

WHEN LOVE IS NOT ENOUGH: TERMINATION OF PARENTAL RIGHTS WHEN THE PARENTS HAVE A MENTAL DISABILITY

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For many people, the ability to be a parent and raise children is taken for granted. However, for parents with mental disabilities, the threat of termination of one's parental rights is very real. For courts, it is difficult to walk the line between the parents' rights and the rights of the child. What should be the appropriate test to determine when parental rights should be terminated? What measures should be taken by our society before termination can occur? The overall theme of this comment is to explore the implementation issues Ohio courts will surely encounter after the Ohio Supreme Court's recent decision in *In re D.A.*¹ by exploring what other courts have done. This comment also hopes to contribute new insight into how to handle such a delicate and important issue.

While mental disability, alone, is insufficient to terminate parental rights, mental disability must be considered in order to ensure that parents get the social service support and classes they need to succeed and

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* I graduated from Denison University with a Bachelors of Art in Sociology and Anthropology, and will graduate from Capital University Law School in May 2009. Thanks to the Capital University Law Review and Professor Mark Strasser. I am not quite sure what guided me to law school. Maybe I was destined for law school as an act of defiance against my last name; perhaps it was my addiction to the television shows of *Law & Order* and *Ally McBeal*. It still remains a mystery to me. I am an avid dog lover and have leaned heavily on my dog, Maggie, for advice throughout the article-writing process.

Although I am just kidding about my dog, I must attribute this subject matter to the summer and winter I spent working at a sheltered workshop for adults with mental retardation and developmental disabilities. I met some of the most amazing individuals at the workshop, and I will never forget how much I learned from them all about how to truly make the most of life, be brave, be in wonder about the world around me, and to accept people, no matter what their differences may be. That is why it is extremely important to me that my friends be given the full protection of the law, especially when their children are at stake. While I recognize that realistically, not all parents will be able to keep their children, it is my goal to make suggestions that might improve their chances of retaining custody of what they love most, their children.

¹ 862 N.E.2d 829 (Ohio 2007).

maintain custody of their children.² If mental disability is not taken into consideration, it will be easier to declare parents with mental disabilities unfit. The child welfare system must be able to accommodate the special needs of parents.

Social service agencies should be required to provide services to parents with mental disabilities. Classes need to be offered within the home. Furthermore, statutory time periods need to be extended to reflect the reality of the ongoing education and services parents with disabilities need to be successful.³ The one year reasonable time period in the Ohio Revised Code does not reflect the realities of ongoing education and services those parents with mental disabilities will need.⁴

Part I of this comment will provide a background on parental rights for parents with a disability. It will also present a brief description of the law regarding termination of parental rights and the typical procedure. Part II will focus on recent developments with termination of parental rights in various states across the country. Part III will discuss trends in Ohio cases and law while Part IV will analyze the implications of these recent developments and also focus on implementation issues that can be furthered in Ohio by comparing other states. Finally, Part V will offer suggestions for changing termination of parental rights proceedings.

I. LAYING THE GROUNDWORK

A. Defining “Disabled”

Various state statutes use different terms to describe “disability” as a factor for terminating parental rights. Some states use “mental retardation” as a ground for termination of parental rights or as a factor to consider.⁵ Other states use the term “mental deficiency,”⁶ which is an older term.⁷

² See discussion *infra* Part V.B–C.

³ See discussion *infra* Part V.A.

⁴ OHIO REV. CODE ANN. § 2151.414(E)(1)–(2) (LexisNexis 2007).

⁵ See, e.g., DEL. CODE ANN. tit 13, §§ 1101(9), 1103(a)(3) (1999); HAW. REV. STAT. ANN. § 571-61(b)(1)(F) (West 2008); N.Y. SOC. SERV. LAW § 384-b(4)(c) (McKinney 2003).

⁶ See, e.g., ARIZ. REV. STAT. ANN. § 8-533(B)(3) (2007); COLO. REV. STAT. § 19-3-604(1)(b)(I) (2008); DEL. CODE ANN. tit 13, §§ 1101(9), 1103(a)(3) (1999).

⁷ Karl A. Menninger, II, *Defense in Proceeding for Termination of Parental Rights on Ground of Mental Disability*, in 46 AM. JUR. 3D *Proof of Facts* 231, 243 (1998).

Mental retardation is defined by the American Association on Mental Retardation as follows:

Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work. Mental retardation manifests before age [eighteen].⁸

Persons with mental retardation are defined as having low intelligence and lack or are deficient in skills or functions needed for daily life, such as eating, dressing, personal hygiene, communicating with others, working and living independently.⁹

Abstract concepts may be difficult for persons with disabilities to understand, and they may lack the ability to learn through generalizing experiences, to follow complex instructions, or to relate to others at an age appropriate level.¹⁰ However, many people with mental disabilities are able to live and work in their community and be accepted and appreciated by society.¹¹ Many successful individuals use habilitation services, such as “behavior modification, occupational and physical therapy, life skills training, sheltered workshops, supported employment, supervised living and residential care.”¹² The typical or primary clinicians involved are clinical psychologists, clinical social workers, occupational therapists, and physical therapists.¹³ In order to understand these vast improvements available to people with disabilities, it is important to understand the history of degradation and discrimination in this country against people with disabilities.

⁸ *Id.* at 244 (quoting AM. ASS’N ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT 1 (9th ed.1992)).

⁹ *See id.*

¹⁰ *Id.*

¹¹ *See id.* at 245.

¹² *Id.*

¹³ *Id.*

B. Past Discrimination and Historical Treatment

Our society has a history of terribly mistreating people with mental disabilities. In the early twentieth century, the theory of “eugenic sterilization” was widespread.¹⁴ This theory supported involuntary sterilization of mentally retarded people because of the belief that “they contributed defective genes to the gene pool of society, were generally unfit to be parents and produced non-productive children.”¹⁵ As a result, some states approved laws authorizing involuntary sterilization of people with disabilities.¹⁶ This viewpoint was further reflected in the 1927 United States Supreme Court case *Buck v. Bell*¹⁷, in which Justice Holmes wrote an often criticized opinion that represents negative attitudes still prevalent in our society.¹⁸ Justice Holmes stated:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles is enough.¹⁹

Clearly, discrimination against those with mental disabilities was rampant in our society. People with disabilities used to be involuntarily admitted to state facilities in the belief that mental retardation was “incurable” and that a “retarded person” could not improve.²⁰

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ 274 U.S. 200 (1927).

¹⁸ Menninger, II, *supra* note 7, at 246.

¹⁹ *Buck*, 274 U.S. at 207.

²⁰ Menninger, II, *supra* note 7, at 245.

C. Procedure for Termination of Parental Rights

Generally, if a child is found to be abused, neglected or abandoned, the state may take the child from the home and place him or her in foster care or other temporary custody arrangements.²¹ Should the parents fail to remedy the issues that led to removal, the state may seek termination of parental rights.²² Some states require separate hearings on both temporary custody and termination, while others will allow both issues to be addressed at once.²³ For the state to succeed in termination proceedings, clear and convincing evidence must establish that statutory grounds for termination have been met and termination must be in the best interest of the child.²⁴

Many state statutes use the term “mental disability” or similar language as criteria for termination of parental rights.²⁵ Most state statutes do not define mental disability, but several require that the disability be determined by a clinician.²⁶ Some states require one or more psychiatrists or psychologists determine whether a disability exists,²⁷ while others require a “qualified mental health professional” to make the determination.²⁸ Most states require that the mental disability of the parent adversely affect his or her ability to care for the child in order for termination to occur, such as when the disability renders the parent unable to care for the child,²⁹ or unable to meet the child's physical and emotional or psychological needs.³⁰ Most states require that the situation which

²¹ *Id.* at 238.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-533(B)(3) (2007); CAL. FAM. CODE § 7827(a) (West 2004); DEL. CODE ANN. tit 13, §§ 1101(9), 1103(a)(3) (1999); HAW. REV. STAT. ANN. § 571-61(b)(1)(F) (West 2008).

²⁶ Menninger, II, *supra* note 7, at 250.

²⁷ *See, e.g.*, CAL. FAM. CODE § 7827(c) (West 2004); DEL. CODE ANN. tit 13, § 1103(a)(3) (1999); 750 ILL. COMP. STAT. ANN. 50/1-1(D)(p) (West 1999).

²⁸ *See* KY. REV. STAT. ANN. § 625.090(3)(a) (West 2006).

²⁹ *See, e.g.*, OR. REV. STAT. § 419B.504(1) (2007); WASH. REV. CODE ANN. § 13.34.180(1)(e)(ii) (West 2004).

³⁰ *See* COLO. REV. STAT. ANN. § 19-3-604(1)(B)(I) (2008); KAN. STAT. ANN. § 38-1583(b)(1) (2000).

called for removal persist or continue to persist for a certain time frame before termination can occur, usually an extended time frame or for the foreseeable future.³¹

D. Constitutional Issues

Many constitutional challenges have been made over the termination of parental rights for people with mental disabilities. These cases include challenges to the burden of evidence standard, adoption statutes, and assumptions of parental fitness. For instance, in *Santosky v. Kramer*,³² the United States Supreme Court determined that due process requires courts to utilize the high, “clear and convincing evidence” standard of proof in parental rights termination cases.³³

In *Helvey v. Rednour*,³⁴ an adoption statute which permitted the court to waive a mentally retarded parent’s consent to the adoption of his or her child without proof of parental unfitness was found to create an unconstitutional presumption of unfitness.³⁵ The statute required consent of the natural parents to the adoption of their children.³⁶ However, if the parents had either been found by the court to be unfit or if the parents were adjudicated incompetent because of mental impairment, mental retardation, mental illness, or if there was no chance for recovery within the foreseeable future, consent was not required.³⁷ For parents without disabilities, a court had to find that the parents were unfit.³⁸ However, there was nothing in the statute requiring a finding of parental unfitness for parents with disabilities before the appointment of a guardian, who would consent to the adoption for the parents.³⁹ The Fifth District Appellate Court of Illinois stated: “Thus, the statute implicitly creat[ed] a presumption that all retarded parents [were] unfit.”⁴⁰ Therefore, the court

³¹ See, e.g., ARIZ. REV. STAT. ANN. § 8-533(B)(3) (2007); IDAHO CODE ANN. § 16-2005 (d) (2001); KY. REV. STAT. ANN. § 625.090(2)(e), (3)(a) (West 2006).

³² 455 U.S. 745 (1982).

³³ *Id.* at 769.

³⁴ 408 N.E.2d 17 (Ill. App. Ct. 1980).

³⁵ *Id.* at 19–20.

³⁶ *Id.* at 19.

³⁷ *Id.* at 19–20.

³⁸ *Id.* at 20.

³⁹ *Id.*

⁴⁰ *Id.*

invalidated the statute under the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment and under the Illinois state constitution.⁴¹ As a result, the court held that the parent could not be deprived of her child without a hearing on her parental fitness.⁴²

In *In re J.M.C.*,⁴³ the District of Columbia Court of Appeals found that a mentally ill mother's due process rights were not violated by the fact that social services in charge of her case failed to make any efforts toward reunification.⁴⁴ The caseworker was assigned to the mother ("N.C.") in February 1996, and "acknowledged that despite her assignment to N.C.'s case, she had never tried to make contact with N.C. prior to seeing her in September 1996."⁴⁵ In explanation she stated: "I would say I wasn't familiar as to the process of the agency and I just never did it."⁴⁶ Even though the social worker assigned to the mother's file neglected her duties, the court found that section 16-2352(a) of the District of Columbia Code did not require agencies to demonstrate they had made efforts to reunify families when they sought termination of parental rights on the basis of neglect.⁴⁷

A New York family court stated that it is not self-evident that mentally ill and mentally retarded parents are incapable of caring for their children.⁴⁸ The court confirmed precedent stating that while section 384-b(4)(c) of the New York Social Service Law did not explicitly require state agencies to provide reunification services to mentally retarded parents, the law was constitutional.⁴⁹ Nevertheless, the agencies were "not relieved of the responsibility to make diligent efforts to reunify the mentally ill with their children."⁵⁰

In *In re R. S.*,⁵¹ the Fifth District Court of Appeal of California affirmed that due process required trial courts to make two findings before

⁴¹ *Id.* at 23.

⁴² *Id.* at 22.

⁴³ 741 A.2d 418 (D.C. 1999).

⁴⁴ *Id.* at 426-27 (citing *In re A.C.*, 597 A.2d 920, 923 (D.C. 1991)).

⁴⁵ *Id.* at 421.

⁴⁶ *Id.*

⁴⁷ *Id.* at 426-27.

⁴⁸ *In re W.W. Children*, 736 N.Y.S.2d 567, 577 (Fam. Ct. 2001).

⁴⁹ *Id.* at 576.

⁵⁰ *Id.*

⁵¹ 213 Cal. Rptr. 690 (Ct. App. 1985).

terminating parental rights.⁵² First, the trial court must determine that the parent's mental deficiency would continue for an indefinite time regardless of medical treatment.⁵³ Second, there must be proof that immediate termination of parental rights was the least detrimental alternative available to protect the child's welfare.⁵⁴

The legal rights of parents with disabilities have improved significantly since the days of Justice Holmes' opinion in *Buck v. Bell*.⁵⁵ Society is beginning to accept that parents with disabilities are able to properly care for their children. However, even the Due Process Clause and the burden of clear and convincing evidence cannot prevent discriminatory assumptions that influence termination proceedings for parents with disabilities. Nevertheless, courts still attempt to improve the process.

II. RECENT DEVELOPMENTS IN THE CASE LAW

A. *Ohio Moves in the Right Direction*

The Ohio Supreme Court recently held that "when determining the best interest of a child under [section] 2151.414(D) [of the Ohio Revised Code] at a permanent-custody hearing, a trial court may not base its decision solely on the limited cognitive abilities of the parents."⁵⁶ The issue before the court was whether a mentally retarded couple's parental rights were properly terminated.⁵⁷

In 2004, the couple voluntarily relinquished custody of D.A., their ten-year-old son, to the Tuscarawas County Job and Family Services due to the son's increasing behavioral issues.⁵⁸ Social Services sought temporary custody over D.A. after classifying him as dependent and neglected.⁵⁹ As part of the agency's case plan, the trial court required both parents to attend parenting classes and undergo psychological evaluations, which revealed that the father had an IQ of sixty-two and the mother an IQ of fifty-nine.⁶⁰

⁵² *Id.* at 696 (quoting *In re David B.*, 154 Cal. Rptr. 63, 68 (Ct. App. 1979)).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ 274 U.S. 200, 207 (1927).

⁵⁶ *In re D.A.*, 862 N.E.2d 829, 835 (Ohio 2007).

⁵⁷ *Id.* at 830.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 830-31.

The parenting education teacher suspended the parents' classes because she believed they would benefit from classes held in their home during visitations with D.A.⁶¹ The parents also attended seven required therapy meetings over the course of five months to help them handle their separation from D.A.⁶² However, for the last part of the case plan, completing a Department of Mental Retardation and Development Disabilities (MRDD) program, the parents did not qualify for services because they were able to meet their basic needs without further assistance.⁶³

Child Services eventually sought permanent custody, and despite the parents' efforts, the trial court found that "although appellants love their son very much and were willing to do anything necessary to bring him home, returning D.A. to them was not in his best interest."⁶⁴ The trial court relied on the parents "very low cognitive skills that hinder their day to day functioning" in its decision.⁶⁵ The court determined that the parents "demonstrate[d] no ability to engage in the type of complex thinking necessary to parent a child."⁶⁶ The trial court also stated that to allow "a normally functioning child like [D.A.] to be parented by two parents with the[se] severe limitations [would] seriously jeopardize his healthy, successful future."⁶⁷ As a result, the trial court found that the parents had "failed continually and repeatedly for a period of six months or more to substantially remedy the conditions causing removal."⁶⁸

D.A. was initially removed from the home at his mother's request because his behavior had become aggressive.⁶⁹ To regain custody of D.A., the parents had to complete the four objectives in the case plan discussed previously, which included completing a psychological evaluation, attending parenting classes, completing an MRDD assessment, and attending therapy.⁷⁰ The Ohio Supreme Court noted: "It is undisputed that

⁶¹ *Id.* at 831.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 833.

⁷⁰ *Id.*

[the parents] complied with every aspect of their case plan with the exception of completing parenting classes, and that failure was due to the agency's suspension of classes after one month."⁷¹ The emphasis placed on the parent's mental retardation constituted a failure to comply with section 2151.414.⁷² The record did not contain clear and convincing evidence "that their limited abilities ha[d] caused or threatened to cause harm to him."⁷³ Therefore, it was not in D.A.'s best interest to have parental rights terminated.⁷⁴

B. Recent Developments in Other States

Several state courts recently held that mental illness or mental retardation alone is not sufficient to terminate parental rights. The following cases reflect the challenging issues the court systems and social service agencies must deal with involving parents with disabilities. However, the cases also reflect biases in reviewing trial records, and the challenges parents with disabilities face in proving that they have a right to be a parent.

The Third Circuit Court of Appeal of Louisiana held in *State ex rel. J.P.A.*⁷⁵ that "mental illness or deficiencies, standing alone, are insufficient grounds to warrant termination of a parent's rights. However, the mental deficiency related to parenting ability can lead to termination of parental rights."⁷⁶ Louisiana's statute "places the burden on the parent seeking to avoid termination when the child has been in foster care for over twelve months."⁷⁷ The statute provides that in order for reunification to remain as the permanent plan for the child, the parent must significantly comply with the case plan and make measurable progress towards correcting the conditions that required the child to be removed.⁷⁸ Children services instituted proceedings against the mother, M.J.A., due to the fact that her husband was a crack addict and the mother allowed a convicted child

⁷¹ *Id.*

⁷² *Id.* at 836.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ 928 So. 2d 736 (La. Ct. App. 2006).

⁷⁶ *Id.* at 741 (citation omitted).

⁷⁷ *Id.* at 738 (citing LA. CHILD CODE ANN. art. 702 D(1) (2004)).

⁷⁸ *Id.* (quoting art. 702D(1)).

molester to be around the children, eventually leading to the children being abused by the man.⁷⁹

Although the appellate court found that mental disability, alone, is insufficient, it also found error with the trial court's view "that, due to M.J.A.'s cognitive limitation, the timetables for reunification should be stretched."⁸⁰ The appellate court qualified the holding by stating that "mental deficiency related to parenting ability can lead to termination of parental rights."⁸¹ M.J.A.'s relationship with a crack addict evidenced extremely poor judgment, and contrary to the trial court's views, nothing in the record indicated that she could or would choose her children over her husband.⁸²

The trial court adopted a doctor's suggestions for reunification with long-term supervision.⁸³ The appellate court focused on the fact that the doctor interviewed the family only once and that after his evaluations were complete, he was no longer in the best position to determine the progress made regarding the case plan.⁸⁴ Instead, the caseworkers who regularly saw M.J.A. and the children "were in a much better position to determine the progress made with the case plan."⁸⁵ The appellate court stated: "These caseworkers clearly thought that little to no progress had been made towards reunification."⁸⁶ As a result, the "trial court's reliance on [the doctor's] initial opinion as a reason not to terminate was misplaced."⁸⁷

Furthermore, the appellate court found M.J.A.'s attendance at parenting classes, where she was doing quite well, was not enough as "she failed to show any benefit from them around her children during visits."⁸⁸ The court stated: "Even after her best efforts in counseling and parenting assistance, and with the knowledge that her children might be taken from her, M.J.A. failed to substantially improve her parenting skills."⁸⁹ In

⁷⁹ *Id.* at 737, 740.

⁸⁰ *Id.* at 741.

⁸¹ *Id.*

⁸² *Id.* at 740.

⁸³ *Id.* at 741.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 740.

⁸⁹ *Id.*

deciding to terminate M.J.A.'s parental rights, the court noted that "while she may love them deeply, she does not possess the ability or the judgment to maintain an appropriate, supportive environment for these children."⁹⁰

Judge Genovese dissented, stating he would "affirm the trial court judgment dismissing the State's petition to terminate parental rights of the mother on the grounds of insufficient proof."⁹¹ In Judge Genovese's opinion:

The record indicates that the trial judge had handled this case for over four years. He, not the majority, had the opportunity to view the demeanor and judge the credibility of not only the mother but of all witnesses. The majority read the book, i.e., a "cold record." The trial court judge saw the play. The law does not permit an appellate court to substitute its judgment for that of the trial court. Though this case may be viewed differently, there was no manifest error and the trial court was not clearly wrong. In my view, the trial court was in the best position to make this demeanor and credibility call.⁹²

Judge Genovese recommended an alternative, suggesting that the children should continue to be supervised by the State in foster care and allow the mother supervised visitation.⁹³ In addition, he suggested giving the mother a six-month period to reach compliance and cure the defects that led to removal.⁹⁴ If she failed to do so, her parental rights would be terminated.⁹⁵ Judge Genovese stated: "The trial court felt that with appropriate counseling and supervision by the State, a change of environment, and a little time, M.J.A. could be a viable mother to her children."⁹⁶

At issue in *In re Lillian*⁹⁷ was whether the allegations contained in a children services petition for an ex parte emergency request for immediate

⁹⁰ *Id.* at 741.

⁹¹ *Id.* at 742 (Genovese, J., dissenting).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ 837 N.E.2d 269 (Mass. 2005).

removal was sufficient to begin a proceeding to determine whether the mother was protecting the children from abuse or neglect.⁹⁸ The guardian ad litem for the children argued that the petition cited to abuse that was over a year old, contained no allegations of current abuse, and only cited to one incident of domestic violence that had been rendered moot because the husband had moved out.⁹⁹ Furthermore, the guardian asserted that the petition failed to allege a connection between the mother's mental health problems and her ability to care for the children.¹⁰⁰ The guardian also claimed there were no allegations that the children had been denied medical care when sick or injured, that the two fathers were unfit, and that the petition improperly alleged that school attendance applied to the children because they were too young to be required to attend school.¹⁰¹ As a result, the guardian argued that the children services department "could not establish a pattern of abuse or current abuse."¹⁰²

The appellate court stated that a parent's "mental illness alone is not sufficient to remove a child from the parent's custody."¹⁰³ However, the court also found that "[a]lthough mental illness is a factor in determining whether to remove a child from a parent's custody, a child who is in danger of neglect or abuse can be removed even if a parent's mental illness is not the operative reason for the child's abuse or neglect."¹⁰⁴ If true, the allegations and inferences drawn from the termination petition "would implicate at least whether the younger children were 'without necessary and proper physical . . . care'"¹⁰⁵ pursuant to chapter 119, section 24 of the Massachusetts General Law.¹⁰⁶ Concerning removal, a trial court does not have to wait until it is presented with a maltreated child before deciding upon the necessity of care and protection.¹⁰⁷

⁹⁸ *Id.* at 271.

⁹⁹ *Id.* at 275 n.13.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 275 n.14.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 275.

¹⁰⁶ MASS. GEN. LAWS ANN. ch. 119, § 24(a) (West 2008).

¹⁰⁷ *In re Lillian*, 837 N.E.2d at 275-76.

In *In re C.M.B.*,¹⁰⁸ a Texas appellate court held that mental illness or incompetence alone is not sufficient grounds for terminating parental rights.¹⁰⁹ To terminate a parent's rights under the Texas Family Code, the evidence must show the parent knowingly placed or allowed the child to remain in conditions or surroundings that endangered the child's physical or emotional well-being.¹¹⁰ The "cause of endangerment must be the child's living conditions."¹¹¹ To terminate a parent's rights under subsection (E), the cause of endangerment must be the parent's conduct, by the parent's acts and omissions.¹¹² The child does not have to suffer actual harm under this standard.¹¹³

However, if a parent's mental state causes him or her to engage in conduct that endangers the physical or emotional well-being of a child, that conduct can be considered in a termination proceeding.¹¹⁴ In *In re C.M.B.*, the mother appealed an order terminating both the mother's and father's parental rights to C.M.B. and appointing the grandparents permanent Joint Managing Conservators.¹¹⁵ The mother's history of ongoing psychiatric and polysubstance abuse problems resulted in inadequate care of C.M.B.¹¹⁶ Family members all reported mistreatment by the mother and expressed concern over her violent and unstable behavior.¹¹⁷

Another issue considered by courts is how much consideration or weight should be given to mental retardation when it is asserted as a ground for termination. Many courts have held that a parent's mental condition must have some negative impact on the child or on parenting ability.

¹⁰⁸ 204 S.W.3d 886 (Tex. App. 2006).

¹⁰⁹ *Id.* at 895 (citing *Carter v. Dallas County Child Welfare Unit*, 532 S.W.2d 140, 141–42 (Tex. Civ. App. 1975)).

¹¹⁰ See TEX. FAM. CODE ANN. § 161.001(1)(D) (Vernon 2002).

¹¹¹ *In re C.M.B.*, 204 S.W.3d at 895 (citing *In re S.H.A.*, 728 S.W.2d 73, 85 (Tex. App. 1987)).

¹¹² *Id.* (citing § 161.001(1)(E)).

¹¹³ *Id.*

¹¹⁴ See *Carter*, 532 S.W.2d at 142.

¹¹⁵ *In re C.M.B.*, 204 S.W.3d at 889.

¹¹⁶ *Id.* at 896.

¹¹⁷ *Id.*

*V.S.B. v. State Department of Health and Social Services, Division of Family and Youth Services*¹¹⁸ noted that continued mental illness of a parent can serve as a basis for termination of parental rights when it is in conjunction with past detrimental actions by the parent.¹¹⁹ Although the mother in *V.S.B.* was stabilized and on medication for her mental illness, the Supreme Court of Alaska still found her unfit to serve as an adequate parent for her four children with psychological and developmental difficulties requiring special attention.¹²⁰ All four children at issue were Indian, so the standards of proof required by the Indian Child Welfare Act (ICWA) applied.¹²¹ The children were adjudged to be in need of aid in accordance with Alaskan law.¹²² Another Alaskan case also held that mental illness can serve as a basis for termination when it is continuing and likely to create a risk of harm to the child.¹²³

The Louisiana Supreme Court in *State ex rel. G.J.L.*¹²⁴ emphasized that the parent's mental condition must be related to parenting ability. The trial court concluded that it was "in the children's best interest to maintain the status quo for the present time."¹²⁵ The trial court denied the State's petition to terminate parental rights. The court stated that the parents should not "be punished simply because of their respective mental and physical handicaps and that they should be allowed to try and be secondary care-givers to their children."¹²⁶ Moreover, the trial court found no evidence in the record to suggest that future adoption of the children would be in their best interest. The children were happy in their foster homes and able to maintain "some semblance of family input in their lives."¹²⁷

¹¹⁸ 45 P.3d 1198 (Alaska 2002).

¹¹⁹ *Id.* at 1206 n.22.

¹²⁰ *Id.* at 1200.

¹²¹ *Id.*

¹²² *Id.* at 1203–05 (citing ALASKA STAT. § 47.10.011(6)–(8) (2006)) (providing that a child is in need of aid if a court finds by a preponderance of the evidence that the child has suffered "mental injury" as a result of "conduct by or conditions created by the parent;" has suffered or is at risk of suffering sexual abuse; or the parents have created conditions resulting in mental injury to the child).

¹²³ *A.H. v. State Dep't. of Health & Soc. Servs.*, 10 P.3d 1156, 1162 (Alaska 2000).

¹²⁴ 791 So. 2d 80 (La. 2001).

¹²⁵ *Id.* at 84.

¹²⁶ *Id.*

¹²⁷ *Id.*

In this case, no party or court disputed that the children would not be returned to either of their parents' permanent custody.¹²⁸ According to the Louisiana Supreme Court, C.R.B. [mother] "missed meetings, including mental health appointments, did not take her medication as required, continued to maintain contact with a known child molester, and never fully acknowledged the reasons her children were taken into State custody."¹²⁹ According to the court, there was no reasonable expectation of significant improvement in C.R.B.'s mental condition or conduct in the foreseeable future, a finding supported by the testimony of two experts.¹³⁰ One expert testified that "C.R.B.'s bad judgments and failure to make decisions for herself and her children could prove to be detrimental to the children's welfare."¹³¹ The expert pointed out that at the age of seven, G.J.L. was responsible for making extremely difficult and mature decisions for such a young child.¹³² He also stated that "C.R.B.'s cognitive limitations, through no fault of her own, precluded her from making the necessary judgments which parents are required to make to insure the well being of their children."¹³³ The expert found that "C.R.B. could function only as a secondary care-giver to her children."¹³⁴

As a result, the court stated: "While this court is cognizant that C.R.B.'s inability to care for her children is due to her mental illness and is of no fault of her own, we must examine very closely the needs of the children."¹³⁵ The court was "not creating a bright line rule that mental illness in and of itself should serve as a sole basis for terminating parental rights."¹³⁶ However, the court found it important to consider the balance between the parent's mental state as it related to the parent's ability to care for his or her children.¹³⁷

¹²⁸ *Id.* at 86.

¹²⁹ *Id.*

¹³⁰ *Id.* (citing *State ex rel. J.A.*, 752 So. 2d 806, 814 (La. 2000)).

¹³¹ *Id.* at 89.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 91.

¹³⁶ *Id.*

¹³⁷ *Id.*

In *In re T.E.B.*,¹³⁸ the Oklahoma Court of Civil Appeals upheld a trial court's reasoning that when the state seeks to terminate parental rights due to a mental condition which impairs his or her ability to care for the child, the state must prove that the parent's mental condition will not respond to treatment and will not substantially improve.¹³⁹ The pertinent statutory language states: "The mental illness or mental deficiency of the parent is such that it will not respond to treatment, therapy or medication and, based upon competent medical opinion, the condition will not substantially improve."¹⁴⁰ This requirement was satisfied by a forensic psychologist establishing that the mother's mental deficiency was not amenable to treatment or improvement.¹⁴¹

These cases demonstrate some of the nuanced issues courts must grapple with in termination proceedings, such as how much weight mental disability should be given as evidence of parental unfitness. Unfortunately, these cases also reflect biases in appellate courts reviewing cold records and overturning trial courts in a better position to make judgments for families. The following section addresses theories used when considering the connection between mental disability and its effect on parenting ability.

III. LEGAL THEORIES UTILIZED IN TERMINATION PROCEEDINGS

A. *Justifying Termination for Parents with Disabilities*

Many courts have underlying theories or presumptions for legally terminating parental rights of parents with disabilities. According to Chris

¹³⁸ 24 P.3d 900 (Okla. Civ. App. 2001).

¹³⁹ *Id.* at 901.

¹⁴⁰ *Id.* (citing OKLA. STAT. tit 43A, § 6-201(e) (1991)).

This statute is different from most states because it actually requires medical proof that the condition will not improve. However, many parents with disabilities are able to improve their parenting skills, although their mental retardation is a permanent condition. The statute also requires a finding that the continuation of parental rights would result in harm or threatened harm to the child (subsection (d)) and that it is in the best interest of the child (subsection (f)). However, it would seem easier to terminate parental rights once it has been established that a parent has a permanent disability.

¹⁴¹ *Id.* at 902.

Watkins, parents with disabilities face multiple layers of discrimination within the court system.¹⁴² He states:

Many statutes that seem to explicitly require a connection between developmental disability and parenting ability in order to terminate parental rights have been interpreted in ways that overlook the parenting abilities of *individual* parents; beliefs about the parenting abilities of the group labeled developmentally disabled are assumed to hold true for all parents with developmental disabilities.¹⁴³

Furthermore, developmentally disabled parents are often not offered reunification services because there is a presumption that they are incapable of learning parenting skills.¹⁴⁴ Even when parents are offered reunification services, these programs are not tailored to meet the needs of a parent with a disability, and as a result, the underlying cause for removal is not addressed.¹⁴⁵

Most current statutes and cases terminating parental rights now require a connection to be made between the parent's disability and his or her parenting behavior.¹⁴⁶ However, Watkins states: "[O]ld presumptions do not die easily, and presumptions of unfitness continue to subtly define the law's approach to parents labeled mentally retarded."¹⁴⁷ Presumptions of unfitness are most apparent where parental rights are terminated before the parent has ever had custody of the child.¹⁴⁸ Watkins writes: "Intervention in these cases often takes place before birth, even though the parent has not done anything to harm or threaten to harm the child."¹⁴⁹ These cases are

¹⁴² Chris Watkins, Comment, *Beyond Status: The Americans with Disabilities Act and the Parental Rights of People Labeled Developmentally Disabled or Mentally Retarded*, 83 CAL. L. REV. 1415, 1438 (1995).

¹⁴³ *Id.* (emphasis added).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* (citing *In re Jennilee T.*, 4 Cal. Rptr. 2d 101, 103 (Ct. App. 1992) (involving a six-day-old infant); *R.G. v. Marion County Office, Dep't of Family & Children*, 647 N.E.2d 326, 327 (Ind. Ct. App. 1995) (involving a newborn infant); *Adoption of Abigail*, 499

(continued)

relatively common, and parents usually do not contest termination.¹⁵⁰ According to Watkins, these parents either do not establish a strong bond with the child or they give in to pressure from social services.¹⁵¹

Florida has terminated parental rights using the theory of “prospective neglect” in situations where the parent has not had custody of the child nor acted abusively or neglectfully toward the child.¹⁵² Under the theory, courts can terminate parental rights because it appears a parent will not be able to provide child support in the future, even though the court lacks proof that the parent abused or neglected the child.¹⁵³

The theory of prospective neglect is demonstrated by the case *In re C.N.G.*, where a child was born to a sixteen year-old mother living in foster care herself.¹⁵⁴ To regain custody, the mother had to acquire housing, attain gainful employment by the time of her graduation, and learn parenting skills.¹⁵⁵ When the mother could not do so, her parental rights were terminated despite never harming or holding custody of the child.¹⁵⁶ The trial court found that because of the mother’s below average

N.E.2d 1234, 1235 (Mass. App. Ct. 1986); (involving a sixteen-day-old infant); *In re J.Y.*, 502 N.W.2d 860, 861 (S.D. 1993) (involving a newborn)).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* Watkins states:

It is not uncommon for parents with disabilities to consent to adoption in order to retain some parental rights rather than risk losing all their parental rights. For example, perhaps the most famous disabled parent, Tiffany Callo, agreed to allow her two boys to be adopted so that she could retain visitation rights. Jay Mathews, *Custody Battle: The Disabled Fight to Raise Their Children*, WASH. POST, Aug. 18, 1992, at Z10. Callo had cerebral palsy and was diagnosed, apparently incorrectly, as mentally retarded. Her first child was declared a dependent of the court three weeks after the child’s birth, and her second child was removed when the child was only two days old. Callo continues to visit both children, who were adopted by different families.

Id. at 1437 n. 127.

¹⁵² *Id.* at 1438–39 (citing *In re J.Z.*, 636 So. 2d 726 (Fla. Dist. Ct. App. 1993)).

¹⁵³ *Id.* at 1439 (citing *In re C.N.G.*, 531 So. 2d 345, 346 (Fla. Dist. Ct. App. 1988) (Coward, J., dissenting)).

¹⁵⁴ *In re C.N.G.*, 531 So. 2d at 346.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 345–46.

intelligence, the child's best interest was to have no relationship with the mother.¹⁵⁷ This decision was upheld by the Florida Court of Appeal.¹⁵⁸

Other states also utilize presumptions of unfitness in termination proceedings. Pennsylvania's termination statute permits parental termination after "repeated and continued incapacity, abuse, [or] neglect . . . and the conditions and causes . . . cannot or will not be remedied by the parent."¹⁵⁹ Watkins states: "At least one Pennsylvania court has interpreted this statute to mean that the status of being 'irremediably' developmentally disabled is sufficient to meet this statutory ground for termination."¹⁶⁰ In *In re P.A.B.*, the Superior Court of Pennsylvania found that the parents had made considerable effort to maintain a relationship with their removed children and attended activities designed to improve their parenting skills.¹⁶¹ The appellate court found that the parents met the statutory grounds for termination because their children had been removed for six months; that the conditions requiring removal (i.e. the parents' disabilities) persisted; the parents could not or would not remedy the conditions (become un-disabled) within a reasonable time; and reunification services were not likely to remedy the conditions.¹⁶² Watkins analyzed the court's decision by stating: "The court seemed to disregard the possibility that the parents might become 'capable' within the meaning of the statute, even with assistance."¹⁶³

However, the appellate court also considered the best interest of the children.¹⁶⁴ The appellate court could not guarantee that the children would be adopted and noted the parental bond with the children.¹⁶⁵ As a result, "these parents were spared: they retained the right to visit their children, although the children remained in foster care."¹⁶⁶ Watkins

¹⁵⁷ *Id.* at 345 n.1 (describing various psychological reports submitted to the trial court with differing assessments of the mother's IQ ranging from forty-three to seventy-five).

¹⁵⁸ *Id.* at 345 (per curiam) (majority opinion).

¹⁵⁹ 23 PA. CONS. STAT. ANN. § 2511(a)(2) (2001).

¹⁶⁰ Watkins, *supra* note 142, at 1439 (citing *In re P.A.B.*, 570 A.2d 522 (Pa. Super. Ct. 1990)).

¹⁶¹ *In re P.A.B.*, 570 A.2d at 523.

¹⁶² *Id.* at 525.

¹⁶³ Watkins, *supra* note 142, at 1440.

¹⁶⁴ *In re P.A.B.*, 570 A.2d at 528.

¹⁶⁵ *Id.*

¹⁶⁶ Watkins, *supra* note 142, at 1440.

believed that if adoptive parents were found, then the “best interests” test would favor “severing the disabled parents’ rights altogether, unless those parents consented to adoption.”¹⁶⁷

B. Does the Court System Perpetuate Stereotyping?

From other states, implementation issues and stereotypes about the probability of future improvement can be found. Alexis Collentine also attempts to explain the layers of discrimination facing parents with disabilities. Collentine states: “An inherent problem in this group of statutes is that the termination is not simply based on the parent’s past actions but on predictions about their future ones as well.”¹⁶⁸ These statutes usually require that the mental disability render the parent unlikely to be able to care for the child within a reasonable time¹⁶⁹ or that the parent be “unable to discharge parental responsibilities . . . for a prolonged indeterminate time.”¹⁷⁰ The following examples discuss the use of conjecture by judges in determining parental unfitness.

In re Zelzack recognized a conflict between different panels of the Michigan Court of Appeals in considering whether Michigan law required two years of parental non-improvement to lapse before parental rights could be terminated, or whether the court could merely anticipate that there would be no likelihood of improvement within two years. The court agreed with the second interpretation.¹⁷¹ The court stated that the law required “only that the mental deficiency preclude proper care for two years without likelihood of improvement.”¹⁷² Furthermore, the court found that “the two-year period is anticipatory and need not elapse prior to the termination of parental rights.”¹⁷³ The court quickly dismissed the issue, leaving no room for discussion about the degree of care or standard a judge must maintain in projecting a parent’s behavior in the future.

¹⁶⁷ *Id.*

¹⁶⁸ Alexis C. Collentine, Note, *Respecting Intellectually Disabled Parents: A Call for Change in State Termination of Parental Rights Statutes*, 34 HOFSTRA L. REV. 535, 554 (2005).

¹⁶⁹ COLO. REV. STAT. § 19-3-604(b)(I) (2008).

¹⁷⁰ NEB. REV. STAT. § 43-292(5) (2004).

¹⁷¹ 446 N.W.2d 588, 591 (1989).

¹⁷² *Id.*

¹⁷³ *Id.*

In *In re Melissa LL.*,¹⁷⁴ a New York appellate court held that the mere possibility that a mentally retarded parent's condition, with proper treatment, could improve in the future was insufficient to vitiate the family court's decision to terminate parental rights based on mental retardation using section 384-b(4)(c) and (6)(b) of the New York Social Services Law.¹⁷⁵ The court makes a determination of whether the parent is mentally retarded under section 384-b(6)(b).¹⁷⁶ A finding of mental retardation seems to create the presumption of unfitness under the New York statute.¹⁷⁷ The court relied on expert testimony by a court-appointed psychologist that concluded the father had a low IQ, was mildly retarded, impulsive, and had unresolved anger management issues.¹⁷⁸ The court stated: "This evidence clearly and convincingly established that respondents are mentally retarded and, based on that condition, presently are, and will for the foreseeable future be, unable to adequately care for their children."¹⁷⁹ Determining the parent is mentally retarded seems to be a prima facie case that the parent will be unable to care for their child for the foreseeable future. This standard allows courts to overlook parents with mental retardation that are able to learn and become good parents. With this statute, these parents are never given the chance because their mental retardation means that they will be unable to improve.

In other states a presumption of unfitness has been present for parents with mental retardation in termination proceedings. Despite statutory and case law language indicating that termination should only be found when

¹⁷⁴ 817 N.Y.S.2d 407 (App. Div. 2006).

¹⁷⁵ *Id.* at 409.

¹⁷⁶ *Id.* at 408 (citing N.Y. SOC. SERV. LAW § 384-b(6)(b) (McKinney 2003)) (defining "mental retardation" as "subaverage intellectual functioning which originates during the developmental period and is associated with impairment in adaptive behavior to such an extent that if such child were placed in or returned to the custody of the parent, the child would be in danger of becoming a neglected child as defined in the family court act").

¹⁷⁷ *Id.* (citing § 384-b(4)(c)) ("The parent or parents, whose consent to the adoption of the child would otherwise be required in accordance with section one hundred eleven of the domestic relations law, are presently and for the foreseeable future unable, by reason of mental illness or mental retardation, to provide proper and adequate care for a child who has been in the care of an authorized agency for the period of one year immediately prior to the date on which the petition is filed in the court.").

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

there is proof of inadequate care from mental disability, commentators have suggested that there may be a presumption of unfitness for parents with mental retardation.¹⁸⁰

Cases have been reported in which the parents' rights were terminated because the parents would not be able to care for the child even when there was no evidence of abuse or neglect.¹⁸¹ In other cases, the child was separated shortly after birth and never returned, and the court found that due to the parent's disability, it was unlikely the parent could care for the child.¹⁸²

In these cases, little effort is made to provide rehabilitative services designed to help the parents regain custody of their children.¹⁸³ The pertinent statutes do not emphasize rehabilitative services. Similarly, statutes do not prioritize reunification efforts, which whether unintentional or not, suggests that the legislation itself reflects a belief that parents with disabilities are unable to learn how to parent properly. Issues with reunification efforts are discussed further below.

C. Reunification Efforts

Reunification efforts are another area where termination has caused controversy. Chris Watkins states, "Perhaps the most blatant element of discrimination in the entire termination process is the routine failure to offer reunification services to parents labeled developmentally disabled or mentally retarded solely on the basis of their disability."¹⁸⁴ Most termination statutes require, explicitly or implicitly, that the state provide

¹⁸⁰ See, e.g., Robert L. Hayman, Jr., *Presumption of Justice: Law, Politics and the Mentally Retarded Parent*, 103 HARV. L. REV. 1201, 1239 (1990); Randy A. Hertz, Note, *Retarded Parents in Neglect Proceedings: The Erroneous Assumption of Parental Inadequacy*, 31 STAN. L. REV. 785, 786, 789 (1979); Phillip J. Prygoski, *When a Hearing is Not a Hearing: Irrebuttable Presumptions and Termination of Parental Rights Based on Status*, 44 U. PITT. L. REV. 879, 904 (1983).

¹⁸¹ Watkins, *supra* note 142, at 1438 (citing *R.G. v. Marion County Office, Dep't. of Fam. & Children*, 647 N.E.2d 326 (Ind. Ct. App. 3d Dist. 1995); *Adoption of Abigail*, 499 N.E.2d 1234 (Mass. App. Ct. 1986); *In re Orlando F.*, 351 N.E.2d 711 (N.Y. 1976)).

¹⁸² See, e.g., *S.T. v. Dep't of Human Res.*, 579 So. 2d 640, 642 (Ala. Civ. App. 1991); *In re J.Y.*, 502 N.W.2d 860, 861-63 (S.D. 1993).

¹⁸³ See, e.g., *In re J.Y.*, 502 N.W.2d at 863 (Henderson, J., dissenting).

¹⁸⁴ See Watkins, *supra* note 142, at 1444.

reunification services to parents before termination is possible.¹⁸⁵ However, most of these statutes create an exception when “clear and convincing” evidence supports a finding that the parents’ condition cannot be changed.¹⁸⁶ This is referred to as “dual liability.”¹⁸⁷ Watkins stated: “A parent’s disability often serves as a dual liability: her disability first leads to initial intervention, and then precludes her from an opportunity to regain custody of her child.”¹⁸⁸

Alexis Collentine found that while parenting classes will not work for every disabled parent, “a number of studies have documented programs that have successfully taught parenting skills to cognitively delayed parents.”¹⁸⁹ These studies determined that the parent-child relationship dictates parental fitness and not IQ levels.¹⁹⁰ In a study directed at self-learning, researchers focused on teaching child care, safety, and health, and found that parents were able to learn the skills and maintain them over eighty percent of the follow-up period.¹⁹¹ Collentine stated: “Ideally, such parenting services would be provided before the parents come into contact with the child welfare system.”¹⁹² Collentine concluded:

The statutes themselves need to evolve further to fit a modern understanding of mentally delayed parents and to effectively meet these statutes’ stated goal of protecting children, either in their family of origin or with an adoptive or foster family. By eliminating the classifications of “mental deficiency” and “mental retardation” from their termination of parental rights statutes, the states will be removing a provision that is

¹⁸⁵ See, e.g., CAL. WELF. & INST. CODE § 361.5(a) (West 2008); N.Y. SOC. SERV. LAW § 384-b(7) (McKinney 2003).

¹⁸⁶ See, e.g., CAL. WELF. & INST. CODE § 361.5(b) (West 2008).

¹⁸⁷ Watkins, *supra* note 142, at 1444.

¹⁸⁸ *Id.*

¹⁸⁹ Collentine, *supra* note 168, at 555 (citing Barbara Y. Whitman et al., *Training in Parenting Skills for Adults with Mental Retardation*, 34 SOC. WORK 431, 433 (1989)).

¹⁹⁰ See *id.* at 555–56.

¹⁹¹ *Id.* at 556 (citing Maurice A. Feldman & Laurie Case, *Teaching Child-Care and Safety Skills to Parents with Intellectual Disabilities Through Self-Learning*, 24 J. INTELL. & DEVELOPMENTAL DISABILITY 27, 42 (1999)).

¹⁹² *Id.*

discriminatory, based on out-moded thinking, and not protective of children. It is not in the best interests of the child, the parent, or the state to define unfitness with a characteristic that has no correlation to the ability to parent.¹⁹³

Nina Wasow found California's use of mental disability as a proxy for permanent inability to parent safely lacked practical and theoretical justification.¹⁹⁴ She asserted:

The mental disability provision of the "reunification bypass" law allows the state to deny the normal twelve months of casework, visitation and social services to a parent whose child has been removed due to abuse or neglect when, in the opinion of two experts, the parent has a mental disability which renders her incapable of utilizing such services or parenting adequately in the near future.¹⁹⁵

In fact, the statute lists around fifteen circumstances including mental disability where the court does not have to order reunification services.¹⁹⁶ Wasow found that many appellate cases revealed that "the courts have serious difficulties coping with expert evidence, tend to ignore the substantive requirements of the law, and fail to take seriously the constitutional issues that the law involves."¹⁹⁷

D. The Weight Given to Mental Disability

The question of how much a parent's mental disability should be considered when termination is sought on other grounds is another concern many states have confronted. This is another implementation issue that Ohio courts may struggle with in the future now that mental disability, alone, is an insufficient ground to terminate parental rights.

¹⁹³ *Id.* at 564 (citation omitted).

¹⁹⁴ Nina Wasow, *Planned Failure: California's Denial of Reunification Services to Parents with a Mental Disability*, 31 N.Y.U. REV. L. & SOC. CHANGE 183, 183 (2006).

¹⁹⁵ *Id.* (citing CAL. WELF. & INST. CODE § 361.5 (West 2008)).

¹⁹⁶ *Id.* at 185 (citing § 361.5(b)).

¹⁹⁷ *Id.* at 184.

In re M.F. involved the state of Illinois seeking termination of a mentally ill mother's rights on the statutory ground of unfitness.¹⁹⁸ The Fourth District Appellate Court of Illinois held that a two-pronged analysis was necessary to determine whether a parent is unfit due to a mental disability.¹⁹⁹ Under the first prong, competent evidence from expert testimony must show that the parent suffers from a mental disability that prevents him or her from properly undertaking parental duties.²⁰⁰ Secondly, the court must find sufficient justification to believe that the inability to perform parental duties will extend beyond a reasonable period of time.²⁰¹ Unlike in *In re Melissa LL.*,²⁰² the court considered the history of the parent and the steps the parent has made to complete reunification efforts in considering whether their disability makes them unfit for the foreseeable future.²⁰³ Mental disability, alone, does not serve as complete proof of unfitness for the foreseeable future.²⁰⁴ This case is helpful due to its implementation of a test that other courts should follow.

The Supreme Court of Indiana in *Egly v. Blackford County Dept. of Public Welfare* terminated a couple's parental rights for being incapable of adequately interacting with their children.²⁰⁵ The lower court had interpreted a provision of the Indiana Code to require that the parent-child relationship pose a threat to the survival of the child, but the Indiana Supreme Court found that when there is a threat to the child's emotional and physical development, termination is warranted.²⁰⁶ The parents had received ongoing assistance from social services, yet were unable to understand what they were taught and had not made any significant progress in the way they interacted with or cared for their children.²⁰⁷ The court found the children were far behind normal development in basic skills such as crawling, speaking, and toilet training.²⁰⁸ In fact, the court

¹⁹⁸ 762 N.E.2d 701, 704 (Ill. App. Ct. 2002).

¹⁹⁹ *Id.* at 705.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² 817 N.Y.S.2d 407, 408 (App. Div. 2006).

²⁰³ *In re M.F.*, 762 N.E.2d at 705-06.

²⁰⁴ *Id.* at 705.

²⁰⁵ 592 N.E.2d 1232 (Ind. 1992).

²⁰⁶ *Id.* at 1234.

²⁰⁷ *Id.* at 1235.

²⁰⁸ *Id.*

seemed to focus on the children's progress away from their parents. The court stated: "[T]he children progressed quickly to age and intellect appropriate skills while away from the parents."²⁰⁹ The court relied heavily on the fact that social workers observed "no change in the interaction between parents and children" and that the "only improvement seen by a social worker who saw the Eglys twice a week was in the cleanliness of the home."²¹⁰ From these findings, the court found that the parents' mental limitations impacted their parenting ability and placed the children's well-being at risk.²¹¹

How much weight expert testimony is given in termination proceedings is another important issue for parents with disabilities. In *In re Cheryl Y.Y.*,²¹² two clinical psychologists differed in their views on whether the mother's I.Q. score was within the range of "mental retardation" within their professional classifications, but both agreed that she was mentally retarded within the meaning of the statute's criteria for termination.²¹³ The law defined mental retardation as "subaverage intellectual functioning that originates during the developmental period and is associated with impairment in adaptive behavior to such an extent that if the custody of the child was given to the parent, the child would be in danger of becoming a neglected child."²¹⁴ The court accepted one psychologist's testimony that the mother's mental deficiencies, coupled with the special needs of her children, created risks for lapses in judgment and the children becoming neglected because of their special needs that placed demands on the mother that were beyond her abilities.²¹⁵ Both experts agreed that there was little likelihood that providing additional services to the mother would improve her parenting abilities.²¹⁶ The court held that the expert testimony established by clear and convincing evidence

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² 754 N.Y.S.2d 705 (App. Div. 2003).

²¹³ *Id.* at 706.

²¹⁴ *Id.* (quoting N.Y. SOC. SERV. LAW § 384-b(6)(b) (Mckinney 2003)).

²¹⁵ *Id.* at 706-07.

²¹⁶ *Id.* at 707.

that the mother, by reason of mental retardation, was unable to care for her children for the foreseeable future.²¹⁷

What is troublesome about *In re Cheryl Y.Y.* is that the experts could not even properly determine the respondent's IQ level; yet the New York Supreme Court, Appellate Division is willing to find their testimony to be "clear and convincing" of her unfitness.²¹⁸ It seems that expert testimony is being relied upon too heavily in this case as evidenced by the court not addressing any testimony by caseworkers or others involved with the family.²¹⁹ Furthermore, there is no discussion about reunification services before termination was approved.²²⁰

In *People ex rel. A.J.*,²²¹ a Colorado appellate court upheld the trial court's conclusion that the mother was unfit and would likely continue to be unfit within a reasonable time to meet the child's needs.²²² The psychiatrist who performed the mother's psychological evaluation concluded that due to her mental health issues and lack of parenting skills, she would not be able to provide a stable environment for her child.²²³

In *In re H.F.G.*,²²⁴ the Court of Appeals of Georgia found sufficient evidence to support the trial court's termination of the mother's parental rights as in the best interest of the child.²²⁵ The mother had completed most of her case plan goals and wished to be a part of the child's life.²²⁶ The caseworker commented that she "could not say whether [the mother] was a fit parent[;] however, she explained that in order to prove she is a fit parent, [the mother] must 'prevent the problems that basically brought the child into foster care.'"²²⁷ The caseworker stated that to be fit, the mother should be able to "provide [for] the basic needs of the child."²²⁸ The court still found that the mother lacked mental capacity to care for the child

²¹⁷ *Id.*

²¹⁸ *See id.*

²¹⁹ *See id.* at 706–07.

²²⁰ *See id.*

²²¹ 143 P.3d 1143 (Colo. Ct. App. 2006).

²²² *Id.* at 1153.

²²³ *Id.*

²²⁴ 635 S.E.2d 338 (Ga. Ct. App. 2006).

²²⁵ *Id.* at 341–42.

²²⁶ *Id.* at 341.

²²⁷ *Id.* at 340.

²²⁸ *Id.*

without assistance and was unable to independently fulfill her parenting responsibilities.²²⁹ The child had been in foster care for three years and his foster parents wanted to adopt him.²³⁰ Although there was no evidence that the child had been harmed, the court asserted it was not obligated to return the child and wait until he actually had been harmed.²³¹

Interestingly, the Georgia termination statute is extremely flexible, and parental rights could be terminated with a finding of parental misconduct or inability and that it is in the best interest of the child for termination to occur.²³² Parental misconduct happens when (1) the child is deprived; (2) lack of proper parental care or control is causing the deprivation; (3) the cause of the deprivation is likely to continue or will not likely be remedied; and (4) continued deprivation is likely to cause serious physical, mental, emotional, or moral harm to the child.²³³ If the court finds clear and convincing evidence of parental misconduct or inability, then the court must consider the physical, mental, emotional and other needs of the child to determine whether termination is in the child's best interest.²³⁴

This section demonstrates some of the issues involved with the weight given to expert testimony, especially in regard to caseworkers who often cannot be objective and have strong personal feelings as to whether the parents should be allowed to retain custody of their children. These issues are also encountered in Ohio. The following section details the statutory requirements for termination of parental rights in Ohio.

IV. WHAT IS REQUIRED OF OHIO COURTS?

In Ohio, a finding of mental disability, alone, is insufficient to terminate parental rights according to the recent Ohio Supreme Court decision of *In re D.A.*²³⁵ The question still remains what is sufficient, as the Ohio Supreme Court just recently promulgated this position. In *In re D.A.*, the Ohio Supreme Court stated: "Despite making several findings regarding the parents' limited cognitive abilities, the trial court did not find

²²⁹ *Id.* at 341.

²³⁰ *Id.* at 340.

²³¹ *Id.* at 341.

²³² GA. CODE ANN. § 15-11-94(a), (b)(4)(A)(i-iv) (2008).

²³³ *Id.* § 15-11-94(b)(4)(A)(i-iv).

²³⁴ *Id.* § 15-11-94(a).

²³⁵ 862 N.E.2d 829, 835-36 (Ohio 2007).

that appellants were unable to provide an adequate home for D.A. due to their mental retardation, a finding that is required to satisfy section 2151.414(E)(2).”²³⁶ Therefore, mental disability coupled with the inability of the parents to provide a safe home environment is sufficient to terminate parental rights.

Ohio Revised Code section 2151.414(E)(2) states as grounds for removal “[c]hronic mental illness, chronic emotional illness, mental retardation, physical disability, or chemical dependency of the parent that is so severe that it makes the parent unable to provide an adequate permanent home for the child at the present time and, as anticipated, within one year after the court holds the hearing.”²³⁷ The Ohio Supreme Court stated: “As for what would be in D.A.’s best interest, the trial court again focused on his parents’ limited cognitive abilities.”²³⁸ The Ohio Supreme Court rejected this, asserting that the trial court should have focused on factors in section 2151.414(D), including the parents’ relationship with their child, whether the parents had ever harmed the child, and where the child would like to live.²³⁹

Under the Ohio Revised Code, the court must conduct a hearing in accordance with section 2151.35 to determine if it is in the best interest of the child to permanently terminate parental rights and grant permanent custody to the agency that filed the motion.²⁴⁰ The court must determine by clear and convincing evidence that it is in the best interest of the child to grant permanent custody of the child to the agency.²⁴¹

The best-interest-of-the-child factors include whether the child is abandoned,²⁴² orphaned with no other relatives able to take custody,²⁴³ or has been “in the temporary custody of one or more public children services agencies or private child placement agencies for twelve or more months of a consecutive twenty-two month period.”²⁴⁴ In addition, if “the child

²³⁶ *Id.* at 835.

²³⁷ OHIO REV. CODE ANN. § 2151.414(E)(2) (LexisNexis 2007).

²³⁸ *In re D.A.*, 862 N.E.2d at 835.

²³⁹ *Id.* (citing § 2151.414(D)).

²⁴⁰ § 2151.414(A)(1).

²⁴¹ *Id.*

²⁴² *Id.* § 2151.414(B)(1)(b).

²⁴³ *Id.* § 2151.414(B)(1)(c).

²⁴⁴ *Id.* § 2151.414(B)(1)(d).

cannot be placed with either of the child's parents within a reasonable time or should not be placed with the child's parents," then termination is warranted.²⁴⁵

The court will enter a finding that the child cannot be placed with either parent within a reasonable time or should not be placed with either parent typically based on two separate factors for parents with mental disabilities. Severe mental retardation to the point where the parent is unable to provide an adequate permanent home is one factor for termination.²⁴⁶ Another factor typically resulting in termination is that the parents cannot remedy the issue leading to removal of the child within a reasonable time.²⁴⁷ The specific statutory language is as follows:

Following the placement of the child outside the child's home and notwithstanding reasonable case planning and diligent efforts by the agency to assist the parents to remedy the problems that initially caused the child to be placed outside the home, the parent has failed continuously and repeatedly to substantially remedy the conditions causing the child to be placed outside the child's home.²⁴⁸

The court can consider several factors in determining whether the parents remedied the conditions leading to removal. The court must consider parental utilization of medical, psychiatric, psychological, and other social and rehabilitative services and resources that were made available to the parents to change their conduct.²⁴⁹ If the parents successfully utilized services to remedy the conditions, they are allowed to resume and maintain custody.²⁵⁰

Another factor is whether the parent has demonstrated a lack of commitment toward the child by failing to regularly support, visit, or communicate with the child when able to do so.²⁵¹ The statute is somewhat

²⁴⁵ *Id.* § 2151.414(B)(1)(a).

²⁴⁶ *Id.* § 2151.414(E)(2).

²⁴⁷ *Id.* § 2151.414(E)(1).

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.* § 2151.414(E)(4).

ambiguous by stating “or by other actions showing an unwillingness to provide an adequate permanent home for the child.”²⁵²

Now that the statutory guidelines have been discussed, Ohio courts’ interpretations of the pertinent statutory guidelines will illuminate how the statute operates in termination proceedings. The following cases demonstrate how Ohio courts have implemented statutory language. These cases also showcase the difficulties in applying the statutory factors that are ambiguous and often covertly discriminatory towards parents with disabilities.

A. Current Ohio Cases

In *In re Bair*,²⁵³ the Ohio Court of Appeals for the Fifth District held that a social worker’s testimony was admissible as lay opinion testimony, the board provided reasonable reunification services, and the evidence supported a finding that the child could not be placed with the mother within a reasonable time.²⁵⁴ Upon Tasha’s birth, the trial court granted RCCSB emergency shelter care of the child, based upon the mother’s mental health problems and low mental functioning and intellectual limitations, given Tasha’s special medical needs.²⁵⁵ Although the mother had completed her required parenting classes as part of her case plan, the social worker assigned to her case voiced concerns over her ability to parent.²⁵⁶ The social worker’s testimony was given significant weight over the mother’s progress with her case plan. The mother was never given the opportunity to prove that she could be a good parent for her child because the child had been placed with children services since birth. The caseworkers testimony was given more credence over the mother’s progress with her case plan, and the ambiguous “reasonable” time frame made it easy for the judge to terminate parental rights.

The case of *In re Porter*²⁵⁷ is an example of the “catch twenty-two” that Collentine describes where the parent’s past behavior dictates

²⁵² *Id.*

²⁵³ No. 02CA13, 2002 WL 31116692 (Ohio Ct. App. Sept. 10, 2002).

²⁵⁴ *Id.* at *2–4.

²⁵⁵ *Id.* at *1.

²⁵⁶ *Id.*

²⁵⁷ Nos. 21080, 21089, 2002 WL 31060270 (Ohio Ct. App. Sept. 18, 2002).

foreseeable future behavior.²⁵⁸ The mother asserted that the grant of permanent custody to CSB was erroneous because she substantially complied with her case plan.²⁵⁹ However, the court found that substantial compliance, alone, did not prove that a grant of permanent custody to an agency was erroneous.²⁶⁰ The court stated that section 2151.414(E)(1) of the Ohio Revised Code:

indicates that if the agency conducts “reasonable case planning and diligent efforts” to assist the parents in resolving the conditions which caused the initial removal of the children and the parents fail to substantially remedy those conditions, then the court is required to find that the child cannot be placed with the parents within a reasonable time.²⁶¹

According to the court, section 2151.414(E) does not require an agency to use reasonable and diligent efforts and emphasized the fact that the mother’s parental rights to a sibling of W.P. had already been terminated under section 2151.414(E)(11).²⁶² The court stated:

Because there was an additional basis under [section] 2151.414(E) [of the Ohio Revised Code] upon which the trial court determined that W.P. could not be placed with Mother within a reasonable time or should not be placed with Mother, we need not consider the effect of Mother’s compliance with the case plan and the application of [section] 2151.414(E)(1).²⁶³

The court found that W.P. could not be placed within a reasonable time or should not be placed with the parents because of the mother’s mental retardation; the fact that she scored in the low to average range of intellectual functioning; and that she had problems applying what she

²⁵⁸ See Collentine, *supra* note 168, at 554.

²⁵⁹ *In Re Porter*, 2002 WL 31060270, at *1.

²⁶⁰ *Id.* at *8 (citing *In re Watkins*, No. 17068, 1995 WL 513118, at *6 (Ohio Ct. App. Aug. 30, 1995)).

²⁶¹ *Id.* (quoting *In re Jones*, No. 20766, 2002 WL 576104, at *7 (Ohio Ct. App. Apr. 17, 2002)).

²⁶² *Id.*

²⁶³ *Id.*

learned.²⁶⁴ The mother's psychological test results indicated depression, a cynical viewpoint, a tendency to ignore the advice of others, and impulsiveness, which the court found dispositive, despite the psychologist also finding a willingness to look at the positive aspects of life and the negative aspects of self in proportion.²⁶⁵ However, the court placed the most emphasis on domestic violence in the home and the potential for future harm to the child and also emphasized the father's failure to remedy conditions inside the home.²⁶⁶

In *In re Sadie R.*,²⁶⁷ the mother's full scale IQ was sixty-seven, which was within the borderline category of mild mental retardation.²⁶⁸ The court found that social service agency was not required to make reasonable efforts to prevent the child's removal from the mother's home due to its previous efforts with the mother's first child and that child's removal.²⁶⁹ The fact that the mother was previously provided extensive services and parenting classes in order to prevent the removal of her first child, yet showed no ability to learn necessary parenting skills, warranted termination of her parental rights.²⁷⁰ Additionally, the appellate court reiterated the trial court's finding that the mother's "chronic mental retardation [and] chronic mental illness was . . . so severe that it makes her unable to provide an adequate permanent home for the child at the present time, and as anticipated, within one year."²⁷¹ The weight given to the mother's mental retardation would no longer be acceptable in Ohio.

B. Other Factors Considered

In *In re Griffin*,²⁷² the appellate court stated that the trial court must consider all relevant evidence.²⁷³ If any of the statutory factors are present, the trial court must find that the child cannot or should not be placed with

²⁶⁴ *Id.* at *7.

²⁶⁵ *Id.* at *4.

²⁶⁶ *Id.* at *7.

²⁶⁷ No. L-04-1057, 2005 WL 195489 (Ohio Ct. App. Jan. 28, 2005).

²⁶⁸ *Id.* at *3.

²⁶⁹ *Id.* at *4.

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² No. CA99-01-020, 1999 WL 1271029 (Ohio Ct. App. Dec. 27, 1999).

²⁷³ *Id.* at *3.

the parent.²⁷⁴ The trial court found by clear and convincing evidence that the daughter, Chrisalyn, could not be reunited with her mother despite the best efforts of child services.²⁷⁵ The trial court found “a substantial probability that Chrisalyn would be adopted and that granting permanent custody to BCCSB was in her best interest.”²⁷⁶

Although the mother made substantial efforts in completing the case plan approved by the trial court, the court found that she had “failed to implement many of the skills taught in parenting and development classes.”²⁷⁷ Furthermore, the court found that the mother’s mental illness prevented her from establishing a safe and nurturing environment where her daughter could be raised.²⁷⁸ Her home was found to be in an unclean condition and that she had never established a bond with her daughter after over one hundred visitation sessions.²⁷⁹ Furthermore, the mother would ask how much time was left in a visitation.²⁸⁰ These actions warranted the termination of her parental rights.²⁸¹

The most important consideration for the court was that the appellant failed to understand the major risk her own mother posed to her daughter’s health and safety.²⁸² The appellant’s mother had sexually abused appellant.²⁸³ The fact that appellant minimized this conduct and stated that she believed her mother was not a threat to her children was striking to the court.²⁸⁴ Lastly, the court relied on psychological evaluations that found appellant was ill-equipped to assume the responsibilities of adulthood and motherhood.²⁸⁵

²⁷⁴ *Id.* at *4 (citing OHIO REV. CODE ANN. § 2151.414(E) (LexisNexis 2007); *In re William S.*, 661 N.E.2d 738, 741 (Ohio 1996)).

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

In *In re Curry*,²⁸⁶ the court immediately cited to the fact that both the mother and the father “suffer” from mental retardation.²⁸⁷ The father had an IQ of fifty-two within the moderate mental retardation range.²⁸⁸ The mother had an IQ of sixty-nine in the mild mental retardation range, and neither parent had considerable reading skills.²⁸⁹ The two children were suffering from developmental delays ranging from ten to eighteen months.²⁹⁰ Children services had previously dealt with the parents over concerns for the older child’s care, and again when one of their younger sons was rushed to the doctor because of a case of impetigo.²⁹¹ The doctor informed the caseworker that the children were “filthy from top to bottom.”²⁹² Children services then filed a complaint alleging the children were neglected.²⁹³

The trial court found that the parents’ mental disabilities inhibited their ability to interact with the children in an appropriate way and to address the children’s developmental delays.²⁹⁴ The appellate court stated: “While the evidence reveals that [the mother] loves her children, the evidence also reveals that [the mother] cannot provide the special care and attention that her children deserve.”²⁹⁵ The appellate court also focused on the foster mother’s ability to appropriately address the children’s developmental delays and to provide the children with needed special care and attention.²⁹⁶

In regard to securing a permanent placement, the appellate court relied on evidence showing that the children thrived while placed in the stable home of the foster mother.²⁹⁷ The court found that the parents failed to demonstrate that they were capable of or were willing to provide the

²⁸⁶ No. 03CA51, 2004 WL 307476 (Ohio Ct. App. Feb. 11, 2004).

²⁸⁷ *Id.* at *1.

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.* at *7.

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.*

children with a nurturing home environment.²⁹⁸ The court noted: “The guardian ad litem, WCCS caseworkers, and the children’s physical therapist all stated that the parents [were] unable to retain information they learned regarding maintaining a safe home and addressing the children’s developmental delays.”²⁹⁹ They believed that the parents’ mental disabilities prohibited them from providing for their children physically and intellectually.³⁰⁰ As a result, the appellate court agreed with the trial court that a legally secure permanent placement could not be achieved without a grant of permanent custody to children services.³⁰¹

As a result, the appellate court awarded permanent custody to children services.³⁰² The court stated: “[The parents] have not shown that they possess the mental capacity to address the children’s own developmental delays. Without proper intervention, the children will continue to suffer.”³⁰³

V. SUGGESTIONS FOR CHANGE

Parents with mental disabilities lose their children to the court system at an alarming rate.³⁰⁴ Commentators have observed that child welfare agencies and experts tend to presume that parents with mental disabilities are unfit to maintain parental relationships, regardless of their capabilities.³⁰⁵ However, researchers have demonstrated that parents with disabilities can act as competent and loving parents with accommodation.³⁰⁶ While not all parents with disabilities can retain

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.* at *8.

³⁰⁴ See, e.g., David McConnell & Gwynnyth Llewellyn, *Stereotypes, Parents with Intellectual Disability and Child Protection*, 24 J. SOC. WELFARE & FAM. L. 297, 299–300 (2002) (presenting studies estimating rates between thirty-three percent and fifty percent).

³⁰⁵ See, e.g., Susan Kerr, *The Application of the Americans with Disabilities Act to the Termination of Parental Rights of Individuals with Mental Disabilities*, 16 J. CONTEMP. HEALTH L. & POL’Y 387, 401–03 (2000).

³⁰⁶ Brief for the American Association on Intellectual and Developmental Disabilities et al. as Amici Curiae Supporting Petitioner at 6, *Irving N. v. R.I. Dep’t. Children, Youth, & Families*, 127 S. Ct. 1372 (2007) (No. 06-603), 2007 WL 275955 (citing Maurice A.

(continued)

custody of their children, many are capable but lack the support needed to keep the children they love.

Case law throughout the country reveals many problems with the court system, including biases and stereotypes that persist today. While Ohio is moving in the right direction toward achieving equity and justice in termination of parental rights proceedings, more can be done to fix the problems still permeating termination of parental rights proceedings. As a result, suggestions for change are included in the next section.

A. Statutory Time Frames

The statutory time frame that most state statutes require creates many issues for both parents and courts, alike. For instance, Ohio has two statutory periods that are both ambiguous and difficult to implement. The first time period is whether or not the court finds that the child can be placed with either parent within a reasonable time or should not be placed with either parent at all.³⁰⁷ The first time period is defined by reasonableness—whether or not the court finds that the child can be placed with either parent within a reasonable time or should not be placed with either parent at all.³⁰⁸ However, a “reasonable” period of time is ambiguous and makes it difficult to establish uniformity in applying the law.

A reasonable time frame is also qualified, in terms of mental disability, with whether the parent could improve in an anticipated time frame of one year.³⁰⁹ Most people view a mental disability as an incurable and permanent condition.³¹⁰ Therefore, with this viewpoint in mind, it is quite unlikely that any court would find that a parent with a mental disability would be able to provide an adequate permanent home for the child within one year after the court holds the hearing.

Feldman, *Parenting Education for Parents with Intellectual Disabilities: A Review of Outcome Studies*, 15 RES. DEVELOPMENTAL DISABILITIES 299, 301 (1994); Feldman & Case, *supra* note 191, at 28). The Amicus Brief was filed after the Rhode Island Supreme Court held that Title II of the Americans with Disabilities Act does not apply to parental right termination proceedings. *In re Kayla N.*, 900 A.2d 1202, 1208 (R.I. 2006).

³⁰⁷ OHIO REV. CODE ANN. § 2151.414(E) (LexisNexis 2007).

³⁰⁸ *See id.*

³⁰⁹ *Id.*

³¹⁰ *See, e.g.,* Kerr, *supra* note 305, at 405.

The word “severe” is also not defined by the statute.³¹¹ How severe any mental disability is at a given time is up to interpretation. People with disabilities can be taught to make improvements in their parenting abilities. The statute bases improvement upon whether it can be anticipated within one year.³¹² This can lead judges, children services, and lawyers to assume that no improvement could possibly be made and to push for termination in cases where a parent could progress, given the right habilitation services he or she may need.

The other statutory requirement that leads to termination is that the parents have failed continuously and repeatedly to substantially remedy the conditions causing the child to be placed outside the home.³¹³ This is almost like a “catch-all” where the court can find any condition to be continuous. A mental disability cannot be “cured,” and if the court finds other conditions have not changed, such as cleanliness or that the parents have not retained the parenting skills from habilitation services, it is easy for a court to terminate based on lack of remedy.

B. Services Before Court Intervention

A related issue is that often, parenting problems are caught entirely too late in a child’s life to allow the parents time to learn and implement better parenting skills. MMRD or children services that are geared to new parents with disabilities that provide classes while the parents are expecting and after the child is born would help to prevent the problems that lead to children being underdeveloped and other psychological and health issues. Termination proceedings are often brought after the parents have struggled for several years without parenting help or supervision. If supervision and classes were provided before problems arose, perhaps the parents would be able to provide a safe, nurturing environment for their children. The court intervenes entirely too late in the process, resulting in termination of parental rights. An anticipated year is not enough to remedy deficient parenting skills that should have been addressed before the children were even born.

I think these issues call for children services and MRDD services to work together to develop a program for women with disabilities who are

³¹¹ See § 2151.414(E).

³¹² *Id.* § 2151.414(E)(2).

³¹³ *Id.* § 2151.414(E)(1); see also *supra* notes 241–252 and accompanying text.

expecting. Furthermore, if a program or even another agency were developed, family members and friends of the parents with disabilities could also help to enroll the parents in a program geared toward their parenting education, if the parents themselves are initially resistant. Early intervention needs to occur. People with disabilities are capable of learning parenting skills to care for their children and provide a safe environment. The “horror” stories that are told from courtroom transcripts could be prevented. However, the state must be willing to intervene and provide programs that do not begin once the children have already developed psychological and health problems. Early intervention could also further reunification efforts and make the services available for reunification more efficient if the social workers are not starting from “ground zero” with parents who have had absolutely no guidance.

C. Reunification Services

Reunification services are often not emphasized by judges and social workers, alike, who believe that a parent with a disability cannot learn and retain the knowledge he or she needs to provide for their child. This fundamental attitude is reflected in the fact that many courts do not require that an agency provide significant reunification services when the situation seems difficult or impossible.³¹⁴ Having such stringent time constraints on the ability of parents to remedy the conditions that led to removal means that reunification services are not emphasized by the courts or children services agencies. A situation that has been several years in the making cannot be remedied overnight. Breaking behavioral patterns takes intense habilitative services, and in order for reunification services to work, the time frame needs to be enlarged. Of course, it is easy theoretically to demand these changes, and much more difficult in reality to get not only the funding, but people who are willing to make the time commitments to truly work with the parents and at least give them a fighting chance to keep their children.

Although not a focus of this comment, the Americans with Disabilities Act was another route suggested by the Amici Curiae in the Petition for Certiorari in *Irving N. v. Rhode Island Department of Children, Youth, and*

³¹⁴ See *supra* notes 117–118 and accompanying text.

Families.³¹⁵ Amici Curiae asserted that Title II of the Americans with Disabilities Act³¹⁶ applies to state termination proceedings. Amici stated: “[B]efore acting to terminate parental rights, the State must do what the ADA requires: ensure that it has provided reasonable accommodation of the parent’s intellectual disability, or that it has taken into account how the parent’s capabilities could improve if reasonable accommodations were afforded.”³¹⁷ According to the Amici, the ADA’s purpose is to prevent purposeful, unequal treatment resulting from “stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.”³¹⁸ Amici stated: “When state courts target people with intellectual disabilities for harsher treatment during termination of parental rights proceedings, they violate the rights to equal treatment and to individualized assessment” that are safeguards under the ADA.³¹⁹ Although the Writ of Certiorari was denied for the case,³²⁰ the issue is still open for future decisions.

D. Standard of Review

Another issue is the standard of clear and convincing evidence on appeal. The standard should be proof beyond a reasonable doubt. I suggest this because of the difficulties reflected in “cold records.” For instance, in *State ex rel J.P.A.*,³²¹ discussed earlier, the dissenting judge commented on the fact that the trial court had dealt with the case for around four years, and that the trial court’s judgment should not be overturned by an appellate court when dealing with termination of parental rights.³²² The appellate court is reviewing a case based on the written words detailing the trial proceedings, but this cannot reflect the character and overall feel for the parents. This cannot reflect the mentality of the case workers and psychologists. You cannot see hostilities, prejudices,

³¹⁵ See Brief for the American Association on Intellectual and Developmental Disabilities et al. as Amici Curiae Supporting Petitioner, *supra* note 306.

³¹⁶ 42 U.S.C. § 12132 (2000).

³¹⁷ Brief for the American Association on Intellectual and Developmental Disabilities et al. as Amici Curiae Supporting Petitioner, *supra* note 306, at 7.

³¹⁸ *Id.* at 11 (quoting 42 U.S.C. § 12101(a)).

³¹⁹ *Id.*

³²⁰ *Irving N. v. R.I. Dep’t. Children, Youth, & Families*, 127 S. Ct. 1372 (2007).

³²¹ 928 So. 2d 736 (La. Ct. App. 2006).

³²² *Id.* at 742 (Genovese, J., dissenting).

stereotypes, and doubts that parents with disabilities face about their abilities to parent. With a higher standard of review, more parents deserving of another chance and more time would be able to keep their children. When a parent's condition is enumerated by statute, such as mental disabilities are, parents with disabilities are specifically targeted, and a higher standard of review would protect these individuals from presumptions about their lack of ability to learn and parent.

Along with the standard of review and reunification services, I believe that the weight given to evidence, such as caseworker testimony and psychiatric and psychological specialists should be given credibility with caution. Courts tend to rely more heavily, in most instances, on caseworker testimony. However, I think this should be very cautious. Often, caseworkers may be frustrated with the parents or even develop the attitude that parents with disabilities should not be able to keep their children. Although caseworkers are attempting to help, they are also trying to protect the interests of the children as well. Caseworkers also may have lost their objectivity in the situation, and might not see improvements by parents because they have firmly cemented the idea that parents cannot provide a safe environment for their children.

VI. CONCLUSION

In this field of law, there are no easy answers. Making decisions about terminating parental rights is complicated and intense without even considering a parent's mental disability. The cases discussed in this article reveal the difficulties courts have in implementing the statutory guidelines for parents with disabilities. The nuanced capabilities of the parents make setting a timeline for improvement within one year almost impossible. Furthermore, courts are dealing with parents that have other complications, such as lack of employment and housing, which also make terminating parental rights almost easier when the parents have a mental disability.

In light of these problems, I suggest that change must occur. The court system cannot intervene at the last minute when problems have already compiled into an insurmountable obstacle. Agencies need to be working with parents from the beginning of their pregnancy. Issues such as work, housing, and parenting abilities cannot be fixed overnight. If agencies seek early intervention, the odds of parents being able to keep their children may improve.

Statutory frameworks need to change as well to reflect the reality of parents with disabilities. It is far too easy to anticipate that a parent will not be able to remedy their disability or the conditions that led to removal in one year and to terminate parental rights with guidance such as this.

Alternatives should be made available to replace permanent termination when the parents are making great improvements, but are not enough within a year to keep their children.

While a parent's love for his or her child may not be enough to keep the child, there should be alternatives so that those making steady improvements are given a chance to fight for custody. The court system is currently stacked against them.