



## The Illinois Children’s Best Interest Act

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In 2019, the Children’s Best Interest Act was signed into law in Illinois to help protect the children of incarcerated individuals from harm.<sup>1</sup> The Act, which took effect on January 1, 2020, set forth additional mitigating factors for courts to consider when sentencing a parent or caregiver and created the right to present a family impact statement at sentencing.

### I. Background

The Illinois legislature passed the Children’s Best Interest Act in an effort to reduce harm to children, families, and communities; to reduce crime and support safer neighborhoods; to support secure parental attachment; and to promote healthy child development.<sup>2</sup> Legislators sought to expand rights of incarcerated parents and decrease the negative impacts of incarceration on child development, which can disrupt healthy brain development and cause long-term health consequences.<sup>3</sup>

Parental incarceration, categorized by the Centers for Disease Control and Prevention as an Adverse Childhood Experience (ACE),<sup>4</sup> significantly correlates to harmful physical and mental health outcomes for children and exacerbates poverty.<sup>5</sup> Parental incarceration impacts many Illinois residents. According to a national report from the Annie E. Casey Foundation, approximately 186,000 children in Illinois have experienced parental separation due to incarceration.<sup>6</sup> Accordingly, the Children’s Best Interest Act has the potential to impact a substantial population.

### II. The Statute

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<sup>1</sup> 2019 Ill. Legis. Serv. P.A. 101-471 (West). *See also* 730 ILL. COMP. STAT. 5/5-5-3.1 (2019).

<sup>2</sup> Gail T. Smith, Children’s Best Interest Project Author, Sentence Mitigation Under the Children’s Best Interest Act (August 11, 2023) (unpublished PowerPoint slides on file with the author).

<sup>3</sup> Emma Peyton Williams, *How 12 States are Addressing Family Separation by Incarceration*, PRISON POL’Y INITIATIVE (Feb. 27, 2023), <https://www.prisonpolicy.org/blog/2023/02/27/caregivers/>; Smith, *supra* note 2.

<sup>4</sup> CHILD. RTS. LITIG. COMM., TRAUMA CAUSED BY SEPARATION OF CHILDREN FROM PARENTS: A TOOL TO HELP LAWYERS 1, 6 (Am. Bar Ass’n Section of Litig. 2019), [https://www.americanbar.org/content/dam/aba/publications/litigation\\_committees/childrights/child-separation-memo/parent-child-separation-trauma-memo.pdf](https://www.americanbar.org/content/dam/aba/publications/litigation_committees/childrights/child-separation-memo/parent-child-separation-trauma-memo.pdf); CTRS. FOR DISEASE CONTROL AND PREVENTION, ADVERSE CHILDHOOD EXPERIENCES (ACEs) PREVENTION RESOURCE FOR ACTION: A COMPILATION OF THE BEST AVAILABLE EVIDENCE 1, 7 (2019), [https://www.cdc.gov/violenceprevention/pdf/ACEs-Prevention-Resource\\_508.pdf](https://www.cdc.gov/violenceprevention/pdf/ACEs-Prevention-Resource_508.pdf).

<sup>5</sup> Smith, *supra* note 2.

<sup>6</sup> THE ANNIE E. CASEY FOUND., A SHARED SENTENCE 1, 5 (2016), <https://assets.aecf.org/m/resourcedoc/aecf-asharedsentence-2016.pdf>.



The Children’s Best Interest Act amended Illinois Compiled Statutes Chapter 730 Corrections § 5/5-5-3.1, which sets forth a list of mitigating factors that “shall be accorded weight in favor of withholding or minimizing a sentence of imprisonment.”<sup>7</sup> The Act provided two additional mitigating factors, one of which focuses on the adverse impact on children when separated from their parent or caregiver. Courts can now consider as a mitigating factor the fact that the defendant is pregnant or is the parent of a child or infant whose well-being will be negatively affected by the parent’s absence.<sup>8</sup> The statute also includes eight circumstances to be considered in assessing this mitigating factor:

- (A) that the parent is breastfeeding the child;
- (B) the age of the child, with strong consideration given to avoid disruption of the caregiving of an infant, pre-school or school-age child by a parent;
- (C) the role of the parent in the day-to-day educational and medical needs of the child;
- (D) the relationship of the parent and child;
- (E) any special medical, educational, or psychological needs of the child;
- (F) the role of the parent in the financial support of the child;
- (G) the likelihood that the child will be adjudged a dependent minor under Section 2-4 and declared a ward of the court under Section 2-22 of the Juvenile Act of 1987;
- (H) the best interest of the child.<sup>9</sup>

The statute does not define “the best interest of the child.” In circumstances where the court finds that the risk of harm to the family posed by the parent or caregiver’s removal outweighs the risk of harm posed to the community by the defendant, the court “shall” impose a sentence that allows the parent to continue to care for the child or children.<sup>10</sup> In addition, the statute provides that the defendant “shall have the right to present a Family Impact Statement” to be considered by the court when imposing a sentence.<sup>11</sup> Family impact statements may include testimony, written documents, and videos from family members and community members.

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<sup>7</sup> 730 ILL. COMP. STAT. 5/5-5-3.1(a)(18)–(19) (2019).

<sup>8</sup> 730 ILL. COMP. STAT. 5/5-5-3.1 (2019). While the original draft of the Children’s Best Interest Act included the same additional, mitigating factors for consideration in pretrial release decisions in addition to sentencing, this provision was removed in anticipation of the Pretrial Fairness Act, which was passed in January 2021 as part of the SAFE-T Act and focuses solely on factors pertaining to pretrial release. *See, e.g., Illinois Supreme Court Rules in Favor of Ending Money Bond*, COAL. TO END MONEY BOND, <https://endmoneybond.org/2023/07/18/illinois-supreme-court-rules-in-favor-of-ending-money-bond/> (last visited Mar. 7, 2024); PRETRIAL FAIRNESS, <https://pretrialfairness.org/> (last visited Mar. 7, 2024).

<sup>9</sup> 730 ILL. COMP. STAT. 5/5-5/3.1(a)(18)–(19).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*



### III. Implementation and Obstacles

The Children’s Best Interest Act has had varied impact, depending on the severity of charges, individual defense counsel’s approach to advocating for the parent to protect the best interest of the child, the availability of evidence to support an argument for sentence mitigation, and the availability of community-based programs that can serve as alternatives to incarceration. Theodore Thomas, Cook County assistant public defender [and director of professional development at the Law Office of the Cook County Public Defender], explained that the statute’s mitigation factors are more successful when used in sentencing arguments and pretrial discussions involving cases with less serious offenses.<sup>12</sup> Additionally, noting that defense counsel now have more discretion when formulating sentencing arguments because the statute does not define the best interest of a child, Thomas explained that he defines the child’s best interest on a case-by-case basis, using all available resources and evidence to formulate an argument for a community-based sentence.<sup>13</sup> In the absence of a specific statutory definition, considerations for defining the child’s best interest can include whether the defendant is the child’s sole caregiver, the availability of other adults well-suited for taking the child into their care, the child’s educational record and experience, as well as legal factors set forth in family law.<sup>14</sup> The factors expressed in the Act regarding the parent’s role, children’s special needs, and the relationship between the parent and child also help to shed light on the child’s best interest, such as the inevitable harm to a child arising from separation in cases where the child is bonded with the parent.<sup>15</sup>

Sentencing arguments utilizing the Act’s mitigation factors often include a Family Impact Statements that compiles letters and statements by other caregivers of the child, extended family, principals and teachers, mentors, church members, and employers and features a cover letter from the Children’s Best Interest Project or another mitigation provider that specifies the scientific basis for a finding that the parent-child separation is harmful to the child.<sup>16</sup> Thomas emphasized that family impact statements can be very powerful in influencing sentencing decisions and often supplement mitigation reports drafted together by mitigation specialists and defense counsel.<sup>17</sup> Mitigation reports are defendant-focused and function as a comprehensive explanation, while family impact statements focus on the impact of the defendant’s incarceration

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<sup>12</sup> Zoom Interview with Theodore Thomas, Dir. of Pro. Dev., Cook Cnty. Pub. Def. (Mar. 19, 2024).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Gail T. Smith, email message to author, June 3, 2024.

<sup>16</sup> Zoom Interview with Theodore Thomas, Dir. of Pro. Dev., Cook Cnty. Pub. Def. (Mar. 19, 2024); Gail T. Smith, email message to author, June 3, 2024.

<sup>17</sup> Thomas, *supra* note 12.



on children or disabled relatives the defendant was taking care of.<sup>18</sup> Thomas noted that both family impact statements and mitigation reports were crucial to crafting a narrative in sentencing arguments.<sup>19</sup>

The new law's impact has been limited by various obstacles and issues. The coronavirus pandemic and quarantining delayed many criminal cases and sentencing hearings, in turn slowing the implementation of the Act.<sup>20</sup> Mandatory minimum sentencing provisions also limit judicial discretion and bar the application of the statute's mitigating factors for certain offenses.<sup>21</sup> Additionally, a lack of widespread knowledge within the legal community of the changes arising from the statute have hindered the statute's implementation, as the Act did not create an initiative or provide funding to educate judges and attorneys.<sup>22</sup>

Gail Smith, director of Illinois' Children's Best Interest Project, advocated for passage of the Act and has been working on its implementation. She said in an interview with CIC that in her experience, clients, rather than legal professionals, were the primary source of inquiries about the statute.<sup>23</sup> The Children's Best Interest Project has held informational sessions for attorneys and judges to increase awareness of the new caregiving-related factors in the sentencing mitigation statute. Smith observed: "We had a huge audience at the state attorney webinar, and they recorded it, but I don't think that means everyone knows about it."<sup>24</sup> Smith noted that while her organization endeavors to promote awareness, they have limited resources— "If I could have 10 lawyers and 20 organizers, we could cover the state, and we could make sure everybody actually knows about it. Then we could also go to Springfield and lobby for better community services and really get this thing done... But we have a couple small grants to do everything we're trying to do."<sup>25</sup>

Smith also emphasized that knowledge of the statute is not enough to reduce incarceration. The legislation did not reference or provide funding for supportive community-based programs to achieve its intended purpose.<sup>26</sup> Sufficient services for defendants who are not incarcerated are slow to arrive, and resources such as chemical dependency treatment may not be covered by or included with medical insurance.<sup>27</sup> Smith explained that several community-based programs that have been helpful to caregivers in the past are no longer in operation. Programs that focus on rehabilitation and provide individuals with access to

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<sup>18</sup> See, e.g., Public Defender Services, *Overview of Mitigation and the Client Interview*, [https://pds.wv.gov/attorney-and-staff-resources/Documents/1587491866\\_What%20is%20mitigation.pdf](https://pds.wv.gov/attorney-and-staff-resources/Documents/1587491866_What%20is%20mitigation.pdf) (last visited May 8, 2024).

<sup>19</sup> Thomas, *supra* note 12.

<sup>20</sup> Smith, *supra* note 2.

<sup>21</sup> Williams, *supra* note 3.

<sup>22</sup> *Id.*

<sup>23</sup> Zoom Interview with Gail T. Smith, Dir., Child. Best Int. Project (Nov. 17, 2023).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*



education, vocational training, mental health services, substance abuse treatment, and employment opportunities can help individuals reintegrate into society, reduce recidivism rates, break the cycle of crime, and ultimately lower incarceration rates. The lack of such services, paired with a lack of funding, poses challenges to advocacy for community-based sentencing alternatives.<sup>28</sup> Additionally, resource constraints have limited evaluation of the statute's impact.<sup>29</sup>

#### IV. Future Prospects

Thomas highlighted a few recommendations for states considering legislation similar to the Children's Best Interest Act. He advises prioritizing resources for mitigating sentences and advocating for statutes that include more factors to consider, to allow for more effective arguments.<sup>30</sup> Additionally, Thomas stresses the need for appropriate attorney training in sentencing advocacy, emphasizing the life-altering impact of sentencing variations stemming from statutory minimums and maximums. To support judges in making informed decisions, he suggests funding for mitigation workers to compile comprehensive reports, ensuring equitable access to thorough assessments for indigent clients.

The passage of the Children's Best Interest Act demonstrates a commitment to raising awareness and mitigating the potential harms associated with parental incarceration. However, the lack of resources for training those working within the legal system, the scarcity of community-based programs that provide alternatives to incarceration, and the pandemic have limited implementation of the Act. This suggests more effective implementation of the Children's Best Interest Act, and similar legislation elsewhere, will require collaboration among legal professionals, community organizations, and policymakers to increase awareness of legislation and promote community-based alternatives.

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Thomas, *supra* note 12.