in the care of an agency when the parent fails to maintain contact with the child or plan for his future for a period of either one year, or fifteen out of the most recent twenty-two months, even though he was capable of doing so (both physically and financially).<sup>199</sup> During that period of time, the agency must make diligent efforts to strengthen the parental relationship.<sup>200</sup> The agency does not have to make diligent efforts where a court has previously decided that those efforts are not necessary.<sup>201</sup>

When the agency charges permanent neglect, the court must first look at the actions that DSS took in your case before they look at your behavior. DSS must prove that, where required, DSS or the foster care agency involved made diligent efforts (as discussed in Part C(5)(a)) to strengthen the relationship between you and your child, and to reunite your family.<sup>202</sup> If you believe that the agency has not made diligent efforts, you or your lawyer needs to explain this to the judge and show that the agency did not actually make proper efforts. For example, if the agency never brought your child to prison for a visit, even though you repeatedly requested that they do so, or if the agency did not help you with a problem related to your parenting, you could bring that up to show the agency did not make diligent efforts to strengthen your relationship. Use telephone logs and copies of bills to establish that you made these efforts. Ask your lawyer to subpoena people from the prison to testify on your behalf.

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416, 593 N.Y.S.2d 401, 405 Fam. Ct. N.Y. Kings County 1992) (granting respondent parent a rehearing to determine whether parent had fulfilled the conditions of the suspended judgment).

<sup>196</sup> N.Y. SOC. SERV. LAW § 384-b(4)(b) (McKinney 2022).

<sup>197</sup> N.Y. SOC. SERV. LAW § 384-b(5)(a) (McKinney 2022).

<sup>198</sup> N.Y. SOC. SERV. LAW § 384-b(5)(b) (McKinney 2022).

<sup>199</sup> N.Y. SOC. SERV. LAW § 384-b(7)(a) (McKinney 2022).

<sup>200</sup> N.Y. SOC. SERV. LAW § 384-b(7)(a) (McKinney 2022). *Compare In re Sheila G.*, 61 N.Y.2d 368, 380, 462 N.E.2d 1139, 1145, 474 N.Y.S.2d 421, 427 (1984) (finding that the foster care agency did not exercise diligent efforts in fostering the relationship between a biological father and his child), *with In re Demetrius F.*, 176 A.D.2d 940, 941, 575 N.Y.S.2d 552, 552 (2d Dept. 1991) (finding that it is unnecessary for the agency to show that it exercised diligent efforts to foster the relationship between a parent and child where the ground for termination of parental rights is mental illness).

<sup>201</sup> N.Y. SOC. SERV. LAW § 384-b(7)(a) (McKinney 2010).

<sup>202</sup> N.Y. SOC. SERV. LAW § 384-b(7)(f) (McKinney 2010) (defining diligent efforts).



Once a court has found permanent neglect, it will hold a dispositional hearing to consider the best interests of the child. A child's best interests (legally speaking) involve his physical and emotional well-being, including a permanent home and a normal, stable family atmosphere.<sup>203</sup>

## 2. Defending Yourself Against Termination of Parental Rights

It is very important that you attend the termination hearing. The agency must serve you with notice (meaning they must tell you the time and location) of the hearing,<sup>204</sup> and inform you that you have a right to attend.<sup>205</sup> At the hearing, DSS will challenge your capabilities as a parent, and you should be there to respond to any issues they raise. If you are not at the hearing, you will not be able to defend yourself, and it might look like you are not interested in protecting your parental rights.

Although you have a right to attend the hearing, if you are in a facility outside of the state where the hearing will be held, the officials at your correctional facility probably will not bring you to the hearing. In one such case, a court held that a hearing could proceed without the presence of the incarcerated parent because the interests of the state and the child outweighed the parent's interest in being at the hearing.<sup>206</sup> In other words, the court found that it was less important to wait for the incarcerated parent than for the state and the child to have the hearing.

If you are unable to attend the hearing, other ways to participate include testifying through a telephone conference call during the hearing, aggressive representation by your attorney (having your lawyer argue strongly for you), and testifying by deposition. A deposition is a special legal tool where

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<sup>203</sup> *In re Michael B.*, 80 N.Y.2d 299, 311–312, 314–315, 604 N.E.2d 122, 129–131, 590 N.Y.S.2d 60, 67, 69 (1992) (concluding that the Appellate Division had used an incorrect test to decide what was in the child's best interests; the Appellate Division relied on the child's length of stay and his bonding with foster parents instead of considering the fitness of the biological parent, the agency's plan for the child, and the child's emotional well-being); *In re Suzanne N.Y.*, 77 A.D.2d 433, 434, 433 N.Y.S.2d 580, 581–582 (1st Dept. 1980) (granting termination of parental rights where an eight-year-old child had lived with her foster parents since the age of four months and her mother was a schizophrenic who required medication to remain minimally functional), *rev'd on other grounds*, 54 N.Y.2d 824, 427 N.E.2d 1187, 443 N.Y.S.2d 722 (1981).

<sup>204</sup> N.Y. SOC. SERV. LAW § 384-b(3)(e) (McKinney 2022).

<sup>205</sup> New York courts have recognized the right to attend termination proceedings. *See In re Guardianship of D.*, 49 N.Y.2d 788, 791, 403 N.E.2d 451, 452, 426 N.Y.S.2d 729, 730 (1980) (ruling that the mother should have been present at the hearing during the testimony of the court-appointed psychiatrist since mother had not waived her right to be present); *see also In re Tyrell M.*, 283 A.D.2d 500, 501, 724 N.Y.S.2d 874, 875 (2d Dept. 2001) (finding that the family court erred in not allowing the mother to testify on her own behalf at the next court date prior to finding that she had neglected her children); *In re Cleveland W.*, 256 A.D.2d 1151, 1151–1152, 684 N.Y.S.2d 121, 121 (4th Dept. 1998) (finding family court abused its discretion by proceeding with termination hearing even though respondent mother had called the court to inform them that she was too ill to attend; her attorney appeared and also told the court about the mother's illness, and the mother supplied a doctor's note documenting her illness); *In re Kendra M.*, 175 A.D.2d 657, 658, 572 N.Y.S.2d 583, 585 (4th Dept. 1991) (finding that the family court erred in conducting the fact-finding hearing on a date when the incarcerated parent could not attend; also finding that the court should have made arrangements to have the parent brought from jail to be present at the hearing); *In re Guardianship of Victory*, 78 A.D.2d 843, 844, 433 N.Y.S.2d 445, 446 (1st Dept. 1980), *aff'd*, 52 N.Y.2d 1071 (N.Y. 1981) (affirming the right that a father of a child born out of wedlock has to participate and be heard at all stages of the proceeding regarding the child's foster care status). The only other states that have found such a right are Arizona, California, and Florida. Texas has held specifically that an incarcerated person has no right to be at the termination hearing. *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, 774–775 (1991/1992).

<sup>206</sup> *See In re Guardianship of A.O.*, 157 Misc. 2d 177, 179–182, 596 N.Y.S.2d 971, 973–974 (Fam. Ct. Bronx County 1993) (finding that a hearing could proceed because the incarcerated father's correctional facility in Connecticut refused to produce him and the father refused alternate methods for out-of-court participation, such as telephone conference and written sworn testimony); *see also In re James Carton K.*, 245 A.D.2d 374, 376–77, 665 N.Y.S.2d 426, 428–29 (2d Dept. 1997) (affirming termination of parental rights despite parent's absence, and holding that a parent's right to be present for fact-finding and dispositional hearings in termination cases must be balanced with the child's right to a prompt and permanent adjudication), *appeal denied*, 91 N.Y.2d 809, 693 N.E.2d 750, 670 N.Y.S.2d 403 (1998). All the states that have decided this issue have ruled that a person incarcerated out of state does not have a right to be produced for the termination hearing. *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, 775–76 (1991/1992).

you answer questions or make statements outside of court and those statements are brought before the court in writing instead of you being there in person to testify.

To decide that you have not “abandoned” or “permanently neglected” your child, the court must find that you: (1) made an effort to keep in contact with your child (which includes contact that you have with the agency), and (2) planned for your child’s future during your incarceration. These two conditions were discussed above.

In New York, you have a right to a lawyer for the termination hearing.<sup>207</sup> The lawyer will help you argue for keeping your parental rights. You can either hire a lawyer yourself or ask the judge to assign one to you. Unfortunately, the family court is unlikely to appoint an attorney if you do not appear at the hearing. You may try to write to the court and respond to the allegations (accusations against you) in the petition or ask to have an attorney appointed.

#### (a) Maintaining Contact with Your Child

The best way to show that you have maintained contact with your child is to give the judge copies of all letters and proof of other communications that you have had with DSS, the caseworker, your child, the family court, the foster parent, and anyone else involved in your child’s foster care. You should keep a file with photocopies or carbon copies of all of these documents. If you cannot photocopy the letters, keep a written record of each letter and a brief summary of what you wrote in the letter. You should also keep a telephone log of all of the calls you make. If you get charged for and pay for phone calls that you make, make sure to get receipts to show the judge.

The court will not accept being in jail or prison as an excuse for losing contact with your child. An incarcerated parent who does not make an effort to keep in touch with the child may be charged with permanent neglect or abandonment.<sup>208</sup> You must personally make contact and cannot rely on a relative to make contact.<sup>209</sup> Also, visitation and contact may not be enough if the court finds the quality of the visits or contacts poor or too infrequent.<sup>210</sup>

The court may decide not to terminate your parental rights if you can show that you had a good reason for not communicating with your child and the agency. Usually, this means you must show that it was *impossible* for you to communicate with either the child or the agency.<sup>211</sup> However, in one case, an incarcerated father who had not communicated with his child or the agency for six months won against the agency in an abandonment proceeding by arguing that his child would be upset by visiting him in a prison setting and explained that he could not communicate through letters or telephone calls

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<sup>207</sup> N.Y. FAM. CT. ACT § 262(a)(iv) (McKinney 2023). See Part H of this Chapter for more information on your right to counsel.

<sup>208</sup> See *In re Antia Siami D.*, 192 A.D.2d 389, 389, 596 N.Y.S.2d 64, 64 (1st Dept. 1993) (terminating incarcerated the parent’s rights because the parent had failed to contact the child for more than six months, even though the parent could have sent a letter or communicated through another person); see also *In re Ravon Paul H.*, 161 A.D.2d 257, 257–258, 555 N.Y.S.2d 49, 49 (1st Dept. 1990) (finding termination of parental rights to be in the best interests of the child where the incarcerated parent did not write, send gifts, telephone, or otherwise try to keep a relationship with the child or the agency; also stating that “sporadic and minimal attempts to maintain a parental relationship are insufficient to prevent a finding of abandonment”); *In re Shannon “QQ”*, 262 A.D.2d 679, 680, 690 N.Y.S.2d 788, 789 (3d Dept. 1999) (stating that “incarceration alone does not excuse respondent’s failure to contact his child” where the parent did not try to contact Social Services to find out the location of his daughter).

<sup>209</sup> See *In re Thomas G.*, 165 A.D.2d 729, 729, 564 N.Y.S.2d 32, 33 (1st Dept. 1990) (holding that communication between a paternal grandmother and an agency did not satisfy the incarcerated father’s obligation to make contact with his child); see also *In re Christopher MM.*, 210 A.D.2d 767, 767, 620 N.Y.S.2d 853, 854 (3d Dept. 1994) (finding father’s contacts to be “minimal and insubstantial” for the purposes of an abandonment proceeding when the only attempts to contact the child were three phone calls placed to child’s grandparents), *appeal denied*, 85 N.Y.2d 807, 651 N.E.2d 918, 628 N.Y.S.2d 50 (1995).

<sup>210</sup> See *In re Cecelia A.*, 199 A.D.2d 582, 583, 604 N.Y.S.2d 327, 329 (3d Dept. 1993) (finding “sporadic and unsubstantial contacts” insufficient to defeat an abandonment petition supported by “clear and convincing evidence”); *In re Tasha Monica B.*, 156 A.D.2d 247, 247, 548 N.Y.S.2d 508, 509 (1st Dept. 1989) (finding that visitation alone was insufficient to show parent was fulfilling obligations where the quality of visitation was poor).

<sup>211</sup> See *In re Trudell J.W.*, 119 A.D.2d 828, 828, 501 N.Y.S.2d 453, 453 (2d Dept. 1986) (finding that the termination of parental rights was appropriate where the mother did not produce evidence that her failure to contact the child or agency was a result of circumstances that made it impossible for her to do so).

because the child was an infant.<sup>212</sup> He also explained that he was scared to contact the agency because he was incarcerated, although he had attempted unsuccessfully to contact them once. In addition, this father had made plans for the child's future, and he had asked his girlfriend to seek visitation with the child. The court concluded that the father's conduct demonstrated that he did not intend to give up his parental rights and responsibilities.<sup>213</sup>

### (b) Planning for Your Child

The second requirement you must satisfy to maintain your parental rights involves planning for your child. Planning for your child is discussed above in Part C(5)(b)(ii). Your plan must be reasonable and achievable.<sup>214</sup>

To show that you are planning for your child's future, you can participate in whatever programs your facility offers for parents, such as parenting courses and drug and alcohol abuse counseling. It is very important that you have evidence of participating in those programs, so you should try to get a certificate that shows that you participated in or completed the program. Otherwise, you can ask your lawyer to *subpoena* a supervisor or counselor who can testify at the hearing about your progress and participation in a program. (A subpoena is an official court document that requires a person to appear in court at a specific time and place.)

## 3. Termination Proceedings Against Prisoners with Long-Term Sentences

Incarcerated people with long-term sentences will have a harder time keeping their parental rights. A plan for long-term foster care, even with adequate visitations and contacts, is not enough to fulfill the obligation of planning for an alternative living arrangement for your child.<sup>215</sup> ASFA's time limits make protecting your parental rights especially difficult in this situation.

New York's highest court has held that parents who will be in prison for a long time (ten to twenty years or twenty-five years to life), and who have no plan for their children other than to have the children remain in long-term foster care, should lose their parental rights.<sup>216</sup> The court decided that the law was not meant to allow children to stay in long-term foster care when their incarcerated parent could not find another place for the child to live.<sup>217</sup> In other words, foster care cannot be used to preserve your parental rights if it is clear that you will never be able to care for your children, and that you have not arranged for another person to care for them while you are in prison. The court acknowledged the importance of the rights of incarcerated parents but decided that the laws were meant to prioritize putting children in permanent homes.<sup>218</sup>

In another case, an incarcerated father planned for his child to stay in foster care until the father was eligible for parole in seven years. The court did not believe this plan was good enough and

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<sup>212</sup> See *In re Baby Girl I.*, 210 A.D.2d 601, 602–603, 619 N.Y.S.2d 832, 833 (3d Dept. 1994).

<sup>213</sup> See *In re Baby Girl I.*, 210 A.D.2d 601, 602–03, 619 N.Y.S.2d 832, 833 (3d Dept. 1994).

<sup>214</sup> See *In re Leon RR*, 48 N.Y.2d 117, 125–26, 397 N.E.2d 374, 379, 421 N.Y.S.2d 863, 868–69 (1979) (finding that the parents' plans for child's future were adequate where the parent solved personal problems that had led to the child's initial removal, found employment, found suitable housing, and sought psychological counseling).

<sup>215</sup> See *In re Gregory B.*, 74 N.Y.2d 77, 90, 542 N.E.2d 1052, 1058, 544 N.Y.S.2d 535, 541 (1989) (finding that leaving a child to foster care until he is no longer a child is not an acceptable plan for the purposes of planning an alternate living arrangement for a child).

<sup>216</sup> See *In re Gregory B.*, 74 N.Y.2d 77, 90, 542 N.E.2d 1052, 1058, 544 N.Y.S.2d 535, 541 (1989) (finding that leaving a child to foster care until he is no longer a child is not an acceptable plan for the purposes of planning an alternate living arrangement for a child).

<sup>217</sup> *In re Gregory B.*, 74 N.Y.2d 77, 89–90, 542 N.E.2d 1052, 1058, 544 N.Y.S.2d 535, 541 (1989) (finding that leaving a child to foster care until he is no longer a child is not an acceptable plan for the purposes of planning an alternate living arrangement for a child).

<sup>218</sup> *In re Gregory B.*, 74 N.Y.2d 77, 89, 542 N.E.2d 1052, 1058, 544 N.Y.S.2d 535, 541 (1989) (quoting *In re Joyce T.*, 65 N.Y.2d 39, 47, 478 N.E.2d 1306, 1311–12, 489 N.Y.S.2d 705, 711 (1985)) (emphasis added); see also N.Y. SOC. SERV. LAW § 384-b(1)(a) (McKinney 2022) (describing legislative intent behind guardianship and custody statutes).

terminated the father's parental rights.<sup>219</sup> Another father in a similar situation also had his parental rights terminated for permanent neglect. The court said that his plan for his child to remain in foster care for six or more years until the father was released was not a good enough plan and that the father should have made other efforts to be involved in his child's life.<sup>220</sup>

A plan for long-term foster care is not enough to make sure you keep your parental rights even when you have maintained contact and a close relationship with your child. If you are serving a long sentence and your child is in foster care, it is very important that you try to remove your child from foster care by privately placing him with a relative or another person. If the court sees that your child will be cared for by a relative while you are in prison, it is less likely to terminate your parental rights.<sup>221</sup>

#### 4. Practical Tips for Preventing Termination of Parental Rights

**Know the Legal Status of Your Child's Placement.** Is your child in foster care or private custody? If your child is in foster care, what type is it? Was your child voluntarily or involuntarily placed there? Gather all documents relating to your child's placement in one place, and keep safe and precise records.

**Maintain Contact with Your Child.** Write letters and cards. If possible, call your child. Try to arrange for visitation as often as possible. Keep copies of everything you send and a log of your phone calls.

**Maintain Contact with Your Caseworker or Your Child's Guardian.** Write or call your caseworker or child's guardian often. Ask about your child's interests, their physical and mental health, their progress in school, and any problems they are having. Also, ask to establish a regular visitation schedule. Again, keep accurate records of your contact with caseworkers and guardians.

**If Your Child Is in Foster Care, Maintain Contact with the Social Services Agency.** At least once every six months, notify the agency of your current address in writing. Cooperate with the foster care agency if it asks you to attend classes or complete programs at your facility or if the agency attempts to arrange visits in order to help you plan your child's future.

**Attend Court Hearings.** Make sure that the judge knows you are involved and are concerned about your child. If you learn that a court hearing has been scheduled, send a letter to the family court clerk asking that you be produced in court (brought before the court legally) and asking to have legal representation assigned to you. Once your lawyer is assigned, make sure you know his or her name, address, and telephone number.

**Most Importantly, Keep Records.** Make a record of every phone call you make to your child, your caseworker, a court, or the foster care agency. If possible, make copies of every letter you send. This is very important and might mean the difference between keeping and losing your child after you are released.

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<sup>219</sup> See *Jewish Child Care Ass'n v. Fernando G.*, 198 A.D.2d 149, 149, 603 N.Y.S.2d 860, 861 (1st Dept. 1993) (finding that the termination of parental rights was appropriate where the incarcerated parent's only plan for his child was to have the child remain in foster care until his release; the court said that the termination of parental rights was especially appropriate since there were relatives who appeared to be "ready, willing, and able" to care for the child during the parent's incarceration but incarcerated parent failed to provide this information to the agency), *appeal denied*, 83 N.Y.2d 753, 634 N.E.2d 603, 612 N.Y.S.2d 107 (1994).

<sup>220</sup> See *In re Latasha C.*, 196 A.D.2d 756, 756, 602 N.Y.S.2d 11, 12 (1st Dept. 1993).

<sup>221</sup> See *Jewish Child Care Ass'n v. Fernando G.*, 198 A.D.2d 149, 149, 603 N.Y.S.2d 860, 861 (1st Dept. 1993); see also *In re Gregory B.*, 74 N.Y.2d 77, 88, 542 N.E.2d 1052, 1057, 544 N.Y.S.2d 535, 540 (1989).

## E. Voluntary Adoption

You might decide that adoption is the best choice for your child. To do this, you must “surrender” your child, which generally means that you give up all your parental rights to your child. Generally, you give up the right to visit your child, call your child, and even learn how your child is doing.<sup>222</sup> This is called a “total surrender.” However, it may be possible to negotiate some conditions for the surrender of your child, such as naming the person who adopts your child or preserving your right to see your child after adoption.<sup>223</sup> This option is called a “conditional surrender.” If you negotiate these conditions and the person who adopts your child prevents you from seeing your child, you may petition a court for visitation. The court will then conduct a hearing to determine if visitation is in the best interests of the child.<sup>224</sup>

Whether you choose a total or conditional surrender, you are making a serious decision and you should get all the advice and help that you think you need. You have the right to talk with a lawyer before you sign the form you sign to give up your child, which is called a “Surrender Instrument.” If your child is in foster care, you have the right to supportive counseling before you sign the surrender instrument.<sup>225</sup> Make sure you have read and fully understand any and all documents that you are asked to sign. If you do not understand something in a document, ask your lawyer to explain it. Do not sign anything until you are sure that you understand what the consequences of signing it will be, that this is what you want to do, and that you think is best for your child.

The adoption process is different depending on whether your child is in foster care or has been placed privately with friends or relatives.

### 1. If Your Child Is in Private Placement

If your child is living with a friend or relative through a private arrangement, you can surrender your child either by giving him to a foster care agency or adoption agency or by making a private adoption agreement.<sup>226</sup> You make the surrender by signing the form in or out of court.

After you have surrendered your child to the agency, you have thirty days to change your mind.<sup>227</sup> If you change your mind after thirty days, you may regain your parental rights only if your child has not yet been placed in an adoptive home.<sup>228</sup> If you change your mind about the surrender and your child is already in an adoptive home, the judge will decide who has legal custody based solely on the “best interests of the child.”<sup>229</sup>

### 2. If Your Child Is in Foster Care

If your child is in foster care, contact your child’s caseworker and explain that you are interested in giving up your child for adoption. When the child is already in foster care, the surrender can take place in one of two ways. The first is to “execute and acknowledge” the surrender instrument in court

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<sup>222</sup> N.Y. SOC. SERV. LAW § 383-c(3)(b) (McKinney 2010). However, a surrender of a child in foster care may include a provision for visitation with the child after adoption.

<sup>223</sup> N.Y. SOC. SERV. LAW § 383-c(2)(b) (McKinney 2010).

<sup>224</sup> See *In re Sabrina H.*, 245 A.D.2d 1134, 1135, 666 N.Y.S.2d 531, 531 (4th Dept. 1997) (finding that a biological mother can petition the court for enforcement of conditions in the surrender agreement). However, an adoptive parent’s refusal to let a biological parent see the child would not allow the biological parent to automatically revoke the surrender.

<sup>225</sup> N.Y. SOC. SERV. LAW §§ 383-c(3)(b), (5)(b)(i) (McKinney 2010).

<sup>226</sup> N.Y. DOM. REL. LAW §§ 115–16 (McKinney 2010). A private adoption involves a contract between the birth parents and adoptive parents without agency involvement.

<sup>227</sup> N.Y. SOC. SERV. LAW § 384(5) (McKinney 2010).

<sup>228</sup> N.Y. SOC. SERV. LAW § 384(5) (McKinney 2010).

<sup>229</sup> N.Y. SOC. SERV. LAW § 384(6) (McKinney 2010).

before a judge.<sup>230</sup> If the surrender takes place in court, your parental rights are “irrevocably” terminated.<sup>231</sup> This means you cannot change your mind and regain your parental rights.

The second type of surrender takes place outside of court and is called an “extra-judicial surrender.” If you sign the surrender instrument outside of court, you have forty-five days after signing the surrender to change your mind.<sup>232</sup>

As with foster parents, ASFA requires that the agency check the criminal records of prospective adoptive parents. The requirements for approval or denial of an adoptive parent are the same as for a foster parent.<sup>233</sup>

## F. Incarcerated Fathers with Children in Foster Care

Incarcerated fathers with children in foster care face unique challenges. As a father, your biological link to your child is not enough to protect your rights as a parent.<sup>234</sup> You must take affirmative actions to protect your rights, such as maintaining contact with your child while he or she is in foster care. Without these actions, you risk losing your child to adoption without the court seeking your consent or even notifying you of its actions.

### 1. Establishing Paternity—Becoming a “Legal Father”

If you are a man, in order to exercise the parental rights described in this Chapter, you must establish paternity by proving to a court that you are the legal father of your child. Apart from giving you rights, establishing paternity also gives you responsibilities. One of the major responsibilities that goes along with a court finding that you are a child’s father is a possible obligation to pay child support.<sup>235</sup>

Establishing paternity is only necessary if your child was born out of wedlock. If you were or are married to the mother of your child, you are automatically considered to be the father of all children conceived or born to the mother during the marriage, and you do not have to establish paternity. However, if you are unmarried, you are not the child’s legal father even if you lived with the mother of your children for a number of years. Additionally, having your name on your child’s birth certificate does not automatically make you the child’s legal father.<sup>236</sup> Therefore, if you were not married to the mother of your child when your child was conceived or born, you will have to prove your paternity. Fathers who married their child’s mother after the child was born must also prove paternity.

To prove your paternity, you should file a petition for an order of “filiation”<sup>237</sup> (another word for paternity) in family court in the county where either the child or the child’s mother lives. Your paternity petition must:

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<sup>230</sup> N.Y. SOC. SERV. LAW § 383-c(3)(a) (McKinney 2010).

<sup>231</sup> N.Y. SOC. SERV. LAW § 383-c(3)(b) (McKinney 2010).

<sup>232</sup> N.Y. SOC. SERV. LAW § 383-c(5)(d)(ii) (McKinney 2010).

<sup>233</sup> See N.Y. SOC. SERV. LAW § 378-a(2)(a) (McKinney 2010). For more information, see Part C(5)(a) of this Chapter.

<sup>234</sup> *Robert O. v. Russell K.*, 80 N.Y.2d 254, 265, 604 N.E.2d 99, 104, 590 N.Y.S.2d 37, 42 (1992) (holding that the biological link of the father is insufficient to create a constitutionally protected interest and that the unwed biological father must demonstrate some action for him to enjoy protection of his parental rights); see also *Caban v. Mohammad*, 441 U.S. 380, 392, 99 S. Ct. 1760, 1768, 60 L. Ed. 2d 297, 307 (1979) (finding that where the father has not taken action to “participate in the rearing of his child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child”).

<sup>235</sup> N.Y. FAM. CT. ACT § 413 (McKinney 2008).

<sup>236</sup> See *In re Strong’s Estate*, 168 Misc. 716, 723, 6 N.Y.S.2d 300, 306 (Sur. Ct. N.Y. County 1938) (“The fact of birth may be established by a birth certificate, although such certificate is not admissible to establish parentage.”), *aff’d*, 256 A.D. 971, 11 N.Y.S. 2d 225 (1st Dept. 1939); see also *Stanford v. Union Labor Life Ins. Co.*, 74 Misc. 2d 781, 786, 345 N.Y.S.2d 928, 934 (Sup. Ct. Monroe County 1973) (“It is the rule in New York that a birth . . . certificate is admissible as a public document only to show the fact of birth . . . and not as evidence of the additional facts recited therein pursuant to law.”).

<sup>237</sup> N.Y. FAM. CT. ACT § 542 (McKinney 2009).

- (1) be in writing, either handwritten or typed;
- (2) state that you (“petitioner”) are the father of the child. You must say you are the father of the child and why. This is done by alleging that you had sexual intercourse with the child’s mother during a time about nine months prior to the child’s birth;
- (3) be verified. You must have a notarized statement saying that the reasons you give in the petition and the claims you make about paternity are true; and
- (4) be served on the respondent. This means you must have someone over the age of eighteen deliver a copy of the petition to your child’s mother. This will inform the mother of the paternity proceedings in family court so that she can be present during the proceedings.<sup>238</sup>

If on the court date the mother agrees that you are the child’s father, the judge may find that paternity has been proven. If the mother disputes that you are the father, the judge may order DNA testing to prove paternity, which you may be required to pay for. Once your paternity is established, you have the right to request visits with your child and to be involved in planning for your child’s future (called permanency planning) while they are in foster care. If paternity is not proven, you do not have a legal right to visits or to a say in permanency planning.

Even if you prove paternity, you may not necessarily have the right to stop your child’s adoption proceedings. The following Section outlines the steps you can take to become a “consent” father (one who has the right to consent to adoption). It also explains the requirements for being considered a “notice” father (one who has a right to be notified of termination of parental rights and subsequent adoption).

## 2. Types of Fathers

As explained in Part D, while your child is in foster care, proceedings may begin to convince the court that terminating parental rights and placing your child for adoption is the best option for your child. Your permission, or consent, may or may not be required for these proceedings to go forward. Your right to consent to adoption or even to be notified about the adoption depends on how the law classifies you as a father.

### (a) Married Fathers

Married fathers have all the rights and obligations that a biological mother would have.<sup>239</sup> If you are a married father, your consent will be needed before any adoption takes place, and you have the right to be present at all hearings, as well as to initiate hearings, as described generally in Part D of this Chapter.

### (b) Consent Fathers

If your child was born out of wedlock, you will retain your right to withhold consent for your child’s adoption only if you fulfill the obligations of a “consent father.” As a consent father, you will have the right to be present at all proceedings concerning your child, and, unless your parental rights have been

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<sup>238</sup> This step may be both difficult and expensive, but it is required. If you do not do this, the court will dismiss your petition and you will have to start all over again. However, if reasonable and numerous attempts are made to serve the mother and these are documented with affidavits of attempted service, the court can authorize “service by alternative means,” which can include sending a letter to her last known address, putting an advertisement in a local paper, or posting a legal notice in the local post office. *See* New York City, Administration for Children’s Services, *Out of Sight, Not out of Mind: Important Information for Incarcerated Parents Whose Children Are in Foster Care* (February 5, 2005). You can obtain a copy of this pamphlet by writing to the Administration for Children’s Services, 150 William Street, New York, New York 10038, or by calling ACS at (212) 619-1309 or (212) 341-3322. More information about how to contact ACS, including a link through which you can send an online message (“Email Us”), is available at <https://www.nyc.gov/site/acs/about/contact-acs.page>.

<sup>239</sup> *See* N.Y. FAM. CT. ACT § 417 (McKinney 2008) (“A child born of parents who at any time prior or subsequent to the birth of said child shall have entered into a ceremonial marriage shall be deemed the legitimate child of both parents for all purposes of this article regardless of the validity of such marriage.”); *see also* N.Y. DOM. REL. LAW § 111(1)(b) (McKinney 2010) (“[C]onsent to adoption shall be required . . . of the parents or surviving parent, whether adult or infant, of a child conceived or born in wedlock.”).

terminated, you must give consent for your child to be adopted.<sup>240</sup> To be considered a consent father, you must maintain “substantial and continuous” contact with your child.<sup>241</sup> Substantial and continuous contact is demonstrated by paying a reasonable sum to support the child, based on your means.<sup>242</sup> Additionally, you must demonstrate that you have either:

- (1) Visited the child at least monthly when physically and financially able to do so, unless you were prevented from visiting by the person or agency with custody of your child;<sup>243</sup> or
- (2) Had regular communication with your child (or the person or agency with custody) when you are unable to visit.<sup>244</sup>

Even if you are a consent father, if the court rules that you have abandoned your child (see Part D(1)(a) of this Chapter), the court will say that you have lost your right to consent to the adoption and will not require your consent for the adoption to proceed.<sup>245</sup>

### (c) Notice Fathers

Being a “notice father” means that the court must inform you if proceedings to terminate the parental rights of your child and/or free him for adoption are initiated. As a notice father, your consent will not be required before your child is adopted, but you will be able to present evidence to the court about what you believe is in the best interests of your child. If you do not satisfy the requirements to be considered a consent father, but you meet one of the following requirements, you may be considered a notice father:

- (1) If a court has officially declared that you are the child’s father;<sup>246</sup>
- (2) If you have filed an unrevoked notice to claim paternity of your child on time;<sup>247</sup>
- (3) If you are on the child’s birth certificate;<sup>248</sup>
- (4) If you were openly living with your child and your child’s mother when the proceedings started, and you presented yourself as your child’s father;<sup>249</sup>
- (5) If the mother has identified you as the child’s father in a written sworn statement;<sup>250</sup>
- (6) If you were married to the child’s mother within six months after the birth;<sup>251</sup> or
- (7) If you have filed an Acknowledgement of Paternity (a sworn statement on a prescribed form) with the Putative Father Registry.<sup>252</sup>

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<sup>240</sup> Note that until your child is six months old, if you are not married to the mother of your child, she can place the child for adoption without your consent. If this happens, you can attempt to block the adoption only by seeking full custody of the child. *See In re Raquel Marie X*, 76 N.Y.2d 387, 408, 559 N.E.2d 418, 428, 559 N.Y.S.2d 855, 865 (1990).

<sup>241</sup> N.Y. DOM. REL. LAW § 111(1)(d) (McKinney 2010).

<sup>242</sup> N.Y. DOM. REL. LAW § 111(1)(d) (McKinney 2010).

<sup>243</sup> N.Y. DOM. REL. LAW § 111(1)(d) (McKinney 2010).

<sup>244</sup> N.Y. DOM. REL. LAW § 111(1)(d) (McKinney 2010).

<sup>245</sup> N.Y. DOM. REL. LAW § 111(2)(a) (McKinney 2010) (failing to visit or communicate with your child for over six months is considered an abandonment of your parental rights); *see In re Eugene MM*, 132 A.D.2d 780, 781, 517 N.Y.S. 2d 326, 328 (3d Dept. 1987) (holding that father who had minimal contact with mother and child, had failed to pay any child support, and had never requested visitation while incarcerated, failed to meet the threshold criteria needed to require his consent to the adoption); *see also In re Joshua II*, 296 A.D.2d 646, 647–648, 745 N.Y.S.2d 112, 113 (3d Dept. 2002) (holding that incarcerated father’s consent to adoption was not required because father abandoned child).

<sup>246</sup> N.Y. DOM. REL. LAW § 111-a(2)(a) (McKinney 2010).

<sup>247</sup> N.Y. DOM. REL. LAW § 111-a(2)(c) (McKinney 2010).

<sup>248</sup> N.Y. DOM. REL. LAW § 111-a(2)(d) (McKinney 2010).

<sup>249</sup> N.Y. DOM. REL. LAW § 111-a(2)(e) (McKinney 2010).

<sup>250</sup> N.Y. DOM. REL. LAW § 111-a(2)(f) (McKinney 2010).

<sup>251</sup> N.Y. DOM. REL. LAW § 111-a(2)(g) (McKinney 2010). Note that marriage within six months of the child’s birth makes you a notice father, but not necessarily a consent father. You can become a consent father by maintaining substantial and continuous contact with your child.

<sup>252</sup> N.Y. DOM. REL. LAW § 111-a(2)(h) (McKinney 2010).



Note that these categories include persons who are listed on the child's birth certificate and persons who have been found to be "legal fathers" by the court. Therefore, even if you are the legal father or the father on the birth certificate, your consent may not be required before your child is adopted, unless you meet the additional requirements listed above for consent fathers. Your status as a notice father or consent father is not permanent. You can move from the notice category to the consent category by maintaining substantial and continuous contact with your child. Likewise, if you do not continue to maintain contact with your child, the court will consider you a notice father, even if at one point you may have qualified as a consent father.

If you have had minimal to no contact with your child and you do not fall under any of the above categories (married, notice, consent, or legal father), you have no rights or duties with regard to your child. The court will not need to notify you or ask for your consent before placing your child up for adoption.

### **G. Getting to Court**

Parents have a right to attend all court proceedings involving the foster care and adoption of their child. For parents who are incarcerated people, you will have to arrange to be brought to court. You will have to request permission from your correctional facility to attend such proceedings, and you should do this as far in advance of the court date as possible. You should also contact your caseworker and tell them that you wish to attend. You have to write to the judge well in advance of the hearing date to request that the judge order the Department of Corrections and Community Supervision to produce you in court. For your request to be approved, you must explain to the judge why it is essential that you attend the hearing. See Appendix A of this Chapter for a sample letter asking the judge to order you to be produced for the hearing.

### **H. The Right to Counsel**

Even though the U.S. Supreme Court has held that there is no constitutional guarantee of a right to a lawyer in proceedings for termination of parental rights or foster care, New York state law does guarantee this right.<sup>253</sup> In most other states, the right to a lawyer in such proceedings has been granted either by the state constitution or by state law. Usually, if you cannot afford to hire your own attorney, you will be assigned what in New York is called an "18-b attorney" when you get to court.<sup>254</sup> You can also try to contact a legal services organization for help, but attorneys at these organizations are generally unavailable for these kinds of cases. See Appendix B of this Chapter, as well as Appendix IV of the JLM, for a list of legal service organizations.

### **I. Conclusion**

If you are incarcerated and have a child, it is important for you to know the options you have in order to maintain your relationship with your child. First, you should decide whether you want your child in private placement (meaning with a family or friend) or in foster care. There are different benefits and drawbacks for each situation, so it is important to weigh all of your options. To have the best opportunity to regain custody of your child when you are outside of prison, you should maintain contact with your child and with your caseworker. You should also keep records of all of the contact you have with both your child and caseworker in case you need to prove your efforts. You should also maintain contact with your child's custodian and keep records of all contact.

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<sup>253</sup> N.Y. FAM. CT. ACT § 262 (McKinney 2008).

<sup>254</sup> "18-b" refers to a free attorney assigned by the court under Article 18-b of the County Law. N.Y. COUNTY LAW § 722 (McKinney 2017).

## Appendix A

### SAMPLE REQUEST FOR AN ORDER TO PRODUCE

This is a sample form. **DO NOT TEAR IT OUT OF THE JLM**. Instead, you may copy the form by handwriting or using a typewriter, filling in your information and editing the language to fit your case.

Date: \_\_\_\_\_, 20\_\_

ATTENTION: Court Clerk  
 Family Court  
 State of New York  
 County of [Name of County]  
 [Street Address]  
 [City or Town], New York, [Zip Code]

RE: [Child's Name], [Child's Birth Date]

Dear Sir or Madam:

I respectfully request to be present for the hearing that is to be held on the [##] day of [month], 20[##], for my child/children, [Name of Children]. I am presently incarcerated at [name of facility], located at the below address. Please submit an "Order to Produce" upon this institution, so that I may be available for this pending hearing.

I am also requesting that the court assign an attorney to represent me in the above proceeding and that all court proceedings be adjourned until I am able to be physically present.

[If applicable: I have not been informed of the date that my child/children will be appearing before your court. Would you kindly notify me of the date and enter this into the record as a Notice of Appearance and request to be produced?]

NOTIFY: [Warden's Name]  
 [Your Name and Address]

Sworn to me on the [##] day of [month] of 20[##].

Name of Parent (Print): \_\_\_\_\_

NYSID #: \_\_\_\_\_

Signature of Parent: \_\_\_\_\_

Notary Public Signature: \_\_\_\_\_

## APPENDIX B

### SERVICES FOR INCARCERATED PARENTS

**Correctional Association of New York**

2090 Adam Clayton Powell Blvd., Suite 200  
New York, NY 10027  
Phone: (212) 254-5700  
<https://www.correctionalassociation.org/>  
Area Served: New York State

**Legal Action Center**

225 Varick Street, Fourth Floor  
New York, NY 10014  
Phone: (212) 243-1313  
Toll-free: (800) 223-4044  
[www.lac.org](http://www.lac.org)  
Area Served: New York State  
*Provides legal information for people with criminal records.*

**Administration for Children's Services  
("ACS")**

Office of Advocacy/Parents' and Children's  
Rights Unit  
150 William Street, First Floor  
New York, NY 10038  
Collect Call Number for Incarcerated Parents:  
(212) 619-1309  
Phone: (212) 676-9421  
Area Served: New York City  
*You can contact this branch of ACS if your child is in foster care in New York City and your child's foster care agency is refusing to bring your child to visit you in prison.*

**The Osborne Association, "Family Resource  
Center" and "Family Works"**

175 Remsen Street, Eighth Floor  
Brooklyn, NY 11201  
Toll-Free Hotline: (800) 344-3314  
Phone: (718) 637-6560  
[www.osborneny.org](http://www.osborneny.org)  
Area Served: New York State  
*The Family Resource Center runs a toll-free hotline and a support group. Family Works manages a parent education program for incarcerated fathers and a children's center in the visiting areas at Sing Sing, Woodbourne, and Shawangunk Correctional Facilities.*

**Hour Children**

36-11 12<sup>th</sup> Street  
Long Island City, NY 11106  
Phone: (718) 433-4724  
[www.hourchildren.org](http://www.hourchildren.org)  
Area Served: New York State  
*Provides five community residential programs for female ex-offenders and their children. Provides parent education, enhanced visiting, and transportation assistance for women incarcerated in two New York State prisons.*

**Women's Prison Association**

110 Second Avenue  
New York, NY 10003  
Phone: (646) 292-7740  
[www.wpaonline.org](http://www.wpaonline.org)  
Area Served: New York City  
*Provides comprehensive services to incarcerated and formerly incarcerated women. Services include parent education, self-help support groups, information, referrals, case management, mentoring, group activities, gifts for children, nursery family reunification support, family therapy, community residential services, and legal services and information.*

**Children of Promise, NYC**

54 MacDonough Street  
Brooklyn, NY 11216  
Phone: (718) 483-9290  
<https://www.cpnyc.org/>  
Area Served: New York City  
*Children of Promise, NYC is a therapeutic community within an after-school program for children and youth impacted by mass incarceration. CPNYC co-locates a Wellness Center with licensed mental health clinicians that promote therapeutic empowerment and partners with the community to dismantle the stigma and heal from the trauma of mass incarceration.*

The following organizations provide free legal services. Contact them if you need to take some action for your child and you cannot afford a lawyer. For a more extensive list of legal services organizations throughout New York State, turn to Appendix IV of the JLM.

<p><b>Legal Services for New York City</b> 40 Worth Street, Suite 606 New York, NY 10013 <a href="https://www.legalservicesnyc.org">https://www.legalservicesnyc.org</a></p> <p><u>Bronx Office</u> 349 East 149th St. 10th Floor Bronx, NY 10451 Phone: (718) 928-3700</p> <p><u>Brooklyn Office</u> 105 Court Street 3rd Floor Brooklyn, NY 11201 Phone: (718) 237-5500</p> <p><u>Manhattan Office</u> 1 West 125th Street 2nd Floor New York, NY 10027 Phone: (646) 442-3100</p> <p><u>Queens Office</u> 89-00 Sutphin Blvd. Jamaica, NY 11435 Phone: (347) 592-2200</p> <p><u>Staten Island Office</u> 36 Richmond Terrace Ste. 205 Staten Island, NY 10301 Phone: (718) 233-6480</p>	<p><b>Prisoners' Legal Services of NY (PLSNY)</b> 41 State Street, Suite M112 Albany, NY 12207 <a href="https://plsny.org">https://plsny.org</a></p> <p><u>Albany Office</u> 41 State Street, Suite M112 Albany, NY, 12207 Phone: (518) 438-8046 Prisons Served: Adirondack, Altona, Bare Hill, Clinton, CNYPC, Coxsackie, Eastern, Edgecombe, Franklin, Gouverneur, Great Meadow, Greene, Hale Creek, Hudson, Marcy, Mid-State, Mohawk, Otisville, Queensboro, Riverview, Shawangunk, Sullivan, Ulster, Upstate, Wallkill, Walsh, Washington, Woodbourne.</p> <p><u>Buffalo Office</u> 14 Lafayette Square, Suite 510 Buffalo, NY 14203 Phone: (716) 854-1007 Prisons Served: Albion, Attica, Collins, Gowanda, Groveland, Lakeview, Orleans, Rochester, Wende, Wyoming.</p> <p><u>Ithaca Office</u> 114 Prospect Street Ithaca, NY 14850 Phone: (607) 273-2283 Prisons Served: Auburn, Cape Vincent, Cayuga, Elmira, Five Points, Southport, Watertown, Willard.</p> <p><u>Newburgh Office</u> 10 Little Britain Road, Suite 204 Newburgh, NY 12550 Phone: (845) 391-3110 Prisons served: Bedford Hills, Downstate, Fishkill, Green Haven, Sing Sing, Taconic.</p> <p><i>** Please note that the PLSNY does not accept phone calls from incarcerated people or their families.</i></p>
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**REGIONAL NEW YORK OFFICE OF CHILDREN & FAMILY SERVICES OFFICES**

Website: <https://ocfs.ny.gov/directories/regional-offices.php>

**ALBANY REGIONAL OFFICE**

Capital View Office Park, Room 234N  
52 Washington Street  
Rensselaer, NY 12144-2796  
Phone: (518) 486-7078  
Counties served: Albany, Clinton, Columbia,  
Delaware, Essex, Franklin, Fulton, Greene,  
Hamilton, Montgomery, Otsego, Rensselaer,  
Saint Regis Mohawk Indian Reservation,  
Saratoga, Schenectady, Schoharie, Warren,  
Washington.

**BUFFALO REGIONAL OFFICE**

Ellicott Square Building  
295 Main Street, Room 545  
Buffalo, NY 14203  
Phone: (716) 847-3828  
Counties served: Allegany, Cattaraugus,  
Chautauqua, Erie, Genesee, Niagara, Orleans,  
Wyoming

**LONG ISLAND REGIONAL OFFICE**

Courthouse Corporate Center  
250 Veterans Memorial Highway, Suite 2A-20  
Hauppauge, NY 11788  
Phone: (631) 240-2567  
Counties served: Nassau, Suffolk

**NEW YORK CITY REGIONAL OFFICE**

163 West 125th Street, 18th Floor  
New York, NY 10027  
Phone: (212) 383-1788  
Counties served: Bronx, Kings, New York,  
Richmond, and Queens

**ROCHESTER REGIONAL OFFICE**

259 Monroe Avenue, Room 307  
Rochester, NY 14607  
Phone: (585) 238-8531  
Counties served: Chemung, Livingston,  
Monroe, Ontario, Schuyler, Seneca, Steuben,  
Wayne, Yates

**SYRACUSE REGIONAL OFFICE**

The Atrium Building, Suite 350  
100 S. Salina Street  
Syracuse, NY 13202  
Phone: (315) 423-1202  
Counties served: Broome, Cayuga, Chenango,  
Cortland, Herkimer, Jefferson, Lewis,  
Madison, Oneida, Onondaga, Oswego, St.  
Lawrence, Tioga, Tompkins

**WESTCHESTER REGIONAL OFFICE**

117 East Stevens Avenue, Suite 300  
Valhalla, NY 10595  
Phone: (845) 708-2445  
Counties served: Dutchess, Orange, Putnam,  
Nassau, Rockland, Suffolk, Sullivan, Ulster,  
Westchester

**CONTACT INFORMATION FOR COUNTY DEPARTMENTS OF SOCIAL SERVICES**

Website: <http://www.ocfs.state.ny.us/main/localdss.asp>

**Albany County DSS**

162 Washington Avenue  
Albany, NY 12210  
Phone: (518) 447-7300

**Albany County Department for Children,  
Youth & Families**

112 State Street, Room 300  
Albany, NY 12207  
Phone: (518) 447-7324

**Allegany County DSS**

7 Court Street  
Belmont, NY 14813-1077  
Phone: (585) 268-9622

**Broome County DSS**

Thomas P. Hoke Human Services Center  
36-42 Main Street  
Binghamton, NY 13905-3199  
Phone: (607) 778-8850

**Cattaraugus County DSS**

One Leo Moss Drive, Suite 6010  
Olean, NY 14760-1158  
Phone: (716) 373-8065

**Cayuga County DSS**

County Office Building  
160 Genesee Street, 2nd Floor  
Auburn, NY 13021-3433  
Phone: (315) 253-1204

**Chautauqua County DSS**

Hall R. Clothier Building  
7 North Erie Street  
Mayville, NY 14757  
Phone: (716) 753-4421

**Chemung County DSS**

425 Pennsylvania Avenue  
P.O. Box 588  
Elmira, NY 14902  
Phone: (607) 737-5309

**Chenango County DSS**

5 Court Street  
Norwich, NY 13815  
Phone: (607) 337-1500  
Toll Free: (877) 337-1501

**Clinton County DSS**

13 Durkee Street  
Plattsburgh, NY 12901  
Phone: (518) 565-3222

**Columbia County DSS**

25 Railroad Avenue  
P.O. Box 458  
Hudson, NY 12534  
Phone: (518) 828-9411

**Cortland County DSS**

County Office Building  
60 Central Avenue  
Cortland, NY 13045  
Phone: (607) 753-5248

**Delaware County DSS**

111 Main Street  
Delhi, NY 13753  
Phone: (607) 832-5300

**Dutchess County DSS**

60 Market Street  
Poughkeepsie, NY 12601  
Phone: (845) 486-3000

**Erie County DSS**

Rath County Office Building  
95 Franklin Street, 8<sup>th</sup> Floor  
Buffalo, NY 14202  
Phone: (716) 858-8000

**Essex County DSS**

7551 Court Street  
P.O. Box 217  
Elizabethtown, NY 12932  
Phone: (518) 873-3441

**Franklin County DSS**

184 Finney Blvd  
Malone, NY 12953  
Phone: (518) 481-1888

**Fulton County DSS**

4 Daisy Lane  
P.O. Box 549  
Johnstown, NY 12095  
Phone: (518) 736-5640

**Genesee County DSS**

5130 East Main Street, Suite 3  
Batavia, NY 14020  
Phone: (585) 344-2580

**Greene County DSS**

411 Main Street  
P.O. Box 528  
Catskill, NY 12414  
Phone: (518) 719-3700  
Toll-Free: (877) 794-9268

**Hamilton County DSS**

White Birch Lane  
P.O. Box 725  
Indian Lake, NY 12842  
Phone: (518) 648-6131

**Herkimer County DSS**

301 North Washington Street, Suite 2110  
Herkimer, NY 13350  
Phone: (315) 867-1291

**Jefferson County DSS**

Human Services Building  
250 Arsenal Street  
Watertown, NY 13601  
Phone: (315) 782-9030

**Lewis County DSS**

5274 Outer Stowe Street  
P.O. Box 193  
Lowville, NY 13367  
Phone: (315) 376-5400

**Livingston County DSS**

1 Murray Hill Drive  
Mt. Morris, NY 14510  
Phone: (585) 243-7300

**Madison County DSS**

Madison County Complex, Building 1  
133 North Court Street  
P.O. Box 637  
Wampsville, NY 13163  
Phone: (315) 366-2211

**Monroe County DSS**

111 Westfall Road  
Rochester, NY 14620  
Phone: (585) 753-6298

**Montgomery County DSS**

County Office Building  
P.O. Box 745  
Fonda, NY 12068  
Phone: (518) 853-4646

**Nassau County DSS**

60 Charles Lindbergh Blvd.  
Uniondale, NY 11553  
Phone: (516) 227-8519

**New York City Administration for Children's Services**

150 William Street, 18th Floor  
New York, NY 10038  
Phone: (212) 341-0900 or 311

**New York City Department of Social Services**

150 Greenwich Street  
Commissioner – 42<sup>nd</sup> Floor / Legal – 38<sup>th</sup> Floor  
New York, NY 10007  
Phone: (212) 341-0900

**Niagara County DSS**

20 East Avenue  
P.O. Box 506  
Lockport, NY 14095  
Phone: (716) 439-7600

**Oneida County DSS**

County Office Building  
800 Park Avenue  
Utica, NY 13501  
Phone: (315) 798-5700

**Onondaga County DSS**

John H. Mulroy Civic Center, 7th Floor  
421 Montgomery Street  
Syracuse, NY 13202  
Phone: (315) 435-2884

**Ontario County DSS**

3010 County Complex Drive  
Canandaigua, NY 14424  
Phone: (585) 396-4060  
Toll-free: (877) 814-6907

**Orange County DSS**

11 Quarry Road, Box Z  
Goshen, NY 10924  
Phone: (845) 291-4000

**Orleans County DSS**

14016 Route 31 West  
Albion, NY 14411  
Phone: (585) 589-7000

**Oswego County DSS**

100 Spring Street  
P.O. Box 1320  
Mexico, NY 13114  
Phone: (315) 963-5000

**Otsego County DSS**

County Office Building  
197 Main Street  
Cooperstown, NY 13326  
Phone: (607) 547-4355

**Putnam County DSS**

110 Old Route 6  
Carmel, NY 10512  
Phone: (845) 808-1500

**Rensselaer County DSS**

127 Bloomingrove Drive  
Troy, NY 12180  
Phone: (518) 833-6000

**Rockland County DSS**

**Robert L. Yeager Health Center**  
Sanatorium Road, Building L  
Pomona, NY 10970  
Phone: (845) 364-3100

**St. Lawrence County DSS**

Harold B. Smith Country Office Building  
6 Judson Street  
Canton, NY 13617  
Phone: (315) 379-2111

**Saratoga County DSS**

152 West High Street  
Ballston Spa, NY 12020  
Phone: (518) 884-4140

**Schenectady County DSS**

797 Broadway  
Schenectady, NY 12305  
Phone: (518) 388-4470

**Schoharie County DSS**

County Office Building  
P.O. Box 687  
Schoharie, NY 12157  
Phone: (518) 295-8334

**Schuyler County DSS**

323 Owego Street, Unit 3  
Montour Falls, NY 14865  
Phone: (607) 535-8303

**Seneca County DSS**

1 DiPronio Drive  
P.O. Box 690  
Waterloo, NY 13165  
Phone: (315) 539-1800

**Steuben County DSS**

3 East Pulteney Square  
Bath, NY 14810  
Phone: (607) 664-2000

**Suffolk County DSS**

MacArthur Building  
3085 Veterans Memorial Highway  
Ronkonkoma, NY 11779  
Phone: (631) 854-9930

**Sullivan County DSS**

16 Community Lane  
P.O. Box 231  
Liberty, NY 12754  
Phone: (845) 292-0100

**Tioga County DSS**

**1062 State Route 38**  
P.O. Box 240  
Owego, NY 13827  
Phone: (607) 687-8300

**Tompkins County DSS**

**Human Services Building**  
320 West State Street  
Ithaca, NY 14850  
Phone: (607) 274-5252

**Ulster County DSS**

1061 Development Court  
Kingston, NY 12401  
Phone: (845) 334-5000



**Warren County DSS**

Warren County Municipal Center  
1340 State Route 9  
Lake George, NY 12845  
Phone: (518) 761-6300

**Washington County DSS**

Municipal Center, Building B  
383 Broadway  
Fort Edward, NY 12828  
Phone: (518) 746-2300

**Wayne County DSS**

77 Water Street  
P.O. Box 10  
Lyons, NY 14489  
Phone: (315) 946-4881

**Westchester County DSS**

112 East Post Road  
White Plains, NY 10601  
Phone: (914) 995-6521

**Wyoming County DSS**

466 North Main Street  
Warsaw, NY 14569  
Phone: (585) 786-8900

**Yates County DSS**

County Office Building  
417 Liberty Street, Suite 2122  
Penn Yan, NY 14527  
Phone: (315) 536-5183