# Putting Children Last: How Washington Has Failed to Protect the Dependent Child's Best Interest in Visitation

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## I. INTRODUCTION

Tommy is a thirteen-year-old foster care child who suffers from severe autism and functions at the level of a toddler.[1] Tommy is unable to speak or care for himself, and he requires constant supervision to prevent self-inflicted injuries such as hair pulling and scratching.[2] Tragically, Tommy's situation is complicated further by his father's own debilitating mental health problems: Tommy's father, Mr. Goodall, suffers from a paranoid personality disorder with obsessive and narcissistic traits.[3]

In 1999, when Tommy was three years old, Mr. Goodall sought the assistance of the Washington State Department of Social and Health Services (DSHS or the Department) to help him properly care for his son.[4] The Department provided Mr. Goodall with services aimed at instructing parents on how to care for the needs of an autistic child.[5] One year after beginning services with DSHS, Mr. Goodall asked the

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1. *In re* Dependency of C.N., No. 58799-4-I, 2007 WL 4489646, at *1 (Wash. Ct. App. Dec. 24, 2007). Although the child's name has been changed to protect his privacy, Tommy's story is based on an actual dependency action filed in King County Superior Court. *See id.* at *1–3.

2. *Id.* at *1.

3. *Id.* at *2–3. Two psychological evaluations, in June 2002 and in December 2005, confirmed this diagnosis. *Id.* The 2002 evaluation recommended that Mr. Goodall be denied visitation with his son until he began mental health treatment and demonstrated progress. *Id.* at *2.

4. *Id.* at *1.

5. *Id.*

Department to place Tommy in foster care.[6] Tommy's first stay in foster care was short-lived. Upon Mr. Goodall's request, DSHS returned Tommy to his care less than three months later.[7] The Department continued providing services to help Mr. Goodall care for his son.[8]

Despite this ongoing assistance, Tommy was returned to foster care in March 2003 after a juvenile court declared Tommy dependent.[9] The court concluded that because Mr. Goodall's significant mental health problems presented a risk to Tommy's health and safety,[10] Mr. Goodall would be denied visitation until he demonstrated progress in mental health treatment.[11]

In 2004, the court ordered supervised visitation between Tommy and Mr. Goodall in light of Mr. Goodall's "progress with treatment."[12] Although Mr. Goodall had undergone some treatment, subsequent visits proved highly detrimental to Tommy's emotional and physical health.[13] Mr. Goodall's actions often caused Tommy emotional trauma.[14] Despite numerous warnings from visit supervisors, Mr. Goodall would frequently make inappropriate comments about how Tommy would die if he remained with his foster parents.[15] Mr. Goodall also refused to recognize Tommy's emotional cues, and he was unable to keep Tommy calm during visits. He would agitate Tommy by speaking or singing loudly in his

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6. *Id.* It is unclear from the record why Mr. Goodall requested DSHS place Tommy in foster care.

7. *Id.* It is also unclear from the record why Mr. Goodall asked for Tommy's return.

8. *Id.* During this time, a public health nurse filed a report with Child Protective Services stating that Mr. Goodall was not able to care for his son. *Id.* The report indicated that Mr. Goodall was "agitated, paranoid, uncooperative, and constantly complained about deficiencies with virtually all the services provided." *Id.*

9. *Id.* at *2. In the State of Washington, a dependency may be established as a result of parental abuse, neglect, or abandonment. WASH. REV. CODE §§ 13.34.010–.810 (2008). When there are reports of parental abuse or neglect, the state will intervene to protect the child, who is then placed in the state's custody. *See* 1 ANN M. HARALAMBIE, HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES 569 (1983). These children are generally referred to as "foster care children" or "dependent children." For an in-depth discussion of dependency, see *infra* Part III.A.

10. *C.N.*, 2007 WL 4489646, at *2. Before the dependency, Tommy had been hospitalized twice for ongoing manic episodes. *Id.* at *1–2. After the first hospitalization, Mr. Goodall refused to follow the hospital's behavior modification plan for Tommy and took Tommy off all of the medications he had been prescribed. *Id.* at *1. Following the second hospitalization, Mr. Goodall refused to return to the hospital to take Tommy home. *Id.* at *2.

11. *Id.* The court opined that visitation between Mr. Goodall and Tommy would not be appropriate until Mr. Goodall was able to understand how his actions negatively affected Tommy. *Id.*

12. *Id.* When the court ordered visitation between March 2003 and May 2004, Mr. Goodall's participation in mental health treatment was inconsistent and sporadic. *See id.*

13. *Id.* at *2–3.

14. *Id.*

15. *Id.* at *3. There was no indication that Tommy was being abused by his foster parents. *Id.*

face.[16] During one visit, several staff members had to restrain Tommy to stop him from mutilating himself.[17]

In January 2006, DSHS requested suspension of visitation based on Mr. Goodall's deteriorating mental health and Tommy's negative reactions to visitation.[18] The court refused to suspend visitation and instead imposed certain rules for Mr. Goodall to abide by during visits.[19] Mr. Goodall consistently failed to abide by the court's conditions, and as a result, Tommy's emotional and physical well-being deteriorated even further.

Following the court's refusal to deny visitation, Mr. Goodall continued to show a lack of awareness of how his actions caused Tommy emotional distress,[20] and Tommy's reaction to the over-stimulation escalated.[21] Visit supervisors and social workers increasingly observed Tommy becoming so hysterical during visits that he would mutilate himself to the point of bleeding, attempt to flee the visitation room, or have a bowel movement in his pants.[22] This inability to cope peaked during one visit when Tommy "made his nose bleed and then smeared the blood on himself and the room."[23]

Visits between Mr. Goodall and Tommy also adversely affected the child's physical well-being.[24] Mr. Goodall would bring food to Tommy during visits despite the visit supervisors' repeated objections.[25] Tommy would then gorge himself, regurgitate, and attempt to re-chew his food.[26]

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16. *Id.*

17. *Id.*

18. *Id.* Mr. Goodall's 2005 psychological evaluation revealed that his "mental functioning had deteriorated to the same point as when dependency was established." *Id.* This was the same level of functioning Mr. Goodall possessed when the juvenile court initially denied visitation. Yet the juvenile court refused to deny visitation. *Id.*

19. *Id.* Specifically, the court ordered that the father

> shall not discuss any disputes or perceived wrongs he believes have occurred in the presence of [Tommy]; refrain from engaging in behavior in front of [Tommy] that has the effect of escalating [Tommy's] behavior or causing him undue stress; shall not raise his voice or engage in other agitated behavior in front of [Tommy]; and refrain from using physical restraint to control [Tommy] in such a manner that obviously escalates [Tommy's] behavior.

DSHS Response in Opposition to Motion for Discretionary Review at 3, *C.N.*, 2007 WL 4489646 (No. 58799-4-I).

20. *C.N.*, 2007 WL 4489646, at *3.

21. *Id.* During this time, Tommy's foster parents reported that it would take several days for Tommy to calm down after a visit. *Id.*

22. DSHS Response, *supra* note 19, at 9.

23. *C.N.*, 2007 WL 4489646, at *3.

24. *Id.*

25. *Id.* Visit supervisors informed Mr. Goodall that food and water were triggers for Tommy, and Mr. Goodall was frequently asked not to bring food to visits. DSHS Response, *supra* note 19, at 4.

26. *C.N.*, 2007 WL 4489646, at *3.

By the summer of 2006, after five additional months of visits with Mr. Goodall that further damaged Tommy's emotional and physical health, the court finally agreed that visitation was no longer appropriate.[27] The court instructed Mr. Goodall to re-engage in treatment and make progress in addressing his psychological disorders before visitation could resume.[28] Mr. Goodall filed a motion for discretionary review[29] to the Washington State Court of Appeals on the grounds that visitation was impermissibly conditioned on his participation in mental health counseling in violation of section 13.34.136(2)(b)(ii) of the Revised Code of Washington (Visitation Statute).[30]

Visitation provides some parents, like Mr. Goodall, the opportunity to continue abusing children who have been removed from the home. Although there is a presumption that children are no longer in danger of abuse when taken into the state's custody, Tommy's story, which is by no means unique, shows that children may still be harmed by their parents during a dependency. Emotional and physical abuse continues in the visitation setting due, in large part, to the language used in the Visitation Statute.

The Visitation Statute provides:

> *Visitation is the right of the family*, including the child and the parent, in cases in which visitation is in the best interest of the child. Early, consistent, and frequent visitation is crucial for maintaining parent-child relationships and making it possible for parents and children to safely reunify. *The agency shall encourage the maximum parent and child and sibling contact possible, when it is in the best interest of the child*, including regular visitation and participation by the parents in the care of the child while the child is in placement. *Visitation shall not be limited as a sanction for a parent's failure to comply with court orders or services* where the health, safety, or welfare of the child is not at risk as a result of the visitation. Visitation may be limited or denied only if the court determines that such limitation or denial is necessary to protect the child's health, safety, or welfare.[31]

This language leaves children vulnerable to visitation abuse for three reasons. First, the "maximum parent and child contact" and "visitation is the right of the family" language improperly gives primacy to the right of parents to visitation over the right of children to healthy visitation.

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27. *Id.* DSHS's motion to suspend visitation was supported by the guardian ad litem, Tommy's mother, four social workers, and Tommy's foster parents. *Id.*

28. *Id.*

29. *Id.* at *3–4. See *infra* Part V.C.3 for a discussion of the outcome of this appeal.

30. WASH. REV. CODE § 13.34.136(2)(b)(ii) (2008).

31. *Id.* (emphasis added).

Although the Visitation Statute indicates that visitation decisions should be made in the best interest of the child, the juvenile and appellate courts often subordinate the child's right to healthy visitation to the parent's right for maximum visitation.[32] Second, the "sanction provision"[33]—the provision barring juvenile courts from suspending visitation as a "sanction" for a parent's noncompliance with services—allows parents to continue visitation until there is overwhelming evidence that the parents' noncompliance with services harms the child.[34] Tommy, for example, was forced into two years of visitation with Mr. Goodall before the juvenile court felt able to find harm and end visitation.[35] Lastly, the Visitation Statute does not define "best interest of the child," the standard juvenile courts are instructed to follow when making visitation decisions.[36] Without meaningful guidelines, juvenile courts have rendered visitation decisions too often in the parent's favor.[37]

Because Tommy and children like him should not be forced into visitation settings that are harmful to their emotional and physical health, the Washington legislature should amend the Visitation Statute. This Comment proposes three amendments to the Statute that would ensure juvenile courts properly focus on the long-term best interests of children and reduce children's exposure to abuse in the visitation setting. First, the Visitation Statute should expressly indicate that visitation is a conditional right of the family and a collaborative endeavor between all parties involved in a dependency.[38] Second, the Statute should rephrase the sanction provision to allow for the suspension of visitation when a parent's consistent noncompliance with services adversely affects the quality of visits.[39] Third, the Statute should define "best interest of the child" to help juvenile courts make visitation decisions that are consistent with the child's health, safety, welfare, and other interests.[40]

To analyze the existing tension between the rights of parents and the rights of children, Part II of this Comment traces the development of

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32. As discussed *infra* Part V, juvenile and appellate courts view the Visitation Statute as an attempt to strengthen the parents' visitation rights. *See In re* Dependency of T.L.G., 139 Wash. App. 1, 17, 156 P.3d 222, 230 (2007).

33. WASH. REV. CODE § 13.34.136(2)(b)(ii) ("Visitation shall not be limited as a *sanction* for a parent's failure to comply with court orders or services . . . ." (emphasis added)).

34. *Id.* (emphasis added).

35. *In re* Dependency of C.N., No. 58799-4-I, 2007 WL 4489646, at *2–3 (Wash. Ct. App. Dec. 24, 2007).

36. WASH. REV. CODE § 13.34.136(2)(b)(ii). Neither the Dependency Act nor the Visitation Statute defines "best interest of the child." *See id.*; *id.* §§ 13.34.010–.080.

37. *See* discussion *infra* Part IV and Part V.

38. *See* discussion *infra* Part VI.A.

39. *See* discussion *infra* Part VI.B.

40. *See* discussion *infra* Part VI.C.

family rights and state intervention under Roman, constitutional, and Washington law. In particular, this Part focuses on the origins of parental rights, the *parens patriae* right of states, and the rights of children. Part III addresses the dependency process in Washington by describing the typical experiences of children and parents after the initial pick-up order placing the child in state custody. Part IV presents the typical benefits and common problems associated with dependency visitation. Part V introduces the former Visitation Statute and the development of the current version, and then proceeds to examine the juvenile court's application of the Statute. Part V also analyzes three visitation cases from the Washington State Court of Appeals. Finally, Part VI recommends three statutory amendments to help courts render visitation decisions that better serve the best interest of the child and minimize the potential for emotional and physical abuse.

## II. THE PARENTAL PREROGATIVE AND STATE INTERVENTION: DEFINING THE SCOPE OF FAMILY AUTONOMY

Juvenile dependency law is designed to respect parental rights while allowing states to protect the health and safety of children.[41] To develop an understanding of the tension between the rights of the parent, the state, and the child, this Part begins by discussing the origin of parental rights. This Part then describes the doctrine of *parens patriae* and the state's role in the dependency process. Finally, this Part explains the child's rights under both federal and state law.

### *A. The History of Parental Rights*

American common law has long recognized that the family, a sacred social association distinct from public life,[42] deserves autonomy.[43] This notion of "family autonomy" can be traced to Anglo-Saxon customary law, Roman law, and Judeo-Christian tradition.[44] In particular, the Roman conception of family has significantly contributed to the American conception of parental rights.

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41. DOUGLAS E. ABRAMS & SARAH H. RAMSEY, CHILDREN AND THE LAW IN A NUTSHELL 8 (2d. ed. 2003).

42. Lois A. Weithorn, *Envisioning Second-Order Change in America's Response to Troubled and Troublesome Youth*, 33 HOFSTRA L. REV. 1305, 1389 (2005).

43. Family autonomy refers to the right of the family—i.e., the parents—to make decisions regarding control, correction, education, and protection of its members without interference by the state. *See* 1 LYNN D. WARDLE, CHRISTOPHER L. BLAKESLEY & JACQUELINE Y. PARKER, CONTEMPORARY FAMILY LAW: PRINCIPLES, POLICY AND PRACTICE 1 (1988).

44. *See id.* The principle of family autonomy can be traced back to the Ten Commandments: "Honour thy father and thy mother: that thy days may be long upon the land which the LORD thy God giveth thee." *Exodus* 20:12 (King James).

Under Roman law, a father's rights to his children and family autonomy were unequivocal.[45] The father held absolute dominion over his children, having the right to sell them into slavery, banish undesirable offspring, and even kill those born with abnormalities.[46] Because the father's right to family autonomy was absolute, neither the rights of children nor the interests of the state could displace it.

Although the Constitution and the Bill of Rights do not address the rights of parents, several Supreme Court opinions have followed Roman tradition to develop the contours of a parental rights doctrine. The American conception of parental rights essentially incorporates the Roman notion of family autonomy by providing parents with significant control over their children while protecting parents from unwarranted intervention by the state.[47]

For instance, the Supreme Court has recognized that parents have the right to control the upbringing of their children and that parental rights are protected under the Fourteenth Amendment.[48] In the seminal case *Meyer v. Nebraska*, Robert T. Meyer was convicted for teaching German to a ten-year-old student at the request of the child's parents.[49] The State of Nebraska had passed a law that prohibited teachers from instructing students in a foreign language before the eighth grade.[50] The Supreme Court reversed the conviction on the grounds that the Nebraska law violated the parents' constitutional right to control the upbringing of their children.[51] In reaching its decision, the Court held that the Fourteenth Amendment unquestionably protects a person's right "to marry, establish a home, and bring up children."[52] The Court further held that the state may not infringe upon this right unless there is potential harm to the child.[53]

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45. HARRY D. KRAUSE & DAVID D. MEYER, FAMILY LAW IN A NUTSHELL 163 (5th ed. 2007). This right included the right to determine the life and death of his children.

46. *See* 1 WARDLE, BLAKESLEY & PARKER, *supra* note 43, at 8.

47. *Id.* at 13–15. Anglo-Saxon law adopted several of the Roman general principals of family autonomy by carrying over the Roman traditions of minimal interference by the state and the rights of parents to rear their children.

48. *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

49. *Id.* Nebraska law required that a child pass the eighth grade before receiving instruction in a language other than English. *See also* ABRAMS & RAMSEY, *supra* note 41, at 15.

50. *Meyer*, 262 U.S. at 397.

51. *Id.* at 403.

52. *Id.* at 399.

53. *Id.* at 399–400 ("The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect."). Although the *Meyer* Court appears to set out a rational basis standard for determining if there has been a due process violation of the parent's right to raise his or her children, the Court has made clear in later

In subsequent decisions, the Supreme Court has reaffirmed *Meyer* and expanded upon parents' fundamental right to nurture and raise their children.[54] The Court has declared that "it is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function . . . include[s] preparation for obligations the state can neither supply nor hinder."[55] The Court has specifically defined the doctrine of parental rights to include the right to educate,[56] to give religious training,[57] and to have physical custody.[58] Family autonomy and parental rights are treated as fundamental liberty interests and a subset of the right of privacy under the Court's jurisprudence.[59]

In justifying a rich parental rights doctrine, the Supreme Court has explained that the notion of parental rights should be respected by the law because of two presumptions: (1) parents possess what children lack in areas of functioning, and (2) parents' love and affection for their children generally causes parents to act in their children's best interests.[60] Nevertheless, the Supreme Court has also recognized that when one or both of these presumptions are rebutted, the state has a compelling right to intervene in the family relationship.[61] Parental rights, therefore, are not entitled to absolute protection, and the rights of the child should prevail when parents no longer act in the child's best interest.

### *B. Justifying State Intervention with the Parens Patriae Doctrine*

When a parent does not act in the child's best interest and the child's health, safety, and welfare are at stake, the state may intervene and act "in its capacity as provider of protection to those unable to care

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opinions that governmental interference with family autonomy is subject to strict scrutiny. *See also* Santosky v. Kramer, 455 U.S. 745 (1982).

54. *See, e.g.*, *Santosky*, 455 U.S. 745, 753; Parham v. J.R., 442 U.S. 584, 602 (1979); Stanley v. Illinois, 405 U.S. 645, 651 (1972); Griswold v. Connecticut, 381 U.S. 479, 481 (1965); Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

55. *Prince*, 321 U.S. at 166. In *Prince*, a guardian of a nine-year-old girl was convicted for violating Massachusetts child labor laws. *Id.* at 160. The guardian had allowed the child to distribute religious literature in a downtown area. *Id.* at 162. Although reaffirming *Meyer* by recognizing that parents have a constitutional right to the care and custody of their children, the Court upheld the Massachusetts' law and the guardian's conviction because the state had a compelling interest to regulate the actions and treatment of children. *Id.* at 163–64, 166. The Court held that parental rights are not absolute and may be restricted to protect the best interest of the child. *Id.* at 166.

56. *See Meyer*, 262 U.S. at 400.

57. *See Prince*, 321 U.S. at 165.

58. *See Stanley*, 405 U.S. at 651.

59. *See generally Griswold*, 381 U.S. 479.

60. Parham v. J.R., 442 U.S. 584, 602 (1979).

61. *Id.* at 603 (holding that when a child's physical or mental health is jeopardized, a state has constitutional control over parental discretion in dealing with the child).

for themselves."[62] Like the parental rights doctrine, the right of state intervention—the *parens patriae* power—originated from Roman jurisprudence, which recognized the Roman emperors as the ultimate parents of the country.[63] Toward the end of the Roman Empire, the law's former conception of the family as having an absolute sphere of autonomy evolved into a more complex model allowing for some state intervention.[64] The Roman emperors severely curtailed the former absolute rights of fathers, primarily by abolishing the father's right to determine the life and death of his children.[65] Additionally, Roman law recognized the family as a "fundamental social cell" deserving of some state protection.[66]

In early American jurisprudence, the Supreme Court acknowledged that the states possessed the *parens patriae* power.[67] Because, however, the presumption in favor of family autonomy still reigned supreme, the Court limited the states' use of the *parens patriae* power. The Supreme Court's precedent created a legal presumption that parents were generally fit to raise and care for their children.[68] The states could exercise the *parens patriae* power and interfere with the parent–child relationship only upon a showing of parental unfitness or child endangerment.[69]

The Supreme Court examined the proper role of state intervention in *Stanley v. Illinois*.[70] The children of Mr. Peter Stanley, an unwed father, were removed from his care upon the death of their mother.[71] Although the Court reversed the dependency because the father had not been provided a hearing to demonstrate his fitness,[72] the Court noted that Illinois' dependency process did not violate the Constitution when due process was satisfied.[73] The Court held that states have a right and duty

62. BLACK'S LAW DICTIONARY 1144 (8th ed. 2004).

63. *See id.*

64. *See* 1 WARDLE, BLAKESLEY & PARKER, *supra* note 43, at 9.

65. *Id.*

66. *Id.* This notion was later adopted by the English Crown, which authorized the government to protect members of the landed gentry deemed unable to care for themselves. *See* ABRAMS & RAMSEY, *supra* note 41, at 8.

67. Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 57 (1890) (holding that the *parens patriae* authority is inherent in the power of every state).

68. 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 588–89 (1877) ("Parents are entrusted with the custody of the persons, and the education, of their children; yet this is done upon the natural presumption, that the children will be properly taken care of, . . . and that they will be treated with kindness and affection. But, whenever . . . a father . . . acts in a manner injurious to the morals or interests of his children; in every such case, the Court of Chancery will interfere.").

69. Stanley v. Illinois, 405 U.S. 645, 652 (1972).

70. *Id.*

71. *Id.* at 646.

72. *Id.*

73. *Id.* at 649.

to protect children through a dependency proceeding.[74] Further, the Court noted that the state's interest "to protect the moral, emotional, mental, and physical welfare of the minor" is legitimate and within the state's police power.[75]

In summary, the *parens patriae* power, as interpreted by the Supreme Court, gives the state broad authority to act in the child's best interest.[76] This power encompasses the state's right to remove a child from parental custody and make the child a dependent of the state when the child's safety or welfare cannot be adequately protected within the familial home.[77] As discussed later in the Comment, this *parens patriae* authority also justifies the state's limitation of visitation when a child's health, safety, or welfare are at risk.[78]

### *C. Children's Rights under the U.S. Constitution and Washington Statutory and Common Law*

Juvenile dependency law can be viewed as a struggle between the right of parents to maintain family autonomy and the right of the state to intervene and protect the interests of a child in cases of abuse and neglect. Little attention, however, is paid to the affirmative rights that children have in the dependency context.

The Supreme Court's incoherent view of children is the main reason for a minimal children's rights doctrine: "The law views children as vulnerable, incapable and needing protection in some circumstances, but as holding constitutional rights, decision-making ability and personal responsibility in others. A person may be a child for one purpose, but an adult for another."[79] Additionally, the Court's fervent protection of parental rights and parental autonomy has restrained the Court from shaping a more developed children's rights doctrine.[80]

Despite its focus on parental rights, the Supreme Court has recognized that children possess some rights with respect to their relationship with their parents.[81] The Court has specifically recognized a child's right to food, shelter, clothing, protection, education, and medical care; yet the

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74. *Id.* at 652.

75. *Id.*

76. Prince v. Massachusetts, 321 U.S. 158, 167 (1944) (holding that the state has a wide range of power for limiting parental freedom and authority in matters affecting the child's welfare).

77. *Stanley*, 405 U.S. at 652.

78. *See* discussion *infra* Parts V–VI.

79. SARAH H. RAMSEY & DOUGLAS E. ABRAMS, CHILDREN AND THE LAW IN A NUTSHELL 7 (2001).

80. *Id.* at 33.

81. MARTIN GUGGENHEIM & ALAN SUSSMAN, THE RIGHTS OF YOUNG PEOPLE: AN AMERICAN CIVIL LIBERTIES UNION HANDBOOK 113 (1985).

Court typically refers to these "rights" as duties owed to children by their parents.[82] One of the more important rights possessed by children is the right not to be abused or neglected by their parents—or put more accurately, the parents' duty not to harm their children.[83] This right not to be harmed is directly intertwined with the state's *parens patriae* right. Unfortunately, the Supreme Court has not delineated the proper balance between the rights of children and the competing rights of parents during a dependency and in the visitation context.[84]

Like the U.S. Supreme Court, Washington courts tend to focus on the role of the state in protecting children. For instance, Washington common law has reaffirmed the state's right to protect children through the use of the *parens patriae* power.[85] In *In re Sego*, the Washington State Supreme Court held that, despite parents' fundamental liberty interest in the care and custody of their children, the state has an equally compelling interest in protecting children from physical, mental, and emotional harm.[86] By recognizing the state's *parens patriae* power, Washington courts implicitly acknowledge the fundamental right of children not to be abused or neglected by their parents.

The Washington legislature has defined more affirmatively the rights of children in the dependency setting.[87] The Juvenile Court Act in Cases Relating to Dependency of a Child and the Termination of a Parent and Child Relationship (Dependency Act)[88] recognizes that children have a right to basic nurturing, which includes the right to a safe, stable, and permanent home and a speedy resolution of the dependency proceeding.[89] The Act also acknowledges that dependent children have a right to maintain familial bonds by requiring frequent visitation between children and their parents.[90] Moreover, the Act attempts to recognize the health and safety rights of children during a dependency. The Visitation Statute, in particular, provides that visitation may be granted

82. *Id.* ("Generally, it is the responsibility of a child's parents or custodians to provide him with the necessary attributes of life. When they fail to fulfill these responsibilities or prevent a child from receiving them, they may be charged with child abuse or neglect.").

83. *Id.*

84. *See* RAMSEY & ABRAMS, *supra* note 79, at 33. In Washington, the legislature has attempted to find the proper balance by implementing a "best interest of the child test" in the visitation setting. *See* WASH. REV. CODE § 13.34.136(2)(b)(ii) (2008).

85. *See In re* Sego, 82 Wash. 2d 736, 738, 513 P.2d 831, 832 (1973); *In re* Dependency of H.W., 70 Wash. App. 552, 555, 854 P.2d 1100, 1102 (1993).

86. 82 Wash. 2d at 738, 513 P.2d at 832.

87. *See* WASH. REV. CODE § 13.34.020.

88. *Id.* §§ 13.34.010–.810.

89. *Id.* § 13.34.020; *see also In re* Welfare of H.S., 94 Wash. App. 511, 530, 973 P.2d 474, 485 (1999).

90. WASH. REV. CODE § 13.34.136(2)(b)(ii).

only when visitation is in the child's best interest.[91] Finally, the Dependency Act is unique in that it expressly places the rights of the child above the rights of the parents: when the rights of parents and the rights of the child conflict, "the rights and safety of the child should prevail."[92]

Because children are often unable to exercise the rights listed above on their own, the Washington legislature has also recognized dependent children's right to have a guardian ad litem (GAL) appointed to protect and advocate for their best interests during the dependency process.[93] The GAL is required to investigate the child's situation, report factual information to the court regarding the best interest of the child, and monitor the parents' compliance with services.[94] Additionally, the Dependency Act charges the GAL with the duty to represent and advocate for the best interest of the child.[95]

The Washington legislature has come far in attempting to protect and secure a child's best interest. As Tommy's story indicates, however, the legislature has not gone far enough. Although the Dependency Act incorporates and expands upon the Supreme Court's interpretation of children's rights, the legislature has failed to provide specific guidance to juvenile courts on the proper balance between the rights of parents and the rights of children. In particular, the current language and interpretation of the Visitation Statute undermines the legislature's goal of protecting children's rights over the rights of parents.

## III. JUVENILE DEPENDENCY IN WASHINGTON: THE TYPICAL EXPERIENCES OF FAMILIES WITH DEPENDENT CHILDREN

For thousands of families in Washington, the dependency process is an emotionally challenging experience in which children are uprooted from their homes. When a child is abused or neglected, as was the case with Tommy, the State of Washington has a right to intervene in the family relationship to protect the health, safety, and welfare of the child.[96] Washington's dependency laws attempt to balance parents' constitutionally protected right to the custody and care of their children and the state's right to protect children from harm. In addition to protecting children from harm, the secondary purpose of dependency is to im-

91. *Id.*

92. *Id.* § 13.34.020.

93. *Id.* § 13.34.100(1). If a child is represented by an attorney in dependency proceedings, then the appointment of a guardian ad litem is at the discretion of the court.

94. *Id.* § 13.34.105.

95. *Id.* § 13.34.105(1)(e). It is important to note that a GAL is not required under the statute to inform the court of the child's wishes regarding placement.

96. *See* discussion *supra* Part II.B–C.

prove parental deficiencies through state intervention.[97] In Washington, this balance is effectuated by the Dependency Act.[98]

This Part describes what families experience in the dependency process, from the initial pick-up order removing the child from the home to the end of the dependency (via reunification or termination of parental rights). Additionally, this Part discusses the specific duties and rights held by parents.

### *A. The Dependency Process*

The dependency process in Washington is initiated when DSHS receives a report that a child has been abused, neglected, or abandoned.[99] Upon receiving a report of abuse, DSHS assigns a social worker to investigate the allegations.[100] The social worker may file a dependency petition with the juvenile court[101] to remove the child from the family home[102] if the child is in immediate danger and if there appears to be merit to the allegations of abuse, neglect, or abandonment.[103] The court may then order law enforcement, a probation counselor, or DSHS to take the child into custody upon finding that the child's health, safety, and welfare will be seriously endangered if he or she is not removed from the

97. Kathleen Haggard, *Treating Prior Terminations of Parental Rights as Grounds for Present Terminations*, 73 WASH. L. REV. 1051, 1059 (1998).

98. *See* WASH. REV. CODE §§ 13.34.010–.810.

99. *Id.* § 26.44.010. DSHS often receives reports of child abuse from concerned family members, friends, or neighbors. A report of child abuse can also be filed by the police department or by hospital staff. *See id.* § 26.44.050 (providing the procedures that law enforcement must follow when placing a child into protective custody); *id.* § 26.44.056 (providing the procedures the hospital must follow when placing an administrative hold on a child).

100. Given the importance of family autonomy, the social worker will provide preservation services if the child is not found to be in immediate danger; the parents will then be asked to enter into a voluntary service contract with DSHS to correct any parental deficiencies. *See id.* § 74.14C.005. These contracts typically require the parents to agree to engage in services, stop dangerous behaviors, and allow social worker visits. So long as the parents comply with the contract and there is no imminent threat of danger in the home, the children will continue to reside with the parents.

101. The juvenile court retains jurisdiction throughout the dependency. When a petition for termination of parental rights is filed, jurisdiction resides with the superior court.

102. *See* § 13.34.040.

103. *Id.* § 13.34.030(5)(a)–(c); *see also id.* § 26.44.020(1) (defining "abuse or neglect" as "sexual abuse, sexual exploitation, or injury of a child by any person under circumstances that cause harm to the child's health, welfare, or safety, excluding conduct permitted under [Washington Revised Code section] 9A.16.100; or the negligent treatment or maltreatment of a child by a person responsible for or providing care to the child"); *id.* § 13.34.030(1) (defining "abandoned" as 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 despite an ability to exercise such rights and responsibilities").

home.[104] The child's parents must be served with a copy of the dependency petition and any supporting documentation.[105]

The juvenile court is required to conduct a fact-finding hearing within seventy-five days of the filing of a dependency petition to determine whether the child is dependent within the meaning of Washington Revised Code section 13.34.030.[106] The petitioner, typically DSHS, bears the burden of establishing by a preponderance of the evidence that the child is dependent.[107] In determining whether a child is dependent, the court may consider the parent's history of involvement with Child Protective Services or law enforcement agencies; the parent's inaction with regard to the child's health, safety, or welfare; and the efforts of DSHS to prevent or eliminate the need for removal of the child from the family home.[108] Following this fact-finding process, the court must conduct a disposition hearing within fourteen days of entering its order.[109] If the child is found to be dependent, then the court will order the placement of the child,[110] the appropriate services for the family,[111] and the amount and type of visitation.[112]

The familiar association with children being "stuck in foster care limbo" occurs at this point: after dependency but before termination of parental rights or reunification. Children typically remain in dependency for two to five years.[113] The dependency process can last for years for

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104. *See id.* § 13.34.050(1).

105. *See id.* § 13.34.050(3). Upon removal from the home, the child is immediately placed in shelter care. *See id.* § 13.34.060. DSHS is required to inform the parents of the reasons for removing the child from the home, the parents' rights under Washington statutes, and the process for protecting parental interests. *See id.* § 13.34.062(1)(a). For the stock notice form given to parents, see *id.* § 13.34.062(2)(b).

The child may remain in shelter care for seventy-two hours, after which time the parents are entitled to a shelter care hearing to determine the placement of the child. *Id.* § 13.34.062(1)(a). At the shelter care hearing, the court must determine whether the child can be safely returned home during the pending dependency action. *Id.* § 13.34.065(1)(a). For more information concerning the shelter care hearing, see *id.* § 13.34.065.

106. *Id.* § 13.34.070.

107. *Id.* § 13.34.110(1).

108. *Id.* § 13.34.110(2). Parents may waive their rights to a fact-finding hearing by signing an agreed order of dependency; however, entry of an agreed order is an admission that the child is dependent within the meaning of the statute. *Id.* § 13.34.110(3)(c)(iii). Before the court will enter the agreed order, parents are required to establish on the record that they understand that the agreed order will satisfy one of the elements required to terminate parental rights. *See id.*

109. *Id.* § 13.34.110(4).

110. *See id.* The court will determine whether the child should be placed with a parent, a relative, or in foster care. *Id.* If the child cannot be placed with the parent due to a risk of harm, the preference in Washington is for the child to be placed with the relative. *Id.*

111. *Id.* § 13.34.136(2)(b)(i).

112. *Id.* § 13.34.136(2)(b)(ii).

113. Telephone Interview with Anonymous Social Worker, Dep't of Soc. & Health Servs., in Lynnwood, Wash. (Nov. 19, 2007) [hereinafter Interview with DSHS Social Worker]. During this

several reasons: (1) the parent fails to comply with services in a timely manner, and therefore it is not safe for the state to return the child to the family home; (2) the severity of the parent's deficiencies requires years of treatment before the child can be returned home; or (3) the parent has periods of improvement followed by periods of regression that delay reunification or termination of parental rights.[114]

The dependency ends upon the occurrence of two possible events: reunification[115] or termination of parental rights.[116] Reunification occurs when the court has found that the parent has sufficiently corrected any parenting deficiencies so that the child can safely be returned home.[117] Termination occurs when the court has found that termination of parental rights is in the best interest of the child and parental deficiencies cannot be corrected in the foreseeable future.[118] Upon terminating parental rights, the child becomes eligible for adoption.

### *B. The Rights and Duties of Parents with Dependent Children*

Although the best interest and safety of the child are the main focus of a dependency, the Dependency Act provides parents with several rights and obligations. First, parents have a right to visitation with their children.[119] In out-of-home dependencies, visitation is fairly uniform for most families: juvenile courts typically order visitation between the parent and child once per week for one to three hours.[120] Parents visit with

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period, the court conducts a review to determine if the current or permanent placement plan should be changed, if services should be ordered, and if visitation should be limited or expanded. *See* WASH. REV. CODE § 13.34.136.

114. Interview with DSHS Social Worker, *supra* note 113.

115. *See* WASH. REV. CODE § 13.34.138(2)(a).

116. *See id.* § 13.34.132.

117. *Id.* § 13.34.138(2)(a).

118. *Id.* § 13.34.180(1)(a)–(f). The court will grant the termination of parental rights if: (a) the child has been found to be a dependent child; (b) the court has entered a dispositional order; (c) the child has been removed from the home for a period of at least six months; (d) services have been offered or provided and all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been offered or provided; (e) there is little likelihood that parental deficiencies will be remedied so that the child can be returned to the parent in the near future, considering whether (i) use of drugs or alcohol render the parent incapable of providing proper care for the child and there is a documented unwillingness of the parent to receive and complete treatment or (ii) psychological incapacity or mental deficiency of the parent is so severe and chronic as to render the parent incapable of providing proper care for the child and there is a documented unwillingness of the parent to receive and complete treatment; and (f) continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home. *Id.*

119. *Id.* § 13.34.136(2)(b)(ii) ("Visitation is the right of the family, including the child and the parent, in cases in which visitation is in the best interest of the child.").

120. Interview with DSHS Social Worker, *supra* note 113.

their children at a DSHS office and are supervised by visit supervisors.[121] During visitation, parents are encouraged to interact with their children in an age-appropriate manner, which includes playing with toys, discussing the child's schoolwork, and bringing the child snacks.[122]

Second, parents have a right to participate in permanency planning to determine the future placement plan for their child.[123] During permanency planning, parents have the opportunity to discuss their progress in addressing parental deficiencies and to comment on whether they desire reunification.

Third, parents have an obligation to comply with services to correct the deficiencies that led to dependency.[124] Given the broad range of possible parental problems, DSHS offers the following services: mental health counseling, substance abuse treatment, parenting classes, psychological evaluations, anger management classes, developmental disabilities services, housing services, and domestic violence treatment.[125] Parents may be granted reunification only upon showing that their parental deficiencies have been corrected.[126]

## IV. TO VISIT OR NOT TO VISIT: THE PROS AND CONS OF VISITATION

Courts, attorneys, GALs, and child psychologists agree that visitation is an important component of dependency and is beneficial to both the parent and child.[127] As Tommy's story reveals, however, visitation may provide an opportunity for parents to abuse their children.[128] This Part first describes the benefits of visitation for the child, the parents, and the court, and then analyzes the possible negative ramifications of visitation.

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121. *Id.*

122. *Id.*

123. *See* WASH. REV. CODE § 13.34.136(1).

124. *See id.* § 13.34.180(1)(d), (e)(i)–(ii).

125. DEPENDENCY & TERMINATION EQUAL JUSTICE COMM. REPORT 15 (2003), *available at* http://www.opd.wa.gov/Reports/Dependency%20&%20Termination%20Reports/2003%20DTEJ%20Report.pdf [hereinafter DTEJ COMM.].

126. WASH. REV. CODE § 13.34.138(2)(a).

127. *See, e.g.*, DTEJ COMM., *supra* note 125, at 19. The DTEJ Report was prepared by a multi-disciplinary group of judges, legislators, DSHS representatives, an assistant attorney general, parents' attorneys, and other professionals involved in dependency and termination cases. *See also* Margaret Smariga, *Visitation with Infants and Toddlers in Foster Care: What Judges and Attorneys Need to Know*, PRAC. & POL'Y BRIEF (ABA Ctr. on Children & Law, Wash. D.C.), July 2007, at 1, *available at* http://www.abanet.org/child/policy-brief2.pdf.

128. *See* discussion *supra* Part I.

### *A. Visitation as a Tool in Bringing About Reunification*

During dependency, visitation is important to three groups: parents, dependent children, and the courts that make visitation decisions. First, visitation is important to dependent children.[129] Regardless of the circumstances, dependent children are harmed by the disruption of the parent–child relationship during the dependency process. Visitation can minimize the emotional harm that dependent children suffer from being separated from their parents by providing children opportunities to maintain and restore familial bonds.[130] Visitation also allows children an opportunity to form a more appropriate parent–child relationship under supervision by visit coordinators.[131]

Second, visitation is crucial for parents.[132] Visitation allows the parents to lessen the pain of separation by remaining a part of the child's life.[133] Visitation provides the parents opportunities to hear about the child's day-to-day life and stay abreast of the child's development.[134] Moreover, visitation is an opportunity for parents to practice parenting skills and receive coaching from visit supervisors.[135] Visitation is also essential for the parents' motivation.[136] By having continued contact with the child, parents are able to keep the hope alive that their child will be returned home after they have fully addressed their parental deficiencies.

Finally, visitation is a critical tool for the courts in assessing whether reunification is possible.[137] The nature of the parent–child interaction during visitation will inform the court of the family's progress or of the parents' inability to correct deficiencies.[138] Without visitation, it would be more difficult for the court to assess if the parents are able to incorporate what they have learned through services into parenting their children and if reunification is a desirable outcome.

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129. DTEJ COMM., *supra* note 125, at 19.

130. Smariga, *supra* note 127, at 1, 5.

131. Interview with DSHS Social Worker, *supra* note 113.

132. DTEJ COMM., *supra* note 125, at 19.

133. Smariga, *supra* note 127, at 6.

134. This is especially true for younger children (infants and toddlers) who develop more quickly than adolescents.

135. Smariga, *supra* note 127, at 6.

136. *Id.*

137. *Id.* at 20. In reviewing a visitation order, the court should look at: whether the current visitation plan allows an attachment to form between the parent and child, whether the visitation allows the parent an opportunity to "parent", what the start and end of visits look like (parent and child responses), and whether the permanency plan is moving toward reunification. *Id.*

138. *Id.* at 6.

### *B. The Dangers of Visitation*

Although visitation between parents and their dependent children often helps reunification, visitation is not always beneficial and may present serious negative ramifications for the children.[139] First, visitation may harm the child when parents engage in behavior that is emotionally or physically abusive.[140] Parental conduct that is likely to result in emotional abuse includes: false promises that the child will return home soon, comments blaming the child for the dependency, or unsubstantiated accusations that the child is being abused in foster care.[141] The parents may also engage in inappropriate conduct that, although not directed at the child, can have an adverse effect on the child's well-being. For example, a child can suffer emotional harm when parents yell at the social workers during visits.[142] Instead of a visit focused on the parent and child, the visit becomes a battle between the visit supervisor and the parents.[143] Visitation is inappropriate in these situations because the visits no longer satisfy the purposes for which they were intended: strengthening the parent–child relationship.

Second, visitation can also prove harmful to the child when parents are unwilling to work with visit supervisors or respond to their child's needs.[144] In this situation, not only will the parents fail to heed visit supervisor warnings regarding inappropriate interaction with the child, but parents will also ignore advice regarding appropriate interaction with the child.[145] Parents who refuse or are unable to respond to their child's cues—such as crying, acting out, or withdrawing—may subject the child to neglect or emotional abuse.[146] For instance, Tommy would repeatedly sign "NO" to his father or would try to flee the room when Mr. Goodall sang or talked loudly near his face.[147] Mr. Goodall would frequently

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139. *See* discussion *supra* Part I.

140. Smariga, *supra* note 127, at 9.

141. Peter G. Jaffe et al., *Courts Responding to Domestic Violence: Parenting Arrangements after Domestic Violence*, 6 J. CENTER FOR FAMILIES, CHILD. & CTS. 81, 85 (2005) (discussing the effect of domestic violence after the children have been removed from the perpetrator). When perpetrators of domestic violence feel unjustly blamed by the system, they may rationalize their behavior to their children or place blame on the children or on the other parent. This ongoing exposure to inappropriate topics of conversation constitutes a form of ongoing emotional abuse that affects children's sense of emotional security. *Id.*

142. Interview with DSHS Social Worker, *supra* note 113.

143. *Id.* Visits between Tommy and Mr. Goodall were often harmful to Tommy because Mr. Goodall refused to listen to visit supervisors, and Mr. Goodall was unable to respond to Tommy's needs for less anxiety. *See* discussion *supra* Part I.

144. Interview with DSHS Social Worker, *supra* note 113.

145. *Id.*

146. *Id.*

147. *In re* Dependency of C.N., No. 58799-4-I, 2007 WL 4489646, at *3 (Wash. Ct. App. Dec. 24, 2007).

ignore these cues from Tommy, and in response, Tommy would become so agitated that he would engage in self-mutilation or other acts exhibiting severe distress and anger.[148]

Third, visitation may be harmful when the parents' deficiencies are readily apparent to the child during visits.[149] A parent's substance abuse or mental health problems are often perceptible to children even during a brief visit.[150] For example, a child may be exposed to erratic and risky adult behavior such as hallucinations and paranoia when parents are not getting treatment.[151] Moreover, parents with these heightened deficiencies are often unable to respond to their child's cues, including the need for a warm and responsive interaction.[152]

Finally, visitation can be harmful to the child when the parents do not visit consistently.[153] Inconsistent visits are harmful to the child because they increase the child's sense of separation, confusion, and abandonment.[154] More importantly, inconsistent visits do not enable the parents and the child to bond.[155] The effect of harmful visitation on children is often evident.[156] Some children will refuse to visit with their parents.[157] Other children will emotionally shut down and fail to respond

148. *Id.* During one visit when Mr. Goodall ignored Tommy's cues, Tommy "tried to drink hot water out of the bathroom faucet and yanked window blind rods off and started waving them around." *Id.*

149. Interview with DSHS Social Worker, *supra* note 113.

150. *Id.* According to the social worker, children as young as three can perceive parental deficiencies. Although a young child may not be able to pinpoint the source of the deficiency (for example, substance abuse or mental health issues), the child can tell "something is not quite right." Because dependent children are often exposed to a more stable environment in foster care, the parents' behavior may seem wrong or inappropriate.

151. Brynna Kroll, *A Family Affair? Kinship Care and Parental Substance Misuse: Some Dilemmas Explored*, 12 CHILD & FAMILY SOC. WORK 84, 88 (2007) (discussing the effect of parental substance abuse on children). This is not to say that all parents with mental health and substance abuse problems are not fit to visit their children. Instead, those parents who have severe problems, refuse treatment, and expose their children to harm should have the appropriateness of their visitation orders carefully examined by the court.

152. *Id.* at 88. This may include a failure to communicate with the child, play with child, or show affection. [*Id.*]

153. Interview with DSHS Social Worker, *supra* note 113.

154. *Id.*

155. *Id.* According to the social worker, parents with untreated substance abuse or mental health problems are more likely to not visit or visit inconsistently. *See also* Kroll, *supra* note 151, at 88 ("[Substance abuse] . . . can render parents psychologically unavailable, inconsistent . . . , less sensitive to children's signals, needs and overall welfare, and *often actually physically absent* because of the demands that obtaining substances may make." (emphasis added)).

156. Interview with DSHS Social Worker, *supra* note 113.

157. *Id.* In *In re Dependency of T.H.*, 139 Wash. App. 784, 162 P.3d 1141 (2007), the child refused to visit with the mother following several emotionally traumatizing in-person visits; the juvenile court suspended visitation until the child wished to renew contact with his mother. *Id.* at 787, 162 P.3d at 1142.

throughout a visit.[158] Children like Tommy may flee the room, act out in rage, or engage in self-mutilation.[159] The effects of a bad visit with the parents can also be seen after the visit has ended.[160] Normally calm children may exhibit increased emotional outbursts following unsuccessful visits.[161] Foster parents may notice an abnormal increase in screaming or disobedience.[162] Yet the most typical response is intense confusion, sadness, and grief.[163] Children will continually ask about permanence and when "things will return to normal."[164]

Although visitation is crucial for reunification and maintenance of the parent–child relationship, these purposes are not served in all situations. They are not served when parents engage in behavior that presents a risk of emotional or physical abuse. They are not served when parents refuse to cooperate with visit supervisors in responding to the child's needs. They are not served when parents are grossly inconsistent with attending visits. And they are not served when parents are unable to conceal their substance abuse or mental health deficiencies from their children.

To ensure that the purposes of the Visitation Statute are properly served, an amendment to the Statute is necessary. Not only can an amendment mitigate the effect that harmful visits have on children, new statutory language will empower courts to suspend or deny visitation without subjecting children to months of harmful visits.

## V. THE WASHINGTON VISITATION STATUTE: AN ANALYSIS OF THE STATUTE, JUDICIAL APPLICATION, AND APPELLATE INTERPRETATION

First, this Part first examines the former Visitation Statute, the legislative history of the current Visitation Statute, and the juvenile courts' application of the Statute. Second, to provide a better understanding of the legal interpretation of the Statute, this Part analyzes two published decisions from the Washington State Court of Appeals: *In re Dependency of T.L.G.*[165] and *In re Dependency of T.H.*[166] Finally, this

158. Interview with DSHS Social Worker, *supra* note 113.

159. *Id.* In addition to fleeing the room or engaging in self-mutilation, Tommy would have a physical reaction (such as a bowel movement) in response to visits with Mr. Goodall. *See* DSHS Response, *supra* note 19, at 9.

160. Interview with DSHS Social Worker, *supra* note 113.

161. *Id.*

162. *Id.*

163. Smariga, *supra* note 127, at 15 ("Very young children cannot understand the separation, and they tend to respond with bewilderment, sadness, and grief."); *see also* Interview with DSHS Social Worker, *supra* note 113. According to the social worker, all dependent children—regardless of the bond they have with their parents—are very confused about what is going to happen to them.

164. Interview with DSHS Social Worker, *supra* note 113.

165. 139 Wash. App. 1, 156 P.3d 222 (2007).

Part discusses the appellate court's unpublished decision in Tommy's case.[167]

### *A. The Legislative History and Plain Meaning of the Visitation Statute*

The Washington legislature has long attempted to balance the rights of parents and the rights of children in the dependency setting. This attempt is shown by the legislature's history amending the Visitation Statute.

In 2001, the legislature formed a committee—the Dependency and Termination Equal Justice Committee ("DTEJ Committee")—to examine specific problems arising in dependency and termination cases, including visitation.[168] In its report, the DTEJ Committee concluded that "visitation is a key, critical issue for both parents and children and that opportunities for visitation should be offered to the maximum extent possible."[169] The Committee made recommendations to change the former version of the Visitation Statute, which provided:

> The agency shall encourage the maximum parent and child and sibling contact possible, including regular visitation and participation by the parents in the care of the child while the child is in placement. Visitation may be limited or denied only if the court determines that such limitation or denial is necessary to protect the child's health, safety, or welfare.[170]

First, the DTEJ Committee recommended that visitation be considered a right of the family.[171] Second, it recommended that visitation should not be used as a sanction for a parent's failure to engage in court-ordered services.[172] Third, it recommended "early, consistent and frequent visitation."[173]

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166. 139 Wash. App. 784, 162 P.3d 1141 (2007).

167. *In re* Dependency of C.N., No. 58799-4-I, 2007 WL 4489646, at *2 (Wash. Ct. App. Dec. 24, 2007).

168. S. 6643, 58th Leg., 2d Sess. (Wash. 2004); *see also* DTEJ COMM., *supra* note 125, at iii. These problem areas included court continuances, the appointment of experts, parents' access to services, and visitation. The DTEJ Committee consisted of a multidisciplinary group of judges, legislators, DSHS representatives, an assistant attorney general, parents' attorneys, court administrators, a county commissioner, and other professionals involved in dependency and termination cases. *Id.* at 1.

169. DTEJ COMM., *supra* note 125, at iii.

170. WASH. REV. CODE § 13.34.136(2)(b)(ii) (2002) (amended 2004).

171. DTEJ COMM., *supra* note 125, at 19.

172. *Id.* ("Suspension of visitation as a penalty for failing a urinalysis or failing to follow through with other services that are not visitation-related is in derogation of the child's and parent's right to consistent and frequent visitation."). It is important to note that the report fails to state that drug and alcohol treatment, mental health counseling, and domestic violence treatment are not visitation-related.

173. *Id.*

The legislature amended the Statute to reflect these three recommendations.[174] First, the Statute was amended to prevent courts from restricting visitation as punishment for parents who failed to comply with court directives.[175] In the 2004 amended version, the Statute provided that "visitation shall not be limited as a sanction . . . where the health, safety, or welfare of the child is not at risk as a result of the visitation."[176] The DTEJ Committee advocated this change because it contended that limiting visitation as a sanction harms the child, and methods other than suspending visitation could sufficiently protect the child's safety and well-being.[177] Second, the legislature amended the Statute to instruct juvenile courts to make visitation decisions based on the child's best interest.[178] Third, the legislature added language that visitation was a right of the family.[179]

Although the legislature intended these changes to protect the best interest of the child, the Statute has had the opposite effect in several cases, including Tommy's dependency. First, the Visitation Statute does not contain clear guidelines to juvenile courts for how to balance the rights of parents and children. The origin of the problem stems from the conflicting language in the Statute. The Statute begins by recognizing that visitation is a right of the family and that parents and children should have maximum contact.[180] Juvenile courts interpret this language as a recognition of the right of parents to maximum visitation with their dependent children.[181] Yet the Visitation Statute also provides that visitation decisions should comport with the best interest of the child and that visitation is not required when it conflicts with the child's health, safety, or welfare.[182] The Visitation Statute does not, however, explain how to properly balance the health and safety rights of children with the parents' right to maximum visitation.

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174. S. 6643, 58th Leg., 2d Sess. (Wash. 2004).

175. *Id.*

176. WASH. REV. CODE § 13.34.136(2)(b)(ii) (2008).

177. Wash. S. 6643. In testimony before the senate, persons testifying in support of the amendment testified that sanctioning visitation was unnecessary because courts have other means of sanctioning parents. *See also* DTEJ COMM., *supra* note 125, at 19-22.

178. WASH. REV. CODE § 13.34.136(2)(b)(ii). "Appropriate levels of visitation should be determined for each family, taking into account their individualized circumstances, including the bond and parental follow-through, among other factors, and consistent with the health, safety, and welfare of the child." DTEJ COMM., *supra* note 125, at 19.

179. WASH. REV. CODE § 13.34.136(2)(b)(ii). This language was influenced by the DTEJ report, which noted that "visitation is the right of the family" and "extremely important to both the child and the parent." DTEJ COMM., *supra* note 125, at 19.

180. WASH. REV. CODE § 13.34.136(2)(b)(ii).

181. *Id.*; *see also* discussion *infra* Part V.B.

182. WASH. REV. CODE § 13.34.136(2)(b)(ii).

Second, the sanction provision, as interpreted by the juvenile and appellate courts, allows parents to continue visitation despite their failure to address parental deficiencies that harm the child.[183] The sanction provision was a well-intentioned attempt to prevent unwarranted restrictions on visitation and to ensure that courts would not limit visitation after a parent missed a few appointments for services.[184] But, when read in conjunction with the earlier language requiring maximum visitation, juvenile courts generally interpret this language as a broad restraint on its ability to limit visitation.[185] As a result, children are often subjected to several harmful visits before a juvenile court will find that the parent's noncompliance with services is an actual risk to the child's health, safety, or welfare.[186] Moreover, the appellate court's interpretation of the sanction provision has tied the hands of juvenile court judges and has forced these judges to allow harmful visitation to continue in order to prove that the parent's noncompliance is directly related to the quality of visits.[187]

Third, the Visitation Statute does not define a child's best interest or explain when it is appropriate to suspend visitation. The current statutory language instructs juvenile courts to make visitation decisions with the health, safety, and welfare of the child in mind.[188] Yet "the health, safety, and welfare of the child" language is a vague and meaningless guide. As a result, juvenile courts have rendered visitation decisions in an ad hoc fashion and all too often in the parent's favor.[189]

Without meaningful guidelines from the Visitation Statute, the juvenile courts have struggled to apply the Statute in a consistent or pre-

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183. *See* discussion *infra* Part V.B.–C.

184. DTEJ COMM., *supra* note 125, at 22 (noting that the suspension of visitation "should not be imposed as sanctions to enforce service orders").

185. *See, e.g.*, *In re* Dependency of T.L.G., 139 Wash. App. 1, 156 P.3d 222 (2007). In *T.L.G.*, the Washington Court of Appeals concluded that the juvenile court improperly denied visitation as a "sanction" for the parents' noncompliance with services even though the juvenile court expressed concern that the children were at risk of harm because the parents refused to address their parental deficiencies for over four years. *Id.* at 9, 17–18, 156 P.3d at 226, 230–31.

186. Tommy, for example, suffered five additional months of abuse before the court felt free to find that Mr. Goodall's noncompliance with services was directly related to the harmful nature of the visits. *See supra* Part I; *see also* discussion *infra* Part V.B.

187. *See* discussion *infra* Part V.B.–C.

188. WASH. REV. CODE § 13.34.136(2)(b)(ii) (2008).

189. Interview with DSHS Social Worker, *supra* note 113; *see also, e.g.*, *T.L.G.*, 139 Wash. App. 1, 156 P.3d 222 (holding that juvenile court should not have suspended visitation even though the parents refused to seek treatment for anger and mental health problems; there was a documented history of volatile visits; and during one visit, the parents became physical with visit supervisors and threatened to hold the child hostage); *In re* Dependency of C.N., No. 58799-4-I, 2007 WL 4489646, at *2–3 (Wash. Ct. App. Dec. 24, 2007) (noting that the juvenile court permitted visitation for two years even though the child demonstrated severe emotional and physical reactions to visits with his father).

dictable manner,[190] and the judges often focus solely on the parents' right to visitation.[191] Moreover, the Washington Court of Appeals has failed to clearly elucidate where parents' rights end and children's rights begin in the visitation setting.[192] These differing outcomes have rendered the Visitation Statute of little use in protecting the interests of children.

### *B. Application of the Visitation Statute at the Juvenile Court Level*

The juvenile court is the key actor in determining the scope of a visitation order; therefore, its application of the Visitation Statute is instructive to determine whether the Statute is, in fact, protecting the best interest of the child. It is no surprise, in light of the legislative history and statutory language, that visitation orders focus on parents' rights.[193] When visits between the parent and child are emotionally damaging for the child, the juvenile courts typically express reluctance in limiting or denying visitation.[194] Instead, as in Tommy's case,[195] the courts often issue "conditions" for the parents to abide by during visits.[196]

Juvenile courts typically rely on two reasons to justify the continuance of visitation. First, visitation brings about reunification.[197] The argument behind this justification is that without visitation parents will not have an opportunity to correct parental deficiencies. The courts often state that visits will improve with time and practice. Second, visitation is an absolute right of the parents.[198]

To suspend a visitation order, social workers generally must provide several accounts of actual harm that the child has suffered during visitation.[199] Sadly, this requires putting the child through the emotional harm of additional visits so that the social worker has more "ammunition" for a later declaration supporting the Department's motion seeking to restrict or deny visitation.[200] Under the current Statute and its

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190. For a discussion of the conflicting opinions in *In re Dependency of T.L.G.* and *In re Dependency of T.H.*, see *infra* Part V.C.2.iii.

191. *See, e.g.*, *T.L.G.*, 139 Wash. App. at 17, 156 P.3d at 230; Interview with DSHS Social Worker, *supra* note 113. The court interpreted the 2004 amendments to the Visitation Statute as "strengthen[ing] the parents' visitation rights and command[ing] the agency to encourage maximum parent-child contact." *T.L.G.*, 139 Wash. App. at 16–17, 156 P.3d at 230.

192. *See* discussion *infra* Part V.C.1–2.

193. Interview with DSHS Social Worker, *supra* note 113. This subpart of the Comment is based on the experiences of a social worker with Children's Administration, a division of DSHS.

194. *Id.*

195. *See supra* Part I.

196. Interview with DSHS Social Worker, *supra* note 113.

197. WASH. REV. CODE § 13.34.136(2)(b)(ii) (2008) ("Early, consistent, and frequent visitation is crucial for . . . making it possible for parents and children to safely reunify.").

198. Interview with DSHS Social Worker, *supra* note 113.

199. *Id.*

200. *Id.*

application at the juvenile court level, the best interest of the child is not adequately protected.

### *C. The Washington Appellate Court's Interpretation of the Visitation Statute*

Decisions from the Washington State Court of Appeals have failed to provide more instructive interpretations of the Visitation Statute and in fact, have muddied the waters. This section examines two recently published decisions: *In re Dependency of T.L.G.* and *In re Dependency of T.H.*[201] This section then examines the court's unpublished opinion in Tommy's case. All three opinions have failed to sufficiently instruct the juvenile courts on how to evaluate visitation issues and the best interest of the child. Moreover, the "guidelines" that the court of appeals provided in these decisions are likely to put children at further risk for ongoing trauma and abuse during visitation with their parents.

#### 1. *In re Dependency of T.L.G.*

In 2007, the court of appeals decided *In re Dependency of T.L.G.*[202] This case was the first to interpret the Visitation Statute as amended in 2004. The *T.L.G.* court's interpretation of the statute rendered the rights and interests of children secondary to the rights of parents by finding that there must be an "actual risk of harm"[203] before visits can be suspended. Sadly, the facts of *T.L.G.* indicate that the appellate court's requirement of "actual risk of harm" means that there must be documented harm during visits before juvenile courts may suspend visitation.[204]

##### *i. Factual Background & Procedural History*

Bonnie Dunlavy and William Gilfillen are the parents of T.L.G. and C.L.G,[205] who were removed from their parents' care in August 2001.[206] From the beginning of the dependency, visitation between the parents and children was problematic.[207] Visit supervisors frequently reported to

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201. *In re* Dependency of T.L.G., 139 Wash. App. 1, 156 P.3d 222 (2007); *In re* Dependency of T.H., 139 Wash. App. 784, 162 P.3d 1141 (2007).

202. *T.L.G.*, 139 Wash. App. 1, 156 P.3d 222.

203. *Id.* at 17, 156 P.3d at 230.

204. *See* discussion *infra* Part V.C.2.iii.

205. *T.L.G.*, 139 Wash. App. at 4, 156 P.3d at 223.

206. Brief of Respondent at 1, *T.L.G.*, 139 Wash. App. 1, 156 P.3d 222 (2007) (No. 57862-6-1). The children were removed from Ms. Dunlavy and Mr. Gilfillen's care because the parents' significant mental health and anger management problems placed the children at risk and rendered the parents unable to care for the children's special needs. *Id.*

207. *Id.* at 2.

the juvenile court that Ms. Dunlavy and Mr. Gilfillen were hostile and verbally abusive to agency staff during visits with their children.[208]

The juvenile court ultimately suspended visitation following a particularly hostile visit that ended with police escorting Ms. Dunlavy from the DSHS office.[209] On January 25, 2002, the parents became antagonistic with the visit supervisor after learning that C.L.G. would not be at the visit.[210] While holding T.L.G., Ms. Dunlavy repeatedly yelled at the social worker regarding their case and threatened to use the child as a hostage.[211] To prevent T.L.G. from witnessing her parents' inappropriate and aggressive behavior, the visit supervisor told the parents to calm down or she would have to end the visit.[212] The parents continued to yell at the visit supervisor, who again instructed them to stop discussing their complaints and the case in front of their child.[213]

When the parents refused to calm down, the visit supervisor called a security guard to protect T.L.G. and to end the confrontation. Immediately, Mr. Gilfillen began yelling and physically attacking the security guard.[214] Meanwhile, Ms. Dunlavy tried several times to leave the visit room with T.L.G.[215] Concerned for T.L.G.'s safety, the social worker assigned to the case intervened and successfully separated the crying and frightened child from her out-of-control mother.[216] Police arrived and escorted Ms. Dunlavy from the DSHS office.[217]

Shortly after the visit, the juvenile court granted DSHS's motion to suspend visitation.[218] Although the parents did not request the reinstatement of visitation until June 2005 (three years after the incident),[219] DSHS continued to oppose visitation on the ground that the parents had

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208. *Id.*

209. *Id.*

210. *Id.* at 3. C.L.G. was not at this particular visit because of an illness. *Id.*

211. *Id.* During this visit, the parents claimed that they believed the visit supervisor was feeding T.L.G. out of a dirty sippy-cup. Mr. Gilfillen also engaged in an argument with the visit supervisor concerning the alleged dirty cup. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* at 4.

216. *Id.* The social worker arrived at the DSHS office shortly before the visit supervisor called the security guard. *Id.*

217. *Id.*

218. *Id.* The parents did not file a response to DSHS's request to suspend visitation. Following suspension of visitation, the parents did not ask the court to reinstate visits. In 2003, parental rights were terminated. In March 2005, the termination orders were reversed and the case returned to the juvenile court. *See In re* Dependency of T.L.G., 126 Wash. App. 181, 108 P.3d 156 (2005).

219. Brief of Respondent, *supra* note 206, at 4. Because the juvenile court could unilaterally reinstate visitation without the parents' filing a request to restore visits, DSHS continued to voice its opposition to visitation during review hearings. *Id.*

yet to resolve their anger and mental health problems.[220] Both DSHS and the GAL argued that the parents' behavior posed a substantial risk to the health, safety, and welfare of the children.[221] The judge denied the parents' request to reinstate visitation.[222] In his ruling, the judge opined:

> Visitation's something we need to work for, but I think two things need to occur. One, the children need to be prepared for it, and two, the parents need to take some action to make it clear that they're taking steps towards addressing the deficiencies that were identified in the dependency previously . . . but also that led to the suspension of visits in January 2002 because of the actions of the parents.[223]

The court denied two more requests to reinstate visitation between August 2005 and May 2006,[224] finding that the suspension of visitation was proper and was not some "punishment" for the parents' noncompliance with services.[225] Each time the court denied visitation, it justified the decision on the grounds that visits would be contrary to the children's best interests and that "there are problems here that need intervention before these children can safely resume contact with their parents."[226] On May 30, 2006, Ms. Dunlavy and Mr. Gilfillen appealed, claiming that the juvenile court abused its discretion in denying visitation.[227]

### *ii. The Court of Appeals' Opinion*

The appellate court reversed the juvenile court's suspension of visitation as a violation of the parents' rights: first, the court held that the parents were improperly denied visitation as a sanction for their noncompliance with court-ordered services;[228] second, the court held that the juvenile court improperly denied visitation without a finding that there was "actual harm" to the children.[229]

According to the court, the 2004 amendments to the Visitation Statute were aimed at "strengthening parents' rights to visitation with their dependent children."[230] The court held that because the Statute requires the Department to encourage *maximum* parent and child contact juvenile courts were prohibited from using visitation as a sanction for a

220. *Id.*
221. *Id.* at 4–5.
222. *In re* Dependency of T.L.G., 139 Wash. App. 1, 8–9, 156 P.3d 222, 226 (2007).
223. Brief of Respondent, *supra* note 206, at 5.
224. *T.L.G.*, 139 Wash. App. at 9–13, 156 P.3d at 226–28.
225. Brief of Respondent, *supra* note 206, at 6–7.
226. *T.L.G.*, 139 Wash. App. at 12, 156 P.3d at 228.
227. *Id.* at 14, 156 P.3d at 228.
228. *Id.* at 18, 156 P.3d at 231.
229. *Id.* at 18, 156 P.3d at 231.
230. *Id.* at 4, 156 P.3d at 223.

parent's failure to comply with court orders or required services.[231] The denial of visitation in this case, according to the court, was "difficult to view as anything but a sanction" because the juvenile court, DSHS, and witnesses repeatedly stated that visitation should not resume until each parent made sufficient progress in court-ordered services.[232]

The court also held that the juvenile court's denial of visitation was an abuse of discretion because there was no showing of actual harm.[233] In reaching its decision, the court reasoned that the Visitation Statute prevents juvenile courts from "limiting or denying visitation without a showing of risk."[234] Thus, a juvenile court may properly restrict visitation only when there is a showing of the "legislatively-mandated risk of harm." In defining this risk, the court held that the risk of harm "must be an actual risk, not speculation based on reports."[235] The court stated that because the burden is on DSHS to encourage maximum parent–child contact,[236] the Department bears the burden of proving that visitation poses a "current concrete risk" to the children before visitation may be suspended.[237] The court concluded that there was no concrete risk of harm when visits remained suspended based on "a single incident."[238]

### *iii. The Effect of* In re Dependency of T.L.G.

With its decision in *T.L.G.*, the court of appeals created a presumption in favor of parents when determining the validity of visitation orders. The court justified this presumption by its interpretation of the Statute's legislative history; according to the court, the purpose of the 2004 amendments was to strengthen parents' rights.[239] The *T.L.G.* decision is troubling for three reasons. First, the court's decision that the juvenile court was merely sanctioning the parents for noncompliance is inconsistent with the juvenile court proceedings. Second, the court's decision improperly placed too much emphasis on the rights of parents in the visitation setting. Third, the court's interpretation of the sanction provision and requirement that juvenile courts find "actual risk of harm" before suspending visitation is inconsistent with the

231. *Id.* at 16, 156 P.3d at 229–30 (emphasis added).

232. *Id.* at 18, 156 P.3d at 231.

233. *Id.* at 18, 156 P.3d at 231.

234. *Id.* at 16–17, 156 P.3d at 230.

235. *Id.* When stating that the risk of harm may not be based on "reports," the court was referencing the reports of the guardian ad litem, social worker, and anger management counselor. All of these reports concluded that visitation would present a significant risk to the health, safety, and welfare of the children. *See* Brief of Respondent, *supra* note 206, at 7–9.

236. *T.L.G.*, 139 Wash. App. at 17, 156 P.3d at 230.

237. *Id.* at 18, 156 P.3d at 230.

238. *Id.* at 18, 156 P.3d at 230.

239. *Id.* at 4, 156 P.3d at 223.

intent of the Visitation Statute and places children at greater risk for emotional or physical abuse.

First, the court's opinion ignores the realities of the case in *T.L.G.* In its decision, the appellate court asserted that the juvenile court's suspension of visitation could only be interpreted as a sanction.[240] This assertion is belied by the record. The juvenile court provided several reasons for denying visitation: the troubling nature of the 2002 visit, the history of visits demonstrating the parents' anger issues, and the parents' consistent failure to address the problems that led to harmful visits in the past.[241] In suspending visitation, the juvenile court concluded that visitation was not in the children's best interest.[242]

Although the appellate court correctly stated that visits may not be suspended solely because of the parents' failure to comply with services, it incorrectly stated that was the juvenile court's justification for suspending visits between T.L.G. and her parents. On the contrary, the juvenile court's oral rulings verify that the parents' anger and mental health issues were tied directly to the troubling visits in the past:

> So the fact that the parents are not fully engaged in services is not just in and of itself reason to not have visitation as some form of punishment. But I do believe that it does indicate that . . . *there are problems here that need intervention before these children can safely resume contact with their parents, and that hasn't occurred.*[243]

The Visitation Statute allows juvenile courts to restrict visitation when a parent's noncompliance with services is tied to a risk of harm to the child and affects the quality of visits.[244] In this case, the juvenile court found that the parents' consistent failure to address anger issues posed a risk of harm to T.L.G. in 2002 and that this risk remained in 2006 because the parents never sought treatment for their anger and mental health issues.[245] The appellate court's decision to reverse the suspension of visitation was improper because the juvenile court was within its discretion to protect the child's best interest.

Second, the court's opinion created a dangerous precedent by holding that the intent of the Visitation Statute was to enhance parents' rights. The court's presumption in favor of parents is contrary to the

240. *Id.* at 18, 156 P.3d at 231.

241. Brief of Respondent, *supra* note 206, at 5–9.

242. *Id.* at 6–7.

243. *Id.* at 6 (emphasis added).

244. *See* WASH. REV. CODE § 13.34.136(2)(b)(ii) (2008). The DTEJ Report also acknowledges that restrictions on visits are appropriate when the "parent's actions [failure to show up to visits or come to visits intoxicated] . . . raise . . . visitation-related issues and can cause children anxiety and disappointment." DTEJ COMM., *supra* note 125, at 19.

245. Brief of Respondent, *supra* note 206, at 6–7.

overall intent of the Dependency Act. Although it is true that reunification is the goal of dependency and that parents do indeed have a right to visitation, the rights of children are paramount in the dependency process.[246] Section 13.34.020 of the Revised Code of Washington—the section describing the purpose of the Dependency Act—provides that when the rights of parents conflict with the rights of the child, "the rights and safety of the child[ren] should prevail."[247] By holding that the burden is on DSHS to prove that visitation poses a "current concrete risk" to the child,[248] the appellate court improperly favored the rights of parents over the rights of the child.

Lastly, the appellate court's decision ignored the realities of dependency and created a dangerous precedent through its interpretation of the sanction provision. The court's opinion failed to take into account that children are dependent because of *parental* abuse, neglect, or abandonment.[249] Maximizing visitation does not correct these problems; services targeted at the parents' issues, on the other hand, do correct these problems and do lead to parental improvement. By concluding that visitation cannot be limited when parents fail to comply with services,[250] the appellate court ignored the inherent importance of services in the visitation setting. Without compliance with services, several, if not all, of the problems underlying the dependency action will not be corrected. Parents who fail to address their deficiencies expose their children to the same problems during visits that their children were exposed to before being placed in foster care.

For instance, healthy visits between Tommy and his father were not possible when Mr. Goodall failed to address his mental health issues.[251] When the juvenile court permitted visitation, Tommy was exposed to additional emotional and physical harm during visits because of Mr. Goodall's noncompliance with services.[252] Healthy visits between parents and children are contingent on the parents' compliance with services.[253]

The appellate court's requirement of current concrete risk and actual risk of harm indicates that there must be *documented* harm to the child—related to the parent's noncompliance—before a juvenile court can properly suspend visitation. As the court's opinion indicates, one

246. WASH. REV. CODE § 13.34.020.

247. *Id.*

248. *In re* Dependency of T.L.G., 139 Wash. App. 1, 18, 156 P.3d 222, 230 (2007).

249. *See* WASH. REV. CODE § 13.34.030(5)(a)–(c).

250. *T.L.G.*, 139 Wash. App. at 18, 156 P.3d 231.

251. *See* discussion *supra* Part I.

252. *See* discussion *supra* Part I.

253. Interview with DSHS Social Worker, *supra* note 113.

incident of harm is not enough to suspend visitation;[254] however, the court failed to explain how much harm is enough. Thus, children like Tommy are subjected to weeks, months, and possibly years of traumatizing visits before a juvenile court can properly suspend visitation under the *T.L.G.* standard.

Although the appellate court's parental rights presumption has the advantage of promoting family reunification through maximum visitation and contact between the parent and child,[255] the decision puts children at too great a risk of suffering harm during visitation. Requiring DSHS to present the court with an actual risk of harm[256] or a current concrete risk[257] before the court can suspend visitation is too high of a standard and does not adequately protect the best interests of children. An amendment to the Visitation Statute is necessary to ensure that the health and safety of children is the primary concern of juvenile courts when rendering visitation decisions.

### 2. *In re Dependency of T.H.*

Later in 2007, the Washington Court of Appeals decided *In re Dependency of T.H.*[258] In *T.H.*, the court's opinion was more consistent with the intent of both the Visitation Statute and the Dependency Act by recognizing the best interest of the child. The decision, however, fell short of adequately protecting the best interest of the child because the court required "evidence of harm" before juvenile courts could restrict or suspend visitation.[259]

#### *i. Factual Background*

Ms. Hackney-Farias is the mother of T.H., a child found dependent in November 2004. The juvenile court removed T.H. from Ms. Hackney-Farias's care because she had "physically and verbally abused T.H., neglected T.H., and despite being aware that T.H. was being sexually abused by her boyfriend's son, took limited actions to protect the child."[260] Hackney-Farias's visits with T.H., both before and during the dependency, were problematic.[261] She repeatedly told T.H. that he was

254. *T.L.G.*, 139 Wash. App. at 18, 156 P.3d at 230.

255. *Id.* at 4, 156 P.3d at 223–24.

256. *Id.* at 18, 156 P.3d at 231.

257. *Id.* at 18, 156 P.3d at 230.

258. *In re* Dependency of T.H., 139 Wash. App. 784, 162 P.3d 1141 (2007).

259. *Id.* at 794, 162 P.3d at 1145 ("[T]his court has stated that an express finding [that a visitation limitation is necessary to protect the child's health, safety, or welfare] is not required if the *evidence supports the conclusion that visitation is harmful to the child.*" (emphasis added)).

260. *Id.* at 786, 162 P.3d at 1141–42.

261. *Id.* at 787, 162 P.3d at 1142.

lying about the sexual and physical abuse,[262] which would leave T.H. extremely upset and distraught.[263] Based on the troubling nature of these visits, the juvenile court ordered no in-person visitation until the child wanted to visit and the child's therapist supported visitation.[264]

During the review hearing in 2005, the juvenile court denied in-person visitation because Ms. Hackney-Farias had not complied with the court-ordered services or addressed the issues that gave rise to problematic visits.[265] In each of five subsequent review hearings, the court found that Ms. Hackney-Farias had failed to comply with services, including individual counseling, and that the reinstatement of in-person visitation was improper.[266] The court indicated that in-person visitation would not be reinstated until the social worker, the GAL, and the child's therapist approved in-person visitation.[267] Ms. Hackney-Farias's rights to T.H. were finally terminated after a trial in 2006.[268] She appealed the termination, arguing that the juvenile court improperly restricted visitation without expressly finding that visitation was contrary to the child's health, safety, and welfare.[269]

### *ii. The Court of Appeals' Opinion*

The appellate court affirmed the juvenile court's restrictions on visitation, holding that the restrictions were necessary to protect T.H.[270] The court noted that the juvenile court had restricted visitation not to sanction Ms. Hackney-Farias's noncompliance with services but to protect T.H. from harm.[271] Additionally, the court stated that the *evidence* on the record supported the juvenile court's imposed restrictions on visitation: "[Ms.] Hackney-Farias's parenting deficiencies that had led to harmful prior visitation had not been remedied through services."[272] In particular, Ms. Hackney-Farias had not participated in a psychiatric evaluation, anger management classes, or counseling.[273]

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262. *Id.*

263. *Id.*

264. *Id.* Shortly following visitation, the mother obtained T.H.'s email address and sent him messages blaming him for the dependency. *Id.*

265. *Id.* at 788, 162 P.3d at 1142. In addition to finding that Ms. Hackney Farias had not complied with anger management or counseling services, the court noted: "Therapist does not recommend or support visitation at this time. Mother has engaged in internet instant messaging and email contact with child, but has made inappropriate comments." *Id.*

266. *Id.* at 788–89, 162 P.3d at 1142–43.

267. *Id.* at 788, 162 P.3d at 1143.

268. *Id.* at 789, 162 P.3d at 1143.

269. *Id.* at 792, 162 P.3d at 1145.

270. *Id.* at 797, 162 P.3d at 1147.

271. *Id.* at 796, 162 P.3d at 1146–47.

272. *Id.*

273. *Id.* at 788–89, 162 P.3d at 1142–43.

The appellate court further held that the Visitation Statute does not require an express finding that denying or limiting visitation is necessary to protect the child's health, safety, or welfare "if the *evidence supports the conclusion that visitation is harmful* to the child."[274] The juvenile court primarily relied on the following evidence: (1) the juvenile court's findings that Ms. Hackney-Farias had not corrected her parental deficiencies and was not in a position to resume visitation without causing further damage to T.H; (2) Ms. Hackney-Farias's noncompliance with services, including anger management and counseling; and (3) the recommendations of the psychological evaluator that visitation would likely cause further damage to T.H.[275] The appellate court concluded that this evidence justified the juvenile court's suspension of in-person visitation.[276]

### *iii. The Effect of* In re Dependency of T.H.

The appellate court's decision in *T.H.* is important for two reasons. On the one hand, when compared with the earlier decision in *T.L.G*, the court's interpretation of the Visitation Statute is more properly focused on the best interest of the child. On the other hand, however, the *T.H.* court embraces the *T.L.G.* court's ambiguous requirement of "evidence" of harm. Thus, the *T.H.* opinion is troubling because it will encourage juvenile courts to put children in abusive and unhealthy visitation settings in order to develop an adequate record to justify suspending visitation.

Although the court's decision in *T.L.G.* clearly supported the parental rights doctrine, the *T.H.* opinion seemed be more focused on the best interest of the child. Unlike the *T.L.G.* court, which did not give any credence to reports by medical professionals,[277] the *T.H.* court recognized that it was appropriate for the juvenile court to consider the opinions of the psychologists involved in the case.[278] Additionally, the *T.H.* court

274. *Id.* at 794, 162 P.3d at 1145 (emphasis added).

275. *Id.* at 795–96, 162 P.3d at 1146.

276. *Id.* at 797, 162 P.3d at 1147.

277. *In re* Dependency of T.L.G., 139 Wash. App. 1, 17, 156 P.3d 222, 230 (2007). In *T.L.G.*, the juvenile court used the reports of a psychologist recommending no visitation between the parents and the children as an additional basis for the suspension of visitation. The appellate court, however, did not give credence to these reports.

278. *T.H.*, 139 Wash. App. at 795, 162 P.3d at 1146. In suspending in-person visitation, the juvenile court seriously considered the recommendations of the psychological evaluator:

> I also think that the psychological evaluator is right to have serious reservations about Ms. Hackney-Farias'[s] ability to parent this child given their history and given the problems and given her lack of insight to date, and that raises concerns for me, not only for Ms. Hackney-Farias and whether she's really in a position to appreciate the problems that

indicated that it was appropriate for the juvenile court to look at the mother's progress in correcting the deficiencies that led to the suspension of visits—including her compliance with services.[279] By allowing juvenile court judges to consider these additional factors, visitation orders are more likely to protect a child's best interest.

Even though the *T.H.* court took a positive step towards recognizing the best interest of the child, the opinion is troubling because it fails to provide a clear definition of how much evidence is sufficient to warrant a restriction or suspension of visitation.[280] This Comment does not advocate that juvenile courts should be allowed to restrict or deny visitation without some basis for believing that visits are not in the child's best interest. But the current requirement of evidence of harm or concrete risk as advocated by the courts in *T.L.G.* and *T.H.* is equally misguided in that its ambiguity renders it useless. This evidentiary requirement is likely to subject children to harm just to create a sufficient record.

The factual backgrounds of these two cases demonstrate the ambiguity of this evidentiary requirement. On one hand, the juvenile court in *T.L.G.* had insufficient evidence to suspend visitation when the parents had a long history of volatile visits that included a particularly troubling visit that involved a physical altercation, threats to hold the child hostage, and attempts to flee the DSHS office with the child.[281] Moreover, the parents in *T.L.G.* refused to address their anger and mental health issues over a period of three years, and the court had received reports from the GAL, a social worker, and an anger management counselor advising that visitation should be denied.[282] On the other hand, the juvenile court in *T.H.* had sufficient evidence to suspend in-person visitation when the mother had a history of verbally abusing T.H. during visits; she was not complying with anger management or individual counseling; and the psychological evaluator reported that visitation was inappropriate.[283] Although it is clear that the appellate court requires some showing that visitation has harmed the child or would be a risk to the child, the amount or the type of evidence needed is never explained.

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caused the court to suspend supervised visits in the first place but also whether or not she's really in a position to resume them without causing further damage to T.H.

*Id.* at 795, 162 P.3d at 1146.

279. *Id.* at 795, 162 P.3d at 1146.

280. *See id.* at 795, 162 P.3d at 1146. Nowhere in the court's opinion does it explain how much evidence is enough. Instead, the court stated merely: "Hackney-Farias's parenting deficiencies that had led to harmful prior visitation had not been remedied through services." *Id.* at 796, 162 P.3d at 1146–47.

281. *See* discussion *supra* Part V.C.1.i.

282. Brief of Respondent, *supra* note 206, at 5–8.

283. *T.H.*, 139 Wash. App. at 795–96, 162 P.3d at 1146.

Moreover, the appellate court failed to clearly explain the factual and legal distinction between *T.H.* and *T.L.G.*

Given the uncertainty of how much evidence is enough to suspend visitation, the opinions in *T.H.* and *T.L.G.* will encourage juvenile courts to allow harmful visits to continue in order to create a record immune from reversal by the appellate court. By amending the language in the Visitation Statute, the legislature can avoid the unnecessary injury that results from this evidentiary standard.

### 3. *In re Dependency of C.N.*

In 2007, the Washington Court of Appeals reviewed the juvenile court's decision to suspend visitation between Tommy and Mr. Goodall to determine whether visitation had been improperly denied as a sanction for Mr. Goodall's noncompliance with court-ordered services.[284] The court held that the suspension of visitation was, in fact, proper to protect Tommy's health, safety, and welfare.[285] In reaching its decision, the court noted that "*the record overwhelmingly support[ed]* the court's conclusion that Goodall's visitations with [Tommy] were physically harmful and emotionally traumatic."[286]

The appellate court also reaffirmed its holdings in *T.L.G.* and *T.H.* that visitation may not be restricted as a sanction for noncompliance with services.[287] In concluding that visitation had not been suspended as a sanction, the court noted that "Goodall's participation and progress in mental health treatment was directly related to the quality of Goodall's visits and the health, safety, and welfare of [Tommy]."[288] The court held that suspension of visitation is proper when a parent's noncompliance with services "directly relate[s]" to the quality of visits.[289]

Although the court found that the suspension of visitation was proper, its opinion is concerning for two reasons. First, the court continued to emphasize that the record must *overwhelmingly demonstrate* that visitation would harm the child.[290] In this case, two years of harmful visits was sufficient evidence, in the appellate court's mind, to affirm the juvenile court's suspension of visitation. Requiring overwhelming evi-

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284. *In re* Dependency of C.N., No. 58799-4-I, 2007 WL 4489646, at *1 (Wash. Ct. App. Dec. 24, 2007). Although unpublished decisions have no binding precedential value, this case is analyzed in this Comment because the court's analysis and holding has likely played a role in the juvenile courts' application of the Visitation Statute.

285. *Id.* at *5.

286. *Id.* at *4 (emphasis added).

287. *Id.* at *5.

288. *Id.*

289. *Id.*

290. *Id.* at *4.

dence, particularly if it means that a child must endure two years of abuse to sufficiently develop the record, is inconsistent with protecting the best interest of the child.

Second, the court's interpretation of the sanction provision remained inconsistent with protecting the child's best interest. Although the appellate court recognized that Mr. Goodall's participation in mental health treatment was a requirement for successful visitation,[291] the court again failed to provide clear guidelines for when noncompliance with services is sufficiently related to visitation to warrant restriction or suspension of visits. The court merely stated that Goodall's noncompliance was "directly related" to the quality of visits.[292] The court failed to explain what types of services are directly related to quality visits or the duration of noncompliance required before visitation can be properly restricted or suspended. Again, this holding seems to indicate that visitation may be restricted or denied only when there is overwhelming evidence before the court.

It is not in the best interest of children to subject them to potentially harmful visitation just to create a record with overwhelming evidence of harm.

## VI. RECOMMENDATIONS

The Visitation Statute should be amended given the ambiguity contained in the language of the Statute, the problematic opinions rendered by the Washington Court of Appeals, and the juvenile courts' practice of continuing visitation despite ongoing harm to the child. Changes to the Statute should accomplish the following goals: (1) safeguarding the long-term best interest of the child; (2) reducing the opportunities for parents to subject their children to emotional harm in the visitation setting; and (3) providing clear guidelines for juvenile courts to use when making visitation decisions.

To accomplish these objectives, the Visitation Statute should expressly indicate that visitation is a conditional right of the family and a collaborative endeavor between all parties involved in a dependency. Further, the legislature should rephrase the sanction provision to better protect the best interests of children and to encourage parents to satisfy their obligation to correct parental deficiencies that affect visitation. Finally, the Statute should define "best interest of the child" to help juvenile courts make visitation decisions that are consistent with the child's health, safety, welfare, and interests.

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291. *Id.* at *5.
292. *Id.*

Given that the courts have been unable to create a clear standard and that children are continually forced to participate in unhealthy and traumatic visitation, the legislature should amend the Statute so that it serves its original goal of protecting children. In relevant part, the Amended Statute would provide:

> Visitation is a conditional right of parents and children, in cases in which visitation is in the best interest of the child. Visitation is a collaborative endeavor between the parents, child, caseworkers, the court, lawyers, and service providers, and all these individuals and/or entities must work together to ensure that visits meet the attachment, emotional, and safety needs of the child. The court shall grant the appropriate level of visitation between parent and child and sibling based on the health, safety, welfare, and best interest of the child. The court has discretion to limit or deny visitation if the parent's noncompliance with services has harmed the child or if the court deems it necessary to protect the child's health, safety, or welfare.
>
> To ensure that the restriction or denial of visitation is not a sanction for the parent's noncompliance with services, the court shall base its decision on at least two of the conditions below:
>
> 1. Prior harmful visits between the parent(s) and the child that are a result of the parent(s)'s noncompliance with services. Services that will warrant the attention of the court are: drug and alcohol treatment, mental health counseling, domestic violence treatment; anger management, and other services that improve the parent(s)'s interaction with the child;
> 2. Recommendations of service providers that visitation is not appropriate;
> 3. The child's requests to restrict visitation;
> 4. Recommendations of social workers, and the parent(s)'s failure to address parental deficiencies; and
> 5. Continued visitation would be contrary to the child's health, safety, welfare, or best interest.
>
> In determining whether visitation is in the best interest of the child, the court should consider the following factors: the relative strength, nature, and stability of the child's relationship with the parent(s); the parent(s)'s performance of parenting functions during visitation; the wishes of the child; the interaction between the parent(s) and the child; the recommendations of service providers and social workers; the mental health and/or substance abuse of the parent(s); and

history of physical violence, physical abuse, sexual abuse, and threats of abduction.

### *A. Visitation: A Conditional Right of the Family and Collaborative Endeavor*

The Visitation Statute should be amended to guarantee that visitation is granted or restricted to safeguard the long-term best interest of the child, not to protect parents' right to visit. This can be achieved by amending the opening language of the Statute to indicate that visitation is not an absolute, unconditional right of the family.

The first three sentences of the Visitation Statue should be amended to provide the following:

> Visitation is a conditional right[293] of parents and children, in cases in which visitation is in the best interest of the child. Visitation is a collaborative endeavor[294] between the parents, child, caseworkers, the court, lawyers, and service providers, and all individuals and/or entities must work together to ensure that visits meet the attachment, emotional, and safety needs of the child. The court shall grant the appropriate level of visitation between parent(s) and child and sibling based on the health, safety, welfare, and best interest of the child.[295]

By adding the word "conditional," the legislature will send the message to the juvenile courts that visitation orders should not be determined under the mindset that visitation is an absolute right of the parent. Rather, this new language will help courts make visitation orders that are truly in the child's best interest.

In addition, the "collaborative endeavor" language will encourage courts to evaluate the opinions of all parties involved in a dependency, including social workers and service providers.[296] This comprehensive

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293. *See* Smariga, *supra* note 127, at 7. This proposed amendment was influenced by Smariga's article; however, the amendment to the sanction provision would likely be interpreted as a departure from her recommendations. In her article, Smariga advocates that courts find "substantial evidence" before limiting visitation. *Id.* This Comment does not advocate such a heightened evidentiary standard.

294. *See id.*

295. This sentence replaces the following sentence: "The agency shall encourage the maximum parent and child and sibling contact possible, when it is in the best interest of the child, including regular visitation and participation by the parents in the care of the child while the child is in placement." WASH. REV. CODE § 13.34.136(2)(b)(ii) (2008).

296. *See* Smariga, *supra* note 127, at 9. According to Smariga,

> When there is any doubt about the safety or benefit of visitation, there should be thorough assessments of the child, the parent(s), and the relationship between the child and parent (known as an attachment assessment). Mental health clinicians can provide important information to attorneys and the court about what is in a child's best interest.

approach is more likely to yield visitation decisions that protect the child's best interest. Under the former language, children were vulnerable to visitation decisions improperly based on the parents' right to visit.

Further, the "appropriate level of visitation" language will guide courts to enter visitation orders that better protect the interests of the child. Under the current version of the Statute, the "maximum parent and child . . . contact" language encourages juvenile courts to make visitation decisions based largely on considerations of the parents' rights. Although the Statute instructs courts to make visitation decisions that are in the child's best interest, the "maximum visitation" language invites courts to be hesitant in restricting visitation.

This amendment would not unduly restrict the rights of parents for two reasons. First, even the plain meaning of the current Visitation Statute does not give parents an unfettered right to visitation: "Visitation is a right of the family . . . in cases in which visitation is in the best interest of the child."[297] Moreover, parents with dependent children have been deemed unfit; thus, the state has a greater interest in intervening in the parent–child relationship to protect the child's best interest.[298] The state's *parens patriae* power does not end once the child is taken into the state's custody. Rather, the state has an ongoing interest to protect the child and to promote the child's interests.[299] For this reason, it is proper to condition visitation on the best interest of the child, including for the protection of the child's health, safety, and welfare.

Second, the Dependency Act expressly provides that when the rights of parents and the rights of children are in conflict, the rights of children are paramount.[300] This suggested amendment does not limit parents' right to visitation any more than the current version; the Dependency Act currently provides that the rights of children must prevail. The purpose of this language is to more clearly elucidate that the rights of children should be the primary consideration.

### *B. Amending the Sanction Provision*

Given the appellate court's decisions in *T.L.G*, *T.H.*, and *C.N.*, it is also necessary to amend the sanction provision of the Visitation Statute

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*Id.* This amendment was influenced by Smariga's article and is included to encourage juvenile courts to evaluate the opinions of all interested and involved parties before rendering a visitation decision.

297. *See* WASH. REV. CODE § 13.34.136(2)(b)(ii) (granting visitation only when it is in the best interest of the child).

298. *See* discussion *supra* Part II.B.

299. *See* WASH. REV. CODE § 13.34.020 (noting that the child's health and safety shall be the paramount concern when the state carries out its duties under the Dependency Act).

300. *See id.*

to ensure that children are not subjected to abusive visits in order to create an adequate record. In particular, the Statute should be amended to give the court discretion to limit or deny visitation if the parent's noncompliance with services has harmed the child or if it is necessary to protect the child's health, safety, or welfare. Further, the Statute should be amended to provide guidelines for the court to use in restricting visitation. To ensure that the restriction or denial of visitation is not merely a sanction for the parent's noncompliance with services, the court shall base its decision on any two of the following:

1. Prior harmful visit(s) between the parent(s) and child that are a result of the parent(s)'s noncompliance with services. Services that will warrant the attention of the court are: drug and alcohol treatment, mental health counseling, domestic violence treatment, anger management, and other services that improve the parent(s)'s interaction with the child;
2. Recommendations of service providers that visitation is not appropriate;
3. The child's requests to restrict visitation;
4. Recommendations of social workers, and the parent(s)'s failure to address parental deficiencies; and
5. Continued visitation would be contrary to the child's health, safety, welfare, or best interest.

This amendment will better protect the interests of children by affording courts greater discretion in limiting visitation. Under this new language, courts would have discretion to suspend visitation after one particularly harmful visit—assuming the presence of at least one other condition. Children like Tommy would not have to be subjected to months or years of harmful visitation so that courts could obtain overwhelming evidence to justify the suspension of future visits. Moreover, by providing the five criteria set out above, the Statute would provide juvenile courts with a guide to determine the amount and type of evidence needed to restrict or suspend visitation.

This amended language would not give courts the opportunity to merely sanction parents for noncompliance without a showing of any harm or risk of harm to the child. By requiring two of the above conditions, courts would have to justify the suspension of visitation on more than just a parent's noncompliance with services. Moreover, this amended language would allow courts to follow the recommendations of service providers, social workers, and GALs if deemed relevant. This

new language is of particular importance because these persons are involved in the case on a daily basis and have a better appreciation of whether visitation is indeed appropriate.

The amendment would not forever deprive parents of their right to visitation. Rather, visitation would resume upon a showing by the parents that they have substantially complied with services and corrected the problems that resulted in the restriction of visitation. If parents are allowed to continue to visit with their children and subject them to emotional harm without consequence, then they will have no motivation to seek help in correcting those deficiencies.

### *C. Defining "Best Interest of the Child"*

Given that the best interest of the child is a vague and amorphous phrase, the Visitation Statute should be amended to include its definition. Such an amendment would enable courts to make visitation decisions that better serve the interests of the child.

The best interest guidelines utilized by courts deciding child custody matters are a useful comparison tool given the similar policy interest of protecting the welfare of children. Family courts are accustomed to dealing with the best interest of the child standard because the judges are often required to consider the best interest of the child when determining which parent will be the primary custodian and when creating the visitation plan for the noncustodial parent.[301] In determining parenting plans, these courts examine the relative strength, nature, and stability of the child's relationship with the parent; the parent's performance of parenting functions; the wishes of the child; the interaction between the parent and the child; the mental health and/or substance abuse of all individuals involved; and history of physical violence, physical abuse, sexual abuse, and threats of abduction.[302] In the custody setting, the first factor—"the relative strength, nature, and stability of the child's relationship with each parent"—is given the greatest weight.[303]

The Visitation Statute should be amended to provide a definition of the child's best interest in line with the factors used in child custody matters.[304] Providing factors will assist courts in making visitation decisions that are more consistent with the child's best interest. These factors demand that the court make child-centric decisions rather than decisions that focus on the parents' right to visitation.

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301. *See In re* Parentage of J.H., 112 Wash. App. 486, 49 P.3d 154 (2002).

302. WASH. REV. CODE § 26.09.187(3)(a)(i)–(vii).

303. *Id.*

304. See *supra* Part VI for the amendment to the best interest of the child provision.

## VII. CONCLUSION

Tommy's experience[305] demonstrates how dependent children are vulnerable to abuse in the visitation setting. The consequences of visitation under the Visitation Statute are considerable for many dependent children.[306] The rights and interests of children are often undermined in visitation orders because of the ambiguous statutory language, the juvenile courts' distaste for suspending visitation, and the appellate court's creation of heightened evidentiary burdens. Although visitation is crucial for reunification and maintenance of the parent–child relationship, these purposes are not served when a parent's inappropriate behavior subjects the child to increased emotional or physical abuse.

If this Comment's recommendations had been in place during the course of Tommy's dependency, he would not have been subjected to years of additional emotional and physical harm to justify a suspension of visitation. The juvenile court would have suspended Mr. Goodall's visits with Tommy sooner if the Statute had provided guidelines for determining when a parent's noncompliance with services negatively affected the quality of visits. Moreover, the proposed language regarding "visitation as a conditional right" and a definition of "best interest of the child" would have better instructed the juvenile court to consider the child's rights before considering the parent's right to continued visitation.

The Visitation Statute should be amended to reflect the Dependency Act's commitment to protecting the best interest of the child. Dependent children have a fundamental right not to be victimized by their parents. By improving the current law, the Washington legislature can ensure that visitation abuse ends.

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305. *See* discussion *supra* Part I.

306. *See* discussion *supra* Part IV.