

# Termination of Parental Rights of the Mentally Ill: An Analysis of Washington Law

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## TABLE OF CONTENTS

I. INTRODUCTION . . . . .	490
II. OVERVIEW OF MENTAL ILLNESS . . . . .	491
III. OVERVIEW OF TERMINATION OF PARENTAL RIGHTS . . . . .	492
IV. TERMINATION OF PARENTAL RIGHTS LAWS— WASHINGTON LAW . . . . .	494
A. <i>Juvenile Court Act—Dependency and Termination of         Parent-Child Relationship</i> . . . . .	494
B. <i>Dependency Stage</i> . . . . .	496
C. <i>Termination of Parental Rights Stage</i> . . . . .	498
1. Order Terminating Parent Child Relationship- Petition-Filing-Allegations . . . . .	499
2. Order Terminating Parent and Child Relationship- Findings . . . . .	501
V. WASHINGTON SHOULD ADOPT A STATUTE CONTAINING A MENTAL ILLNESS DEFINITION AND A STATUTE THAT IS SOLELY DEDICATED TO MENTALLY ILL PARENTS . . . . .	503
A. <i>Mental Illness Definition</i> . . . . .	503
1. Washington Law . . . . .	503
2. Mental Illness Definitions in Other Termination of Parental Rights Laws . . . . .	505
B. <i>Termination of Parental Rights Statute Solely         Dedicated to Mentally Ill Parents</i> . . . . .	506
1. Texas Termination of Parental Rights Laws and the Mentally Ill . . . . .	507
a. Texas Statute . . . . .	507
b. Texas Case Law . . . . .	508

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2. Why Washington Should have a Termination of Parental Rights Law Solely Dedicated to Mentally Ill Parents . . . . .	509
VI. CONCLUSION . . . . .	510

## I. INTRODUCTION

Termination of the most fundamental right of adults—the right to care for one’s children—remains one of the more difficult duties facing Washington courts. In such situations, the courts of this state look to termination of parental rights statutes.<sup>1</sup> Termination is necessary when a parent is abusive, neglectful, or remiss in parenting roles, regardless of the parent’s intent.<sup>2</sup> Termination statutes protect children from parents who act in a manner detrimental to the child’s well-being.<sup>3</sup> Increasingly, Washington courts have addressed termination of the parental rights of convicts,<sup>4</sup> drug addicts,<sup>5</sup> or people with deficiencies that complicate parenting.

Among the last group of parents are the mentally ill. In recent years, the mentally ill have overcome many obstacles due to a more tolerant and educated society, as well as favorable legal decisions regarding discrimination, equal protection, and equal opportunity.<sup>6</sup> Despite recent progress, however, concern continues to surround the issue of whether mentally ill parents receive equal treatment in parental termination procedures. Questions remain as to whether Washington’s termination guidelines adequately address the needs of a mentally ill parent to ensure that termination is absolutely necessary.

This Comment analyzes Washington’s termination of parental rights laws to demonstrate how the state, through its use of both the Department of Social and Health Services (“D.S.H.S.”) and the courts, addresses the termination of parental rights of the mentally ill.<sup>7</sup> Section II provides an overview of mental

1. See generally WASH. REV. CODE §§ 13.34.010-.810 (2000 & Supp. 2001).

2. See WASH. REV. CODE § 13.34.020 (2000) (stating that the intent of Washington’s termination statutes is to promote the interests of the child).

3. *Id.*

4. See *In re A.T.*, 109 Wash. App. 709, 712-15, 34 P.3d 1246, 1248-49 (2001).

5. See *In re J.W.H.*, 106 Wash. App. 714, 726, 24 P.3d 1105, 1112 (2001).

6. See Americans With Disabilities Act of 1993, 42 U.S.C. §§12181-12189 (1998); *Olmstead v. L.C. ex rel Zimring*, 527 U.S. 581, 607 (1999).

7. This Comment will consider only those mentally ill parents suffering from psychological or emotional disorders (i.e., schizophrenia, bipolar disorder, depression, multiple personalities, suicidal tendencies) that are “conceptualized as a clinically significant behavioral or psychological syndrome” and “considered a manifestation of a behavioral, psychological, or biological dysfunction in the individual.” DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, xxx-xxxi (4th ed., text rev. 2000). However, a mentally ill parent does *not* include a mentally retarded or mentally deficient parent or a parent with a low

illness and its effects on American society. The next section presents an overview of termination of parental rights laws, including a summary of basic elements contained in many termination of parental rights statutes. Section IV analyzes Washington's termination of parental rights statutes specifically,<sup>8</sup> detailing the allegations required in a termination petition<sup>9</sup> and the findings necessary for a termination order.<sup>10</sup> Finally, Section V analyzes Washington statutes addressing termination of parental rights and their application to mentally ill parents<sup>11</sup> by comparing Washington termination of parental rights laws with those of other states. This Comment advocates that in order for the State to adequately protect the parental rights of the mentally ill, Washington must (1) define "mental illness" in the termination of parental rights statutes, and (2) dedicate a statute *solely* to mentally ill parents.

## II. OVERVIEW OF MENTAL ILLNESS

Generally speaking, a mental illness is "any disorder that affects the mind or behavior."<sup>12</sup> Other sources define a mental illness as a "mental or emotional disease, disturbance, or disorder. . . ."<sup>13</sup> Many people suffer from a mental illness. One study found that approximately 22.1% of Americans 18 or older "suffer from a diagnosable mental disorder in a given year."<sup>14</sup> Another found that of the ten foremost causes of disability in developed countries, four are mental disorders, including schizophrenia, bipolar disorder, and depression.<sup>15</sup>

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intellectual functioning capacity. See Anne M. Payne, J.D., Annotation, *Parent's Mental Deficiency as Factor in Termination of Parental Rights—Modern Status*, 1 A.L.R. 5th 469, 488 & n.1 (1992) (discussing the termination of parental rights of mentally retarded and mentally deficient parents). Also, this Comment does *not* include parents who suffer from alcohol or drug abuse in the definition of a mentally ill parent.

8. See generally WASH. REV. CODE §§ 13.34.010-.810 (2000 & Supp. 2001).

9. WASH. REV. CODE § 13.34.180 (2000 & Supp. 2001); see *infra* notes 69-88 and accompanying text.

10. WASH. REV. CODE § 13.34.190 (2000); see *infra* notes 89-110 and accompanying text.

11. Most of the cases cited in this Comment refer to the termination of the parental rights of mentally ill mothers, while few discuss the termination of rights of both parents. Although many cases address the parental rights of mentally ill fathers, the majority of such fathers did not appeal the termination.

12. TABER'S CYCLOPEDIA MEDICAL DICTIONARY, 1196-97 (17th ed. 1993).

13. ON-LINE MEDICAL DICTIONARY, at <http://cancerweb.ncl.ac.uk/cgi-bin/omd?mental+illness> (last visited May 9, 2002).

14. Nat'l Inst. of Mental Health, *The Numbers Count: Mental Illness in America*, available at <http://www.nimh.nih.gov/publicat/numbers.cfm> (last visited June 6, 2002) [hereinafter *The Numbers Count*].

15. *Id.* For a description of the types of mental illnesses and their treatments, see generally Krista A. Gallager, Note, *Parents In Distress: A State's Duty to Provide*

Mental illness can lead to a diminished capacity to adapt to everyday needs.<sup>16</sup> For example, a parent who suffers from a mental illness may not be able to face the everyday task of caring for a child. As a result, the right of a mentally ill parent to care for his or her child may come into question.

### III. OVERVIEW OF TERMINATION OF PARENTAL RIGHTS

Termination of parental rights is governed by state statute. Many termination statutes “were enacted or substantially revised contemporaneously with the expansive growth of other laws dealing with child abuse and neglect.”<sup>17</sup> Although each state has its own termination procedures, most termination statutes share common elements.

First, a report of abuse, neglect, or abandonment must be made “to an appropriate state agency or law enforcement official.”<sup>18</sup> Statutes usually define abuse, neglect, or abandonment through a temporal element.<sup>19</sup> If evidence shows the child is in danger, the child may be removed from the home and placed in foster care.<sup>20</sup> If the state cannot remedy the situation in the short-term, it will ask for court intervention.<sup>21</sup> Courts often conduct hearings regarding the child’s needs for finances, clothing, food, or anything else that

*Reunification Services to Mentally Ill Parents*, 38 FAM. & CONCILIATION CTS. REV. 234 (2000).

16. Gallagher, *supra* note 15, at 235.

17. Douglas E. Cressler, *Requiring Proof Beyond A Reasonable Doubt In Parental Rights Termination Cases*, 32 J. FAM. L. 785, 788 (1993-94).

18. *Id.*

19. For example, Florida and Idaho provide that abandonment occurs when the parent fails to maintain any type of normal relationship with the child for least one year. *See* FLA. STAT. ANN. § 39.806(1)(e) (West Supp. 2002); IDAHO CODE § 16-2005(a) (Michie 2001), *amended by* 2002 Idaho Sess. Laws 233. On the other hand, Louisiana statutes consider abandonment to occur when the parent fails to maintain contact with the child for at least six months. LA. CODE JUV. PROC. ANN. art. 1015(4)(a)-(b) (West Supp. 2000). Wyoming considers abandonment when the parent has left the child for three months and cannot be located. WYO. STAT. ANN. § 14-2-309(a)(ii) (Michie 2001). Wisconsin has the a time span of two to six months, depending on the circumstances. WIS. STAT. ANN. § 48.415(1)-(3)(a)(1) (West Supp. 2001). Nebraska and North Carolina have statutes that do not allow termination to be considered unless a child has been abandoned six months prior to the date of the petition. *See* NEB. REV. STAT. § 43-292(1) (1998); N.C. GEN. STAT. § 7B-1111(7) (2002). An Oklahoma statute, on the other hand, states that a child is abandoned when the parent fails to communicate with the child for “six consecutive months out of the last fourteen months, immediately preceding the filing of a petition for termination of parental rights.” OKLA. STAT. ANN. tit. 10 § 7006-1.1(2)(c) (West Supp. 2002).

20. Cressler, *supra* note 17, at 788 (citing MODEL JUVENILE COURT ACT §§ 13-16 (1987); 43 C.J.S. *Infants* §§ 71, 73 (1978)).

21. *Id.* (citing MODEL JUVENILE COURT ACT §§ 13-17 (1987); 43 C.J.S. *Infants* §§ 36-38, 71-72 (1978)).

could improve the child's lifestyle.<sup>22</sup> During these hearings, the court may keep the child separated from the parent.<sup>23</sup> The court considers the parent's fitness to care for the child<sup>24</sup> or whether specific abuse, such as neglect, sexual abuse, or abandonment is present.<sup>25</sup> During this time, the state provides services aimed towards reunifying the family.<sup>26</sup> These services may include supervised visits or counseling.<sup>27</sup> However, upon evidence that the services are not working or have no chance of working, the state may initiate termination proceedings.<sup>28</sup>

When the state intervenes in the parent-child relationship, efforts to reunite the family must be made to protect the parent's Fourteenth Amendment due process rights. The United States Supreme Court held that a parent's right to retain custody and control of his or her child is a fundamental constitutional right.<sup>29</sup> In *Santosky*, the Supreme Court held that parents have a "fundamental liberty interest" in the care, protection, and custody of their child under the Fourteenth Amendment.<sup>30</sup> The Court held that this right is not lost when a

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22. In Alaska, for example, a child must be deemed a "child in need of aid." ALASKA STAT. § 47.10.011 (Michie 2000). In Iowa and Maryland, a child must be "in need of assistance." IOWA CODE ANN. § 232.2(6) (West 2000); MD. CODE ANN., FAM. LAW § 5-313(a)(2) (1999). In Kansas, statute requires the child to be "in need of care." KAN. STAT. ANN. § 38-1583(a) (2000). Finally, in Wisconsin the child must be "in need of protection or services." WIS. STAT. ANN. § 48.415(2) (West Supp. 2001).

23. Cressler, *supra* note 17, at 788.

24. For example, Colorado, Illinois, Minnesota, and Rhode Island consider a parent to be unfit if a parent fails to discharge parental responsibilities as a result of a condition such as mental illness. See COLO. REV. STAT. ANN. § 19-5-105(3.1)(a)(I) (West 2001); 750 ILL. COMP. STAT. ANN. § 50/1 (West 1999); MINN. STAT. ANN. § 260C.301(1)(b)(2) (West Supp. 2000); R.I. GEN. LAWS § 15-7-7(e) (2000).

25. See MO. REV. STAT. § 211.447.4(2)(c) (Supp. 1999); *In re T.G.*, 965 S.W.2d 326, 333 (Mo. Ct. App. 1998).

26. Cressler, *supra* note 17, at 788.

27. See, e.g., LA. CHILDREN'S CODE ANN. art. 1036 (1995); WASH. REV. CODE § 13.34.136 (2000).

28. Cressler, *supra* note 17, at 788-89.

29. *Santosky v. Kramer*, 455 U.S. 745, 758-59 (1982). The Santoskys had three children removed from their home and placed with foster parents after incidents of "parental neglect." *Id.* at 751. When termination proceedings began, the Santoskys argued that the New York statute's "fair preponderance of the evidence" standard violated their due process rights. *Id.* The trial judge rejected their argument and terminated their parental rights. *Id.* at 751-52. On appeal, the Santoskys again challenged the statute's standard of review as an unconstitutional violation of a fundamental right. *Id.* at 752. However, the New York Court of Appeals held "the preponderance of the evidence standard 'proper and constitutional'" because "no substantial constitutional question [was] directly involved." *Id.* In holding the New York statute unconstitutional, the Supreme Court based its decision on three factors: "the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." *Id.* at 754 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

30. *Id.* at 753.

parent is perceived as a less than model parent or has temporarily lost custody.<sup>31</sup> In addition, the Court held that any termination must be supported by “clear and convincing evidence,” a standard of proof that “adequately conveys to the factfinder the level of subjective certainty about his factual conclusions necessary to satisfy due process.”<sup>32</sup> Therefore, in a proceeding prior to or during termination, state agencies must use all available services to satisfy due process and support termination with clear and convincing evidence.

#### IV. TERMINATION OF PARENTAL RIGHTS LAWS— WASHINGTON LAW

Washington’s termination laws<sup>33</sup> apply to parents of children who have been declared dependent by D.S.H.S.<sup>34</sup> The relevant laws are discussed below.

##### *A. Juvenile Court Act—Dependency and Termination of Parent-Child Relationship*

Sections 13.34.010-.810 (“Juvenile Court Act”) of the Revised Code of Washington govern dependency and termination of parental rights.<sup>35</sup> The Juvenile Court Act essentially revised the state’s juvenile justice system.<sup>36</sup> The creation of the Juvenile Court Act was prompted by two events. First, the United States Supreme Court held that a juvenile is entitled to due process when sentenced to an institution.<sup>37</sup> This holding caused a chain reaction of

31. *Id.*

32. *Id.* at 745.

33. *See generally* WASH. REV. CODE §§ 13.34.010-.810 (2000 & Supp. 2001).

34. *See* WASH. REV. CODE § 13.34.025 (Supp. 2001). This section took effect on July 22, 2001, pursuant to the Washington State Constitution, Article 2, Section 41. “The department of social and health services serves parents and children with multiple needs, which cannot be resolved in isolation. Further, the complexity of service delivery systems is a barrier for families in crisis when a child is removed or a parent is removed from the home. The department must undertake efforts to streamline the delivery of services.” § 13.34.025.

35. The Juvenile Court Act was introduced and referred to the Committee on Institutions on January 24, 1977 with the goal of “revising the juvenile justice and care system.” 3rd S.H.B. 371, 45th Leg., 1st Ext. Sess., at 38 (Wash. 1977). After two substitute bills and several revisions by both the state legislature and senate, section 13.34 was signed by Governor Dixy Lee Ray on June 18, 1977. S.B. 371, 45th Leg., 1st Ext. Sess. (Wash. 1977); 1977 Wash. Laws 291, 1042.

36. Wash. 3rd S.H.B. 371, at 38.

37. *In re Gault*, 387 U.S. 1, 41 (1967). The Gault’s 15-year-old son was taken into custody after a complaint that he and a friend made “lewd” telephone calls. *Id.* at 4. The juvenile court sentenced him to the Arizona Industrial School as a juvenile delinquent until he reached the age of majority. *Id.* at 7. The parents filed a writ of habeas corpus arguing that

legislative revisions spanning juvenile confinement as well as other juvenile court practices such as “committing truants, runaways, and incorrigible children to juvenile correctional institutions.”<sup>38</sup> Second, Congress passed the Juvenile Justice and Delinquency Prevention Act of 1974.<sup>39</sup> This Act required states to remove children who committed non-criminal acts from “correctional facilities and detention centers by August 1977.”<sup>40</sup> As a result, the Washington State Legislature was required to reform its juvenile statutes.<sup>41</sup> Since its passage in 1977, the Juvenile Court Act has been known as “The Juvenile Court Act in Cases Relating to Dependency of a Child and the Termination of a Parent and Child Relationship.”<sup>42</sup>

Since the Washington Legislature changed the definitions of the Juvenile Court Act, various subsections were modified or recodified to clarify

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the Arizona Juvenile Code was an unconstitutional denial of due process. *Id.* at 8. The superior court dismissed the writ and the state supreme court affirmed. *Id.* at 9-10. The Supreme Court reversed, stating that the Arizona Juvenile Code impliedly requires due process in juvenile proceedings, including the son’s juvenile proceedings. *Id.* at 30-31. In addition, the Court stated that due process requires that adequate notice be given to both the son and the parents on the “specific charge on factual allegations” at the “earliest practicable time” in order to prepare for the hearing. *Id.* at 33. Once informed of the proceeding, parents are entitled to counsel, not “an intentional relinquishment or abandonment’ of a fully known right.” *Id.* at 41-42. The Court also stated that due process includes a juvenile’s right against self-incrimination and the right to confrontation. *Id.* at 55-56.

38. Wash. 3rd S.H.B. 371, at 38.

39. Pub. L. No. 93-415, 88 Stat. 1109 (1974); 42 USC §§ 3811-3814, 3821, 3882, 3883, 3888 (1974). These statutes were later omitted when appropriations were not authorized for fiscal years after 1974. See Pub. L. No. 92-381, 86 Stat. 532 (1972).

40. See Wash. 3rd S.H.B. 371, at 38.

41. *Id.* This was in spite of prior attempts to bring Washington’s juvenile laws “into conformity with current practice and recent events.” *Id.*

42. WASH. REV. CODE § 13.34.010 (2000). When Section 13.34 was initially enacted in 1977, one of the provisions stated, “The legislature declares that the family unit is a fundamental resource of American life which should be nurtured. Toward the continuance of this principle, the legislature declares that the family unit should remain intact in the absence of compelling evidence to the contrary.” See Basic Juvenile Court Act, ch. 291, § 30, 1977 Wash. Laws 1002, 1013. However, this legislative declaration has evolved and now proclaims:

[T]he family unit is a fundamental resource of American life which should be nurtured. Toward the continuance of this principle, the legislature declares that the family unit should remain intact *unless a child’s rights to conditions of basic nurture, health, or safety is jeopardized. When the rights of basic nurture, physical and mental health, and safety of the child and the legal rights of the parents are in conflict, the rights and safety of the child should prevail. In making reasonable efforts under this chapter, the child’s health and safety shall be the paramount concern. This right of a child to basic nurturing includes the right to a safe, stable, and permanent home and a speedy resolution of any proceeding under this chapter.*

WASH. REV. CODE § 13.34.020 (2000) (emphasis added).

dependency and termination hearings. Among such changes were revisions of the definitions of "abandoned" and "dependent children."<sup>43</sup> These technical changes not only made the Juvenile Court Act more efficient, but they also led to a more definitive process for determining whether termination is necessary.

The thrust of the Juvenile Court Act is in dependency and termination procedures.<sup>44</sup> Dependency must be proven prior to any termination proceeding. Each element will now be discussed in detail.

### B. *Dependency Stage*

The purpose of the dependency stage is to preserve and improve the family through state intervention.<sup>45</sup> In Washington, the dependency process begins with a report of child abuse or neglect.<sup>46</sup> A child is abused or neglected when the child suffers an injury, mistreatment, abuse, or exploitation in a manner that threatens the child's health, safety and welfare.<sup>47</sup> Any person who reasonably believes that a child suffers from abuse or neglect may report to D.S.H.S. or the police.<sup>48</sup> A person reporting neglect or abuse is immune from any civil or criminal liability that may arise from the report.<sup>49</sup> Anyone who is required to report abuse or neglect and fails to do so is guilty of a gross misdemeanor.<sup>50</sup>

43. The current definitions of "abandoned" and "dependent child" are as follows: "Abandoned" means when the child's parent, guardian, or other custodian has expressed, either by statement or conduct, an intent to forego, for an extended period, parental rights or responsibilities. . . . If the court finds that the petitioner has exercised due diligence in attempting to locate the parent . . . guardian, or other custodian for a period of three months creates a rebuttable presumption of abandonment, even if there is no expressed intent to abandon.

WASH. REV. CODE § 13.34.030(1) (2000).

"Dependent child" means any child who: (a) Has been abandoned; (b) Is abused or neglected as defined in chapter 26.44 RCW by a person legally responsible for the care of the child; or (c) Has no parent, guardian, or custodian capable of adequately caring for the child, such that the child is in circumstances which constitute a danger of substantial damage to the child's psychological or physical development.

WASH. REV. CODE § 13.34.030(4) (2000).

44. Kathleen Haggard, *Treating Prior Termination of Parental Rights As Grounds For Present Termination*, 73 WASH. L. REV. 1051, 1058 (1998).

45. *Id.* at 1059.

46. See WASH. REV. CODE § 26.44.010 (2000); WASH. REV. CODE § 13.34.040(1) (2000).

47. WASH. REV. CODE § 26.44.020(12) (2000).

48. WASH. REV. CODE § 26.44.030(3) (2000).

49. WASH. REV. CODE § 26.44.060 (2000); *Dunning v. Pacerelli*, 63 Wash. App. 232, 239, 818 P.2d 34, 38 (1991).

50. WASH. REV. CODE § 25.44.080 (2000).



Once a report is made, Child Protective Services (“C.P.S.”), a division of D.S.H.S., begins the dependency process. Anyone can file a petition in the county in which the child resides, alleging that the child is in need of services and requesting court intervention.<sup>51</sup> After a petition is filed, the court may order law enforcement, a probation counselor, or C.P.S. to take the child into custody.<sup>52</sup> The parent must be served with a copy of the petition and any supporting documentation.<sup>53</sup> If the child has been taken into protective custody prior to the filing of the petition, the entity with custody also must be served.<sup>54</sup>

Washington statutes provide that a child removed from the home must be immediately placed in shelter care.<sup>55</sup> When a child is placed in shelter care, C.P.S. must inform the parent of “the child having been taken into custody, the reasons why the child was taken into custody, and [the parent’s] rights . . . as soon as possible.”<sup>56</sup> Furthermore, “in no event shall notice be provided more than twenty-four hours after the child has been taken into custody.”<sup>57</sup> The parent is entitled to a shelter care hearing no later than seventy-two hours after the child is taken into custody.<sup>58</sup> During the shelter care hearing, a juvenile probation counselor must submit a recommendation as to whether shelter care should continue.<sup>59</sup> At this point, the court may return the child to the parent unless (1) reasonable efforts have not been made to make the child’s return home possible and (2) either the child has no parent or guardian to provide care

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51. WASH. REV. CODE § 13.34.040(1).

52. WASH. REV. CODE § 13.34.050(1) (2000). However, the court may only enter an order provided:

(a) A petition is filed with the juvenile court alleging that the child is dependent and that the child’s health, safety, and welfare will be seriously endangered if not taken into custody; (b) an affidavit or declaration is filed by the department in support of the petition setting forth specific factual information evidencing reasonable grounds that the child’s health, safety, and welfare will be seriously endangered if not taken into custody and at least one of the grounds set forth demonstrates a risk of imminent harm to the child. . . . and (c) the court finds reasonable grounds to believe the child is dependent and that the child’s health, safety, and welfare will be seriously endangered if not taken into custody.

*Id.*

53. WASH. REV. CODE § 13.34.050(3) (2000).

54. *Id.*

55. WASH. REV. CODE § 13.34.060(1) (2000). The statute also provides that the child can be placed with a person described in RCW 74.15.020(2)(a) so long as the child would not be jeopardized or that the efforts to reunite the child with the parent will not be hindered. § 13.34.060(1)(a).

56. WASH. REV. CODE § 13.34.060(2) (2000).

57. *Id.*

58. § 13.34.060(1)(b). Weekends and legal holidays are excluded from this time limit.

*Id.*

59. WASH. REV. CODE § 13.34.065(1) (Supp. 2001).

and supervision, the parent has been charged with custodial interference, or returning the child to the home would otherwise “present a serious threat of substantial harm” to the child.<sup>60</sup>

A court must conduct a factfinding hearing within seventy-five days of the filing of a dependency petition.<sup>61</sup> Within fourteen days, the court must conduct a dependency disposition hearing.<sup>62</sup> At this hearing, the court determines whether the child should be placed with a parent,<sup>63</sup> a relative,<sup>64</sup> or in licensed foster or group care.<sup>65</sup> If the court places the child with the parent, it must also provide a program “to alleviate the immediate danger to the child, to mitigate or cure any damage the child has already suffered, and to aid the parents so that the child will not be endangered in the future.”<sup>66</sup> On the other hand, if there is no reasonable belief “that the health, safety, or welfare of the child [will] be jeopardized, or that efforts to reunite the parent and child will be hindered,” the court can place the child with a relative.<sup>67</sup>

During the disposition hearing, the court must also provide a plan to return the child to the parent.<sup>68</sup> The plan outlines programs the parent must complete within a certain time frame in order to resume custody.<sup>69</sup> These programs may include drug treatment, counseling, and parenting classes.<sup>70</sup> If the parent refuses or does not adequately complete these programs, and the child cannot be returned home, such evidence can be used against a parent during termination proceedings.<sup>71</sup>

### C. Termination of Parental Rights Stage

Washington courts terminate parental rights only in the most compelling

60. WASH. REV. CODE § 13.34.065(2) (Supp. 2001); *see also* WASH. REV. CODE §§ 9A.40.060(2), .070(2) (2000) (setting forth the elements and punishments for custodial interference).

61. WASH. REV. CODE § 13.34.070(1) (2000). The seventy-five day requirement can be extended upon the showing of exceptional circumstances. *Id.*

62. WASH. REV. CODE § 13.34.110 (2000 & Supp. 2001).

63. WASH. REV. CODE § 13.34.130(1)(a) (2000).

64. WASH. REV. CODE § 13.34.130(1)(b) (2000).

65. *Id.*

66. § 13.34.130(1)(a).

67. § 13.34.130(1)(b).

68. WASH. REV. CODE § 13.34.136(1)(a) (2000). The plan may also outline, after termination of parental rights, that the child be placed for adoption, guardianship, permanent legal custody, long-term relative or foster care, or, if 16 or over, complete a responsible living skills program, or live independently. *Id.*

69. WASH. REV. CODE § 13.34.136(1)(b)(i) (2000).

70. Haggard, *supra* note 44, at 1061-62.

71. *See* WASH. REV. CODE 13.34.132(4)(g) (2000).

circumstances.<sup>72</sup> In addition, Washington courts only hear termination proceedings “after considerable efforts to cure parental deficiencies and reunify the family have failed.”<sup>73</sup> In termination proceedings, two sections of the Juvenile Court Act play a predominant role.<sup>74</sup>

### 1. Order Terminating Parent Child Relationship- Petition-Filing-Allegations

A termination petition must set out certain allegations. All allegations that are not established through clear and convincing evidence will result in an improper termination and grounds for appeal.<sup>75</sup>

A termination petition “may be filed in juvenile court by any party to the dependency hearing proceedings concerning that child.”<sup>76</sup> The petition must state that the dependent child resides in the county where the petition is filed<sup>77</sup> and must be served on the child (if over twelve-years-old), the parent, and other parties<sup>78</sup> involved in the termination proceedings.<sup>79</sup>

In addition, the petition must allege six factors. First, the court must have found that the child is dependent.<sup>80</sup> Second, the petition must show that “the court has entered a dispositional order” determining placement of the child.<sup>81</sup> Third, the child must have been removed from parental custody for at least six months following a dependency finding.<sup>82</sup> Fourth, the petition must state that all necessary and reasonably available services “capable of correcting the parental deficiencies within the foreseeable future have been expressly and understandably offered or provided.”<sup>83</sup> Fifth, the petition must allege that there is little chance that the conditions will improve in the near future.<sup>84</sup> Should the parents fail to substantially improve their parental deficiencies within twelve

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72. Haggard, *supra* note 44, at 1062 (citing *In re A.J.R.*, 78 Wash. App. at 229, 896 P.2d at 1032 (1990)).

73. *Id.*

74. See WASH. REV. CODE §§ 13.34.180, .190 (2000 & Supp. 2001).

75. See *supra* notes 29-32 and accompanying text.

76. WASH. REV. CODE § 13.34.180(1) (2000 & Supp. 2001).

77. WASH. REV. CODE § 13.34.040(1) (2000).

78. WASH. REV. CODE § 13.34.070(1) (2000).

79. § 13.34.180(1).

80. § 13.34.180(1)(a); see WASH. REV. CODE § 13.34.030(5) (2000).

81. § 13.34.180(1)(b); see also WASH. REV. CODE § 13.34.130 (2000).

82. § 13.34.180(1)(c).

83. § 13.34.180(1)(d); see also WASH. REV. CODE § 13.34.136 (2000) (requiring that the state provide the court a permanency plan of care with the goal of reuniting parent and child).

84. § 13.34.180(1)(e).

months of entry of a dispositional order, a rebuttable presumption exists that the condition will not be remedied.<sup>85</sup> The presumption only arises with a showing “that all necessary services reasonably capable of correcting the parental deficiencies within the foreseeable future have been clearly offered or provided.”<sup>86</sup> The court can also consider factors such as alcohol and drug use<sup>87</sup> and a parent’s “psychological incapacity or mental deficiency,”<sup>88</sup> so long as they demonstrate parental unwillingness or inability to accept state services.<sup>89</sup> Sixth, the petition must allege that the child’s prospects for “integration into a stable and permanent home” are clearly diminished.<sup>90</sup>

Other allegations, in addition to these six elements, can be made. For instance, the petition may allege that a parent cannot be found and no one has acknowledged maternity or paternity.<sup>91</sup> In such a case, parental rights may be terminated by default, provided the allegation is proven beyond a reasonable doubt.<sup>92</sup> The petition may also allege that the parent has been convicted of (1) murder or homicide by abuse of another child of the parent,<sup>93</sup> (2) manslaughter of another child of the parent,<sup>94</sup> (3) “[a]ttempting, conspiring or soliciting [a third-party] to commit” murder, homicide, or manslaughter,<sup>95</sup> or (4) assault against the child, or another child of the parent.<sup>96</sup> Should the court agree with the allegations set forth in the petition terminating parental rights, the court can then consider whether an order terminating parental rights is necessary.<sup>97</sup>

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85. *Id.*

86. *Id.*

87. § 13.34.180(1)(e)(i).

88. § 13.34.180(1)(e)(ii). For an in depth look into the parent’s psychological incapacity or mental deficiency, see *infra* Part V and accompanying text.

89. *See* § 13.34.180(1)(e).

90. § 13.34.180(1)(f).

91. WASH. REV. CODE § 13.34.180(2) (2000 & Supp. 2001).

92. *See In re C.R.B.*, 62 Wash. App. 608, 616, 814 P.2d 1197, 1202-03 (1991) (permitting default judgment in termination proceedings).

93. *See* WASH. REV. CODE § 13.34.180(3)(a) (2000 & Supp. 2001); *see also* WASH. REV. CODE §§ 9A.32.030, .050, .055 (2000) (defining first and second degree murder, and homicide by abuse).

94. *See* WASH. REV. CODE § 13.34.180(3)(b) (2000 & Supp. 2001); *see also* WASH. REV. CODE §§ 9A.32.060, .070 (2000) (defining manslaughter).

95. *See* WASH. REV. CODE § 13.34.180(3)(c) (2000 & Supp. 2001).

96. *See* WASH. REV. CODE § 13.34.180(3)(d) (2000 & Supp. 2001); *see also* WASH. REV. CODE §§ 9A.36.011, .021, .031, .041 (2000) (defining assault).

97. *See* WASH. REV. CODE § 13.34.190 (2000).

## 2. Order Terminating Parent and Child Relationship-Findings

The Juvenile Court Act gives the state several options of how to show that parental rights should be terminated.<sup>98</sup> So long as the petitioner shows “[t]he allegations contained in the petition . . . are established by clear, cogent, and convincing evidence,” or beyond a reasonable doubt (depending on the allegations), and termination is in the child’s best interest, the court may enter an order terminating all parental rights.<sup>99</sup>

The court may also enter an order terminating all parental rights after dependency<sup>100</sup> or dispositional hearings.<sup>101</sup> However, the court can only enter a termination order after the *two* requirements of section 13.34.190 are met.<sup>102</sup>

The first requirement for the order is complicated by the fact that there are four different ways to satisfy this requirement, each with different standards of proof.<sup>103</sup> For instance, the first requirement can be satisfied if all six required “allegations contained in the petition as provided in RCW 13.34.180(1) through (6) are established by clear, cogent, and convincing evidence.”<sup>104</sup> However, some allegations may be waived if they are proven beyond a reasonable doubt. For example, the termination order may be entered if “the provisions of RCW 13.34.180(1) (a), (b), (e), and (f) are established beyond a reasonable doubt . . . .”<sup>105</sup> If the state proves beyond a reasonable doubt that the child has been abandoned,<sup>106</sup> it does not have to show that the child has or will be removed or that any parenting services were provided.<sup>107</sup> Establishing these allegations in the petition beyond a reasonable doubt will satisfy the first requirement to enter the order.

Alternatively, if the child was found under circumstances where the parent’s location is unknown<sup>108</sup> and there is either no acknowledgment of paternity or maternity or no claim of custody within two months of the child’s

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98. *Id.*

99. *Id.*

100. *See* WASH. REV. CODE § 13.34.110 (2000 & Supp. 2001).

101. *See* WASH. REV. CODE § 13.34.130 (2000); *see also supra* notes 60-65 and accompanying text.

102. WASH. REV. CODE § 13.34.190.

103. *Id.*

104. *Id.*; *see also supra* notes 76-91 and accompanying text.

105. WASH. REV. CODE § 13.34.190(1)(b).

106. *See* WASH. REV. CODE § 13.34.030(1).

107. WASH. REV. CODE § 13.34.190(1)(b).

108. *See* WASH. REV. CODE § 13.34.180(2) (2000 & Supp. 2001).

discovery,<sup>109</sup> the first requirement is satisfied.<sup>110</sup> To determine whether these conditions “are established beyond a reasonable doubt, the court shall consider whether one or more of the ‘aggravated circumstances’ listed in RCW 13.34.132 exist.”<sup>111</sup> When the petitioner proves the allegations beyond a reasonable doubt, the first requirement for entry of the order is satisfied.

Another way to satisfy the first requirement is to establish “the allegation under R.C.W. 13.34.180(3) . . . beyond a reasonable doubt.”<sup>112</sup> So, if the court finds beyond a reasonable doubt that the parent has been convicted of murder, homicide by abuse, manslaughter, or assault against the child or another child of the parent, the first requirement for entering the order is satisfied.<sup>113</sup> The requirement is also met if a parent fails to comply with court-ordered treatment,<sup>114</sup> a child under three has been abandoned,<sup>115</sup> or the child was born of a sex-related crime or incest.<sup>116</sup> The allegations in the petition must be proven to the requisite degree of certainty before the court may focus on “the best interests of the child.”<sup>117</sup>

The second, and less complicated, requirement is whether termination is in

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109. *Id.*

110. WASH. REV. CODE § 13.34.190(1)(c).

111. *Id.*; see also WASH. REV. CODE §§ 13.34.180(1)(e)-(f) (2000 & Supp. 2001), WASH. REV. CODE § 13.34.132(4) (2000) (giving a list of “aggravated circumstances”). In determining whether “aggravated circumstances” exist, Washington courts are required to consider certain crimes and offenses committed by the parent and whether the parent’s past convictions will impair his or her parental abilities. § 13.34.132(4). Among the crimes and offenses the court “shall” consider are rape (WASH. REV. CODE § 13.34.132(4)(a); see also WASH. REV. CODE §§ 9A.44.073, 9A.44.076, .079 (2000)); criminal mistreatment of the child (WASH. REV. CODE § 13.34.132(4)(b); see also WASH. REV. CODE §§ 9A.42.020, .030 (2001)); assault of the child (WASH. REV. CODE § 13.32.132(4)(c); see also WASH. REV. CODE §§ 9A.36.011, .021, .120, .130 (2000)); “murder, manslaughter, or homicide by abuse of the child’s other parent, sibling, or another child” (WASH. REV. CODE § 13.34.132(4)(d); “attempting, soliciting, or conspiring to commit a crime” (WASH. REV. CODE § 13.34.132(4)(e)); or if the court finds that the parent to be sexually violent predator. WASH. REV. CODE § 13.34.132(4)(f).

112. WASH. REV. CODE § 13.34.190(1)(d) (2000). See also WASH. REV. CODE § 13.34.180(3) (2000 & Supp. 2001).

113. WASH. REV. CODE § 13.34.190(1)(d).

114. WASH. REV. CODE § 13.34.132(4)(g).

115. § 13.34.132(4)(h). See WASH. REV. CODE § 13.34.030(1) for the definition of “abandoned.”

116. § 13.34.132(4)(i). The sex offenses in Washington include rape (WASH. REV. CODE §§ 9A.44.040, .050, .060 (2000)), rape of a child (WASH. REV. CODE §§ 9A.44.073, .076, .079 (2000)), child molestation (WASH. REV. CODE §§ 9A.44.083, .086, .089 (2000)), sexual misconduct (WASH. REV. CODE §§ 9A.44.093, .096 (2000)), and custodial sexual conduct with a minor (WASH. REV. CODE §§ 9A.44.160, .170 (2000)).

117. *In re H.W.*, 92 Wash. App. 420, 425, 961 P.2d 963, 966 (1998).

the child's best interests.<sup>118</sup> Essentially, the court must conclude that, on the basis of all the evidence, it is in the best interests of the child to terminate parental rights.<sup>119</sup> If the court determines that termination is not in the child's best interest, the court cannot enter the order.<sup>120</sup> To do so is an abuse of discretion and grounds for appeal.<sup>121</sup> Regardless of which combination of allegations the petitioner uses, the first and second requirements must be proven in order to terminate parental rights.

## V. WASHINGTON SHOULD ADOPT A STATUTE CONTAINING A MENTAL ILLNESS DEFINITION AND A STATUTE THAT IS SOLELY DEDICATED TO MENTALLY ILL PARENTS

The dependency and termination procedures found in the Juvenile Court Act apply to *all* parents.<sup>122</sup> However, more protection should be afforded to mentally ill parents. Lawmakers have enacted legislation providing institutions, at-home services, medication, and other benefits to the mentally ill.<sup>123</sup> Although the Juvenile Court Act provides courts with initial, basic steps to determine whether a parent's mental illness impairs the ability to care for a child, more must be done. The following are two suggestions Washington lawmakers should adopt to ensure that a mentally ill parent is provided more protection.

### A. *Mental Illness Definition*

#### 1. Washington Law

Washington does not define mental illness in its termination statute.<sup>124</sup> When considering a parent's mental illness, the court is limited to examining:

Psychological incapacity . . . of the parent that is so severe and chronic as to render the parent incapable of providing proper care for the child for extended periods of time . . . and documented unwillingness of the parent

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118. WASH. REV. CODE § 13.34.190(2) (2000).

119. See *In re J.B.S.*, 123 Wash.2d 1, 8-9, 863 P.2d 1344, 1348 (1993) (stating that, according to legislative pronouncement, the child's interests must be considered and will outweigh the interest of a parent).

120. *In re A.V.D.*, 62 Wash. App. 562, 571-72, 815 P.2d 277, 282-83 (1991).

121. *Id.* at 571, 815 P.2d at 282.

122. *In re H.S.*, 94 Wash. App. 511, 527, 973 P.2d 474, 484 (1999), *cert. denied*, 529 U.S. 1108 (2000).

123. See WASH. REV. CODE § 72.23 (2000).

124. See WASH. REV. CODE § 13.34.030 (2000) (providing definitions of certain terms mentioned in the Juvenile Court Act).

to receive and complete treatment or documentation that there is no treatment that can render the parent capable of providing proper care for the child in the near future.<sup>125</sup>

Therefore, Washington courts must determine that (1) the parent's mental illness limits the parent's ability to care for the child for a period of time, (2) the parent is unwilling to accept and complete any parental services provided by the D.S.H.S., and (3) the parent's unwillingness results in no treatment to improve care for the child.<sup>126</sup>

Although this law provides a method for courts to respond to a parent's mental illness, the Juvenile Court Act does not define "psychological incapacity."<sup>127</sup> Washington courts are left to make that determination within the totality of the circumstances.<sup>128</sup> Although judges have general ideas on mental illness, it is quite likely that they have little or no direct experience with a mentally ill person. With a statutory definition of mental illness, courts would have a better understanding of how a parent is suffering and how the illness can be treated. As a result, courts could better ascertain the manner in which the illness affects the parent's ability to parent. This simple statutory addition would improve the court's ability to protect mentally ill parents.

Including a definition of mental illness in the Juvenile Court Act would also correct assumptions that all mental illnesses can be treated with the same medication and procedures and that a person only suffers from one mental illness. Psychological studies have shown that a person can suffer from multiple mental illnesses at one time.<sup>129</sup> For example, a person suffering from bipolar disorder may have both depressive and manic episodes.<sup>130</sup> In a similar manner, a person suffering from an anxiety disorder may have phobias and panic attacks.<sup>131</sup> To complicate matters, when a person has more than one mental illness the treatment for one illness may not address the other. A person suffering from schizophrenia can be treated by antipsychotic medications.<sup>132</sup> However, this same person may also suffer from anxiety attacks, which must be treated with different medication or counseling.<sup>133</sup>

The current Juvenile Court Act considers "psychological incapacity" as

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125. WASH. REV. CODE § 13.34.180(e)(ii) (2000 & Supp. 2001).

126. *Id.*

127. *See* WASH. REV. CODE § 13.34.030 (2000).

128. *In re H.S.*, 94 Wash. App. 511, 528, 973 P.2d 474, 484 (1999) (citing *In re Hauser*, 15 Wash. App. 231, 235, 548 P.2d 333 (1976)).

129. *The Numbers Count*, *supra* note 14.

130. *Id.*

131. *Id.*

132. Gallagher, *supra* note 15, at 236.

133. *See id.* at 237.



including a variety of mental illnesses and disorders that require particular treatment. Clarification of the types of mental illnesses and corresponding treatments would provide courts a better understanding of the parent's circumstances. As a result, the mentally ill parent would be offered the best protection during dependency and termination proceedings. In short, providing a mental illness definition under the Juvenile Court Act would establish an accurate starting point for courts as they address parental needs.

## 2. Mental Illness Definitions in Other Termination of Parental Rights Laws

Some states define mental illness in their termination of parental rights statutes or reference a definition contained within another statute. For example, Oklahoma and Wisconsin define mental illness as a mental disease that affects the parent in such a way that treatment is necessary to protect the parent's or the community's welfare.<sup>134</sup> California defines "mentally disabled" parents as those who "suffer a mental incapacity or disorder that renders the parent or parents unable to care for and control the child adequately."<sup>135</sup> Alaska, however, defines mental illness as "an organic, mental or emotional impairment" that substantially and adversely affects a person's ability to consciously control his own actions, "perceive reality or to reason or understand."<sup>136</sup> New York, which has the most extensive definition in its termination statute, defines mental illness as:

[A]n affliction with a mental disease or mental condition which is manifested by a disorder or disturbance in behavior, feeling, thinking, or judgment 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.<sup>137</sup>

By contrast, Kentucky's termination of parental rights laws reference a definition in another section, which states:

[A] person with substantially impaired capacity to use self-control, judgment, or discretion in the conduct of the person's affairs and social

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134. See OKLA. STAT. ANN. tit. 10, § 7006-1.1(13)(c) (West Supp. 2002) (referencing OKLA. STAT. ANN. tit 43A, § 6-201(f) (West 1998)); WIS. STAT. ANN. § 48.415(3)(a) (West 1997) (referencing WIS. STAT. ANN. § 51.01(13)(a) (West 1997)).

135. CAL. FAM. CODE § 7827(a) (West Supp. 2000).

136. ALASKA STAT. § 47.10.990(17) (Michie 2000) (referencing ALASKA STAT. § 47.30.915(12) (Michie 2000)).

137. N.Y. SOC. SERV. LAW § 384-b(6)(a) (McKinney 1992).

relations, associated with maladaptive behavior or recognized emotional symptoms where maladaptive behavior or recognized emotional symptoms where impaired capacity, maladaptive behavior or emotional symptoms can be related to physiological, psychological, or social factors[.]<sup>138</sup>

As previously mentioned, Washington does not have a definition of mental illness in its termination of parental rights statute.<sup>139</sup> By having such a definition in the Juvenile Court Act, or even by referring to another mental illness definition,<sup>140</sup> courts, D.S.H.S., and parents would be able to understand and address a parent's mental condition. Courts need to determine the background of the parent's mental illness and the course of treatment necessary to reunite the parent and child.

Currently, courts are forced to spend time determining whether the mental illness impairs parenting skills. By referring to a statutory definition<sup>141</sup> or medical authority,<sup>142</sup> all parties to the termination proceedings would benefit. If, after analyzing the mental illness and giving the appropriate course of treatment, the parent could not correct his parental deficiency, termination of parental rights would be viable. A definition would ensure that a mentally ill parent has a greater opportunity to be rehabilitated, thus having a better chance of reunification with the child.

### *B. Termination of Parental Rights Statute Solely Dedicated to Mentally Ill Parents*

If a definition of mental illness is not added to the Juvenile Court Act,<sup>143</sup> the State legislature should adopt a statute dedicated to mentally ill parents whose parental rights are terminated. Texas has a termination statute that specifically addresses mentally ill parents.<sup>144</sup> Washington should follow Texas's statute because it provides laws focusing on the effects of the illness on the ability to parent, rather than the parent him- or herself. Below is a

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138. KY. REV. STAT. ANN. § 625.090(3)(a) (Michie 1999); KY. REV. STAT. ANN. § 202A.011(9) (Michie 1998).

139. See WASH. REV. CODE § 13.34.030 (2000); see also *supra* notes 124-33 and accompanying text.

140. See WASH. REV. CODE § 72.23.010(5) (2000) (defining "mentally ill person"); WASH. REV. CODE § 74.29.010(3) (2000) (defining "physical, mental, or sensory disability").

141. *Id.*

142. See DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, *supra* note 7, at xxx-xxxii.

143. See *supra* notes 124-33 and accompanying text.

144. TEX. FAM. CODE ANN. § 161.003 (Vernon Supp. 2002).

summary of the Texas termination laws. Examples from case law illustrate the statute's effectiveness.

## 1. Texas Termination of Parental Rights Laws and the Mentally Ill

### a. Texas Statute

Texas has two termination of parental rights statutes: one that deals with abandonment, neglect, or voluntary termination of parental rights,<sup>145</sup> and one dealing with a parent's inability to care for the child.<sup>146</sup> The latter deals exclusively with mentally ill parents when mental illness is the reason for the parent's inability to care for the child. Under Texas law, the court will order the termination of parental rights when the Department of Protective and Regulatory Services<sup>147</sup> ("Department") proves the following five elements.<sup>148</sup> First, the parent must have a "mental or emotional illness or a mental deficiency" that prevents the parent from providing "for the physical, emotional, and mental needs of the child."<sup>149</sup> Second, the Department must show, through clear and convincing evidence, that "in all reasonable probability" the illness or deficiency "will continue to render the parent unable to provide for the child's needs until the [child's] 18th birthday."<sup>150</sup> Third, the Department must have temporary or "sole managing conservator[ship]" of the child for no less than six months before the termination proceeding beings.<sup>151</sup> Fourth, reasonable efforts must have been made to reunite the parent and child.<sup>152</sup> Finally, termination of parental rights must be in the best interests of the child.<sup>153</sup> Only when all five elements are present will Texas courts enter an order terminating parental rights.<sup>154</sup> Texas statutes also protect the mentally ill parent by providing an attorney ad litem.<sup>155</sup>

These statutes permit the Texas courts to address terminating a mentally ill parent's parental rights without inquiring into whether the parent has

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145. See TEX. FAM. CODE ANN. § 161.001 (Vernon Supp. 2002).

146. See TEX. FAM. CODE ANN. § 161.003 (Vernon Supp. 2002).

147. This department is the equivalent to Washington's Department of Social and Health Services.

148. TEX. AM. CODE ANN. § 161.003(a) (Vernon 1996 & Supp. 2002).

149. TEX. FAM. CODE ANN. § 161.003(a)(1).

150. § 161.003(a)(2); see also *supra* notes 29-32 and accompanying text.

151. § 161.003(a)(3).

152. § 161.003(a)(4).

153. § 161.003(a)(5).

154. See § 161.003(a).

155. See TEX. FAM. CODE ANN. § 161.003(b), (d) (Vernon Supp. 2002).

abandoned, abused, or neglected the child.<sup>156</sup> As a result, the court looks at one issue: whether the parent's mental illness prevents the parent from adequately caring for the child's needs.<sup>157</sup> Also, by the time termination proceedings begin, the Department has already provided services to improve a deficiency in parenting skills and address the parent's mental illness.<sup>158</sup> Therefore, if termination proceedings begin, it is more probable that the parent cannot care for the child because of the mental illness, and terminating parental rights is the only option.<sup>159</sup>

#### b. Texas Case Law

Texas case law also provides insight into the advantages of a statute dedicated solely to mentally ill parents. In *In re Carroll*<sup>160</sup> a lower court's order terminating parental rights of a mother who suffered from mental illness was upheld.<sup>161</sup> The mother argued that Texas's parental rights termination law violated her rights to equal protection and due process.<sup>162</sup> In upholding the statute, the court held that although the statute classified mentally ill parents differently than non-mentally ill parents, there was a legitimate state interest in protecting the welfare of a child.<sup>163</sup> In addition, the court reasoned that under state law the mentally ill are offered more protections against "arbitrary state action in a termination suit than are other parents."<sup>164</sup> Although the state law may intrude on a parent's due process rights, any termination can only be done upon a showing of clear and convincing evidence.<sup>165</sup> Therefore, Texas's termination of parental rights statute was valid.

In another case, *Spurlock v. Texas Department of Protective & Regulatory Services*,<sup>166</sup> the court upheld the termination of the parental rights of another parent who suffered from "chronic paranoid schizophrenia and schizoaffective disorder."<sup>167</sup> The mother argued that the Department failed to show through

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156. See TEX. FAM. CODE ANN. § 161.001 (Vernon 1996).

157. See TEX. FAM. CODE ANN. § 161.003(a).

158. See § 161.003(a)(4).

159. See § 161.003.

160. 819 S.W.2d 591 (Tex. Ct. App. 1991).

161. *Id.* at 593. In its opinion, the court did not disclose what kind of mental illness the mother suffered.

162. *Id.* at 592. Specifically, the mother argued that Texas Family Code Section 15.024 (the termination of parental rights law at the time) was unconstitutional. *Id.*

163. *In re Carroll*, 819 S.W.2d at 592.

164. *Id.*

165. *Id.* at 593 (citing *Santosky v. Kramer*, 455 U.S. 745, 767 (1982)).

166. 904 S.W.2d 152 (Tex. Ct. App. 1995).

167. *Id.* at 156. The record revealed that the mother was hospitalized and had a history

clear and convincing evidence that she was unable to meet the physical, emotional, and mental needs of her children until they were eighteen years of age.<sup>168</sup> In upholding the termination order the court relied on two Department witnesses, who concluded that because of her schizophrenia, the mother was unable to live alone and incapable of meeting her children's physical and emotional needs.<sup>169</sup> The court then concluded that because the children were in foster care and would likely remain there until they reached eighteen, termination of the mother's parental rights was in their best interest.<sup>170</sup> As a result, the court upheld the lower court's order.<sup>171</sup>

*In re Carroll* and *Spurlock* demonstrate the ability of Texas courts to explain and clarify the statute, thereby addressing the needs of mentally ill parents. These cases were appealed on constitutional arguments of vagueness and denial of due process. However, the Texas courts have consistently held that the state has a legitimate interest in protecting the well-being of a child.

The focus of the statute is on the ability of the parent to meet the children's needs, not merely on the status of the parent as mentally ill; proof by clear and convincing evidence is required that the mentally ill parent is unable to meet the children's needs now and will continue to be unable to meet those needs throughout the children's minority.<sup>172</sup>

Protecting the child includes protection from a mentally ill parent.<sup>173</sup> Washington courts have also held that the interests of the parent cannot outweigh the interests of the child.<sup>174</sup>

## 2. Why Washington Should have a Termination of Parental Rights Law Solely Dedicated to Mentally Ill Parents

Washington should follow Texas's lead and enact a termination of parental rights law that addresses mentally ill parents specifically. As Texas courts have held, a law that violates a mentally ill parent's due process rights is valid only

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of noncompliance with her medication, which resulted in the child being in foster care. *Id.* at 157.

168. *Id.*

169. *Id.*

170. *Spurlock*, 904 S.W.2d at 158.

171. *Id.* at 160.

172. *Id.* at 159.

173. *In re Carroll*, 819 S.W.2d 591, 592 (1991).

174. *See In re H.S.*, 94 Wash. App. 511, 530, 973 P.2d 474, 485 (1999) (finding that the rights of a parent do not subvert the needs of a child).

if the purpose of the statute is to protect the child.<sup>175</sup> The statute will be valid so long as the *Santosky* “clear and convincing standard” is the minimum standard to ensure the parent’s due process rights.<sup>176</sup> Such a statute would also allow courts and D.S.H.S. to focus on whether a parent’s mental illness renders him or her incapable of caring for the mental, emotional, and physical needs of a child. If mental illness is the basis for the parent’s deficiency, then it can be assumed that the child is dependent and should be placed in foster care or with adoptive parents. As a result, time and money will be saved in lieu of spending months gathering facts to determine if the child is dependent and what types of services are needed to rehabilitate the parent. For a mentally ill parent, D.S.H.S. could provide treatment based upon the type of illness or disorder in order to best rehabilitate the parent. To enact this type of statute would not only better prepare the state to provide services to mentally ill parents, but would be more efficient in reuniting the parent and child. If such efforts are deemed impossible, termination can continue without any doubt that it is the only option.

## VI. CONCLUSION

Mentally ill parents continue to contest the termination of their parental rights. Although Washington has addressed the needs of mentally ill parents, more should be done to ensure that termination of their parental rights is the only alternative.

First, Washington should include a definition of mental illness in the termination of parental rights statute. As mentioned earlier, some states have mental illness definitions in their termination statutes.<sup>177</sup> If Washington’s law does not define mental illness, it should at least refer to a “mental illness” definition provided in another statute.<sup>178</sup>

In the alternative, Washington’s termination of parental rights laws should include a mental illness definition that explains what makes a parent mentally ill, lists the illnesses (schizophrenia, personality disorder, depression, etc.) that qualify as a mental illness, or both.<sup>179</sup> Such a definition would save time and

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175. See WASH. REV. CODE § 13.34.020 (2000) (stating that the “child’s health and safety shall be of paramount concern”).

176. See *supra* notes 29-32 and accompanying text.

177. See *supra* notes 134-42 and accompanying text.

178. See WASH. REV. CODE § 72.23.010(5) (2000); WASH. REV. CODE § 74.29.010(3) (2000).

179. See DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, *supra* note 7, at 297-98.

money and would give the courts a solid basis for making their termination decisions.

The second suggestion challenges the Washington State Legislature to enact a termination of parental rights law solely dedicated to mentally ill parents.<sup>180</sup> The current termination statute applies to all parents.<sup>181</sup> A statute dedicated solely to termination of the parental rights of the mentally ill would give attorneys and courts a clearer law and decrease the risk of improper terminations. It would also give lawmakers room to identify the strengths and weaknesses of court procedures, hearings, pleadings, reunification plans, and court appointments. A statute that deals with mentally ill parents alone would also provide all parties a fair trial.

The time has come for lawmakers to impose more protections for mentally ill parents. When the state takes a child away from a mentally ill parent without considering how the law applies to the parent's illness, parents are deprived of their constitutional right to raise their children. Effective termination of parental rights laws are not only better for mentally ill parents, but all parents.

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180. *See supra* notes 143-74 and accompanying text.

181. *See generally* WASH. REV. CODE §§ 13.34.010-.810 (2000 & Supp. 2001).

