

## MEMORANDUM

TO: Daniel J. Stewart, Chairman

FROM: Brian M. Callahan

RE: Care of pregnant inmates and newborn children

DATE: April 25, 2007

If an inmate committed to a county jail is “pregnant and about to give birth to a child, the officer in charge of such institution, a reasonable time before the anticipated birth of such child, shall cause such woman to be removed from such institution and provided with comfortable accommodations, maintenance and medical care elsewhere, under such supervision and safeguards to prevent her escape from custody as he may determine, and subject to her return to such institution as soon after the birth of her child as the state of her health will permit.” Correction Law §611(1).

Thereafter, section 611(2) of the Correction Law allows a child born to an inmate of a county jail to be returned with its mother to the jail “unless the chief medical officer of the correctional institution shall certify that the mother is physically unfit to care for the child [emphasis added].”

Correction Law section 611(2) further provides that “[t]he officer in charge of such institution may cause a child cared for therein with its mother to be removed from the institution at any time before the child is one year of age.” It has been held that the Sheriff does not have absolute discretion in this matter, and may only order such removal if it is determined “that the welfare of the child is not served by keeping it in confinement.” Apgar v. Beauter et al., 75 Misc.2d 439, 441 (Tioga Co. Sup. Ct. 1973). The Apgar court further held “[t]hat incarceration in a jail or correctional institution per se does not constitute such unfitness or exceptional circumstances so as to require that a newborn infant be taken from its mother is attested to by the enactment by the Legislature of subdivision 2 of section 611 of the Correction Law.” Id., at 441.

In fact, the Sheriff’s burden of demonstrating that the interest of an infant will not be served by returning it to jail with its mother will often be considerable, as the Apgar court noted that such a child will be supplied with adequate food, shelter and clothing, officers will be present 24 hours a day, and medical assistance by the jail physician is available at all times. “Also, the child will be subject to the constant care and attention of its natural mother, a factor which, as shown above, the

courts and the Legislature consider to be of great importance to the welfare of a child.” Id., at 442.

Finally, Correction Law §611(3) similarly provides that any woman committed to a county jail, who at the time of such commitment is the mother of a “nursing child in her care under one year of age,” may also bring such child into the jail, subject to the same provisions as provided in Correction Law §611(2). For the purposes of this statute, the term “nursing child” applies only to babies breast-fed by the mother. 1947 N.Y. Op. Atty. Gen. 189.