TERMINATION OF PARENTAL RIGHTS IN WASHINGTON

Although parents have natural[1] and constitutional[2] rights to custody of their offspring, the state may intervene to protect abused or neglected children.[3] A common form of state intervention is a court order declaring the child "dependent."[4] Courts may order a dependent child removed from the home and placed in institutional or foster care,[5] but the parents' legal relationship with the child continues. If home conditions preclude the child's return, and the parents refuse to terminate their legal relationship, the child may remain in foster care until reaching majority.[6] Only court ordered termination of parental rights will allow the child to move into a permanent adoptive home.

Prior to 1978, Washington allowed trial judges broad discretion to decide, on a case by case basis, the necessity of terminating parental rights.[7] The recently adopted Juvenile Court Act in

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1. "Parental rights encompass: the right to establish a home and bring up the child; the right to the care, custody, society and association of the child; the rights arise by natural law; they are not property rights." Dobson, *The Juvenile Court and Parental Rights*, 4 FAM. L.Q. 393, 395 (1970)(footnotes omitted). *See* Note, *The Parens Patriae Theory and Its Effect on the Constitutional Limits of Juvenile Court Powers*, 27 U. PITT. L. REV. 894, 905 (1966).

2. Meyer v. Nebraska, 262 U.S. 390 (1923). In *Meyer*, the Court determined that one aspect of the guarantee of liberty in the fourteenth amendment is the right to raise children. *Id.* at 399. The Court upheld the parents' right to determine the kind of education their children would receive in Pierce v. Society of Sisters, 268 U.S. 510 (1925). In Stanley v. Illinois, 405 U.S. 645 (1972), the Court reiterated that "[t]he rights to conceive and to raise one's children have been deemed 'essential.' . . . The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment . . . ." *Id.* at 651 (footnotes omitted). The Court reemphasized its holding that the definition of liberty, as protected by the due process clause of the fourteenth amendment, includes freedom of choice in bearing and raising children in Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

3. The state intervenes in the family under the doctrine of parens patriae, which views every child's welfare as the concern of the state. *See* Dobson, *supra* note 1, at 396; Kleinfeld, *The Balance of Power Among Infants, Their Parents and The State*, 5 FAM. L.Q. 63, 66 (1971); Note, *Parens Patriae and Statutory Vagueness in the Juvenile Court*, 82 YALE L.J. 745, 748 (1973).

4. The Washington statute provides a variety of grounds upon which a court may declare an individual under the age of eighteen dependent. These grounds include situations where a child is abandoned, abused, neglected, in conflict with his or her parent or guardian, in danger of degenerating into serious delinquent behavior, or in need of treatment. WASH. REV. CODE § 13.34.030 (Supp. 1977). For a discussion of the Washington dependency statute prior to July 1, 1978, see Comment, *Procedural and Substantive Rights of Parents in Child Dependency Hearings*, 12 GONZ. L. REV. 505, 515 (1977).

5. *See In re* Sego, 82 Wash. 2d 736, 513 P.2d 831 (1973).

6. In Washington, the state can also place the child in a group home or other institutional care, but generally cannot place a nondelinquent in a secured detention facility. *See* WASH. REV. CODE § 13.34.140 (Supp. 1977).

7. *See* text accompanying notes 20-43 *supra*.

Cases Relating to Dependency of A Child and the Termination of a Parent and Child Relationship[8] represents a legislative attempt to nurture the family unit by severely limiting trial court discretion. The new law provides standards making judicial termination of parental rights difficult in all cases.[9] The Institute of Judicial Administration and the American Bar Association also have jointly proposed standards limiting trial court discretion in termination proceedings.[10] The ABA proposal, however, differs markedly from the Washington legislation. Attempting to limit the duration of foster care placements, the ABA would require the trial judge to order termination in many cases of extended foster care.[11] This comment contrasts the system of broad discretion under the previous Washington law with the two very different systems of limited discretion embodied in the Juvenile Court Act and the ABA proposal.

Although acknowledging the need for more research concerning the effects of foster care,[12] commentators generally agree that removal, even from a bad family environment, creates severe problems for the child.[13] Court ordered removal disrupts the parent-child relationship and may cause psychological damage more serious than the harm intervention is intended to prevent.[14] Long term foster care compounds these problems. Even if the child stays in one foster home, the uncertain nature of the placement,[15] and the possibility the child will view the placement as

8. WASH. REV. CODE §§ 13.34.010-.210 (Supp. 1977). Prior to the 1977 act, the Washington courts referred to termination as "permanent deprivation" of parental rights. *In re* Sego, 82 Wash. 2d 736, 738, 513 P.2d 831, 832-33 (1973). This comment uses the term "termination" to conform with the new statute's terminology. The Juvenile Court Act became effective in Washington on July 1, 1978. The Washington Legislature allowed almost a full year following enactment of the statute before it went into effect. This allowed juvenile courts and child welfare agencies time to prepare for the many changes mandated by the new law.

9. *See* text accompanying notes 72-103 *supra.*

10. JOINT COMMISSION ON JUVENILE JUSTICE STANDARDS, INSTITUTE OF JUDICIAL ADMINISTRATION & AMERICAN BAR ASSOCIATION, JUVENILE JUSTICE STANDARDS PROJECT—STANDARDS RELATING TO ABUSE AND NEGLECT (1977) [hereinafter cited as STANDARDS].

11. *Id.* at 154-61.

12. *See, e.g.*, Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623, 643-44 (1976)(this article and the article cited at note 13 *supra* include material developed by Professor Wald for the ABA's Juvenile Justice Standards Project).

13. *See, e.g.*, Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 994 (1975).

14. *Id.*

15. Foster care placements are uncertain because, although they are designed to be short-term arrangements, in actual practice they may continue for years. *See* Comment,

punishment, may create further emotional difficulty for the child.[16] Generally, however, the longer a child remains in foster care, the greater the chance of multiple foster placements.[17] Every new placement involves another separation experience and another adjustment into a new home environment, and tends to multiply the child's psychological difficulties.[18] Multiple placements may cause the child to feel rejected, and destroy continuity needed for stable emotional development.[19]

Statutory termination guidelines did not exist in Washington prior to the Juvenile Court Act.[20] Although the previous statute did not expressly mention termination, the Washington Supreme Court held that superior courts could terminate parental rights when the trial judge found dependency under the previous statute,[21] and found substantial evidence indicating termination would enhance the child's welfare. The court admitted that criteria establishing the child's best interest were "conspicuous by their absence" from case law,[22] but refused to enunciate standards because mandatory consideration of specified factors might prevent the careful individual treatment needed in complex termination cases.[23] The Washington Supreme Court, therefore, allowed trial courts broad discretion to weigh the interests of family and child on a case by case basis.

The supreme court provided few guidelines to aid trial courts in weighing these interests. Although defining the parents' interest as a "sacred right,"[24] the court stated that where the rights of parent and child conflicted, the child's interest must prevail.[25] By

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The Foster Parents Dilemma: "Who Can I Turn to When Somebody Needs Me?", 11 SAN DIEGO L. REV. 376, 390 (1974).

16. *See* Wald, *supra* note 13, at 995. The uncertain length of foster placements also creates difficulties for foster parents who must try to provide normal affection and care for the child while avoiding emotional attachments. Katz, *Legal Aspects of Foster Care*, 5 FAM. L.Q. 283, 301 (1971).

17. *See* Fanshel, *Status Changes of Children in Foster Care: Final Results of the Columbia University Longitudinal Study*, 55 CHILD WELFARE 143 (1976); Maas, *Children in Long-Term Foster Care*, 48 CHILD WELFARE 321 (1969).

18. N. LITTNER, SOME TRAUMATIC EFFECTS OF SEPARATION AND PLACEMENT 22 (1973).

19. Wald, *supra* note 12, at 645-46.

20. The prior law expressed a definite preference for the natural parents in custody matters, and prohibited the court from removing the child from the home unless the welfare of the child so required, but the statute did not provide standards to terminate parental rights. *See* Juvenile Court Law, ch. 160, § 14, 1913 Wash. Laws 520 (repealed 1977)(repeal effective July 1, 1978).

21. *In re* Sego, 82 Wash. 2d 736, 513 P.2d 831 (1973). For a discussion of the previous statute, see Comment, *supra* note 4, at 515.

22. *In re* Becker, 87 Wash. 2d 470, 477, 553 P.2d 1339, 1341 (1975).

23. *Id.* at 478, 553 P.2d at 1341.

24. Moore v. Burdman, 84 Wash. 2d 408, 411, 526 P.2d 893, 895 (1974).

25. Child welfare prevailed in *In re* Sego, 82 Wash. 2d 736, 513 P.2d 831 (1973), where

excluding consideration of such factors as the quality of education or living environment provided the child,[26] the court indicated that although trial courts could act to protect children, they could not rearrange families solely to place children with those perceived best able to rear them.[27] The supreme court sought, however, to allow the trial judge ample flexibility to reach a decision that recognized both the child's welfare and the parents' rights.[28] Furthermore, the supreme court placed very strong reliance on a trial court termination decision.[29]

Although prior Washington law granted trial judges broad discretion in deciding whether to terminate parental rights, proof requirements and procedural rules helped to safeguard the rights of natural parents.[30] After articulating several formulations of the proof required,[31] the Washington Supreme Court held that only substantial evidence—"clear, cogent, and convincing proof"[32] —would support a termination order. The supreme court also held that parents are entitled to notice of the issues in the hearing and to notice the hearing might result in termination.[33] The court also required the state to provide appointed counsel to indigent parents.[34] Unlike jurisdictions that admit hearsay evidence in ter-

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the supreme court affirmed a termination order despite Justice Finley's strong dissent. Although the father was in the penitentiary for murdering the child's mother, the trial court found that he had made remarkable rehabilitative progress. Despite this progress and his possibility of parole and desire to reunite with the child, the supreme court upheld the termination order because it was in the child's best interest.

26. *In re* Day, 189 Wash. 368, 384, 65 P.2d 1049, 1056 (1937).

27. *See In re* Warren, 40 Wash. 2d 342, 343, 243 P.2d 632, 633 (1952). *See also* Lovell v. House of the Good Shepherd, 9 Wash. 419, 37 P. 660 (1894); *In re* May, 14 Wash. App. 765, 545 P.2d 25 (1976).

28. *In re* Becker, 87 Wash. 2d 470, 478, 553 P.2d 1339, 1343 (1976).

29. The court in *In re* Schulz, 17 Wash. App. 134, 140, 561 P.2d 1122, 1126 (1977), said that "particularly . . . in child deprivation [termination] cases" the appellate court cannot substitute their findings for that of the trial court.

30. *See* Katz, *Judicial and Statutory Trends in the Law of Adoption*, 51 GEO. L.J. 64, 69 (1962).

31. "We have also referred to the proof necessary for permanent deprivation as that supported by 'the most powerful reasons,' 'imperatively demanded,' and, a 'plain showing.'" *In re* Sego, 82 Wash. 2d 736, 738, 513 P.2d 831, 832 (1973) (citations omitted).

32. *Id.*

33. *In re* Martin, 3 Wash. App. 405, 476 P.2d 134 (1970).

34. *In re* Luscier, 84 Wash. 2d 135, 524 P.2d 906 (1974). The case is discussed in Comment, *supra* note 4, at 507-08. Justices Black and Douglas dissented from a denial of certiorari where an indigent mother was denied court appointed counsel to defend herself against a state action to take custody of her children. Justice Black stated that:

> Here the State is employing the judicial mechanism it has created to enforce society's will upon an individual and take away her children. The case by its very nature resembles a criminal prosecution. The defendant is charged with conduct—failure to care properly for her children—which may be criminal and which in any event is viewed as reprehensible and morally wrong by a majority

mination proceedings to insure all relevant factors are presented to the court,[35] the Washington Supreme Court excluded the use of hearsay.[36] Excluding hearsay indicated the court viewed termination as a formal adversary proceeding[37] and insured parents the opportunity to cross-examine social workers and psychologists upon whom the state frequently relied to prove the necessity of a termination order.[38]

Broad judicial discretion allowed trial judges to choose the factors they would focus on when making termination decisions.[39] Such flexibility allowed a judge to make termination orders either difficult to obtain, thereby permitting extended foster placements, or easy to obtain, thereby promoting early termination and permanent child placement.[40] Critics attacked such broad discretion on two related grounds: (1) it allowed judges to decide

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> of society. And the cost of being unsuccessful is dearly high—loss of the companionship of one's children.

Meltzer v. Buck LeCran & Co., 402 U.S. 954, 959 (1971) (Justice Black was protesting the denial of certiorari in Kaufman v. Carter, 402 U.S. 964 (1971).).

35. *See* Note, *Proceedings to Terminate Parental Rights: Too Much or Too Little Protection for Parents?*, 16 SANTA CLARA L. REV. 337, 349-52 (1976).

36. *In re* Ross, 45 Wash. 2d 654, 277 P.2d 335 (1954).

37. *See* Katz, *supra* note 30, at 69.

38. *See* Note, *In the Child's Best Interests: Rights of the Natural Parents in Child Placement Proceedings*, 51 N.Y.U. L. Rev. 446, 467-68 (1976). Another factor that favors parents under the prior and current law is the court's power of modification. WASH. REV. CODE § 13.34.150 (Supp. 1977). *See In re* Boatman, 73 Wash. 2d 364, 438 P.2d 600 (1968); McClain v. Superior Court, 112 Wash. 260, 190 P. 852 (1920). If the court chooses to retain jurisdiction over the child, it can modify a termination order even after awarding permanent custody to another party. A juvenile court has argued that the power of modification gives parents an adequate post-judgment remedy and thus precludes the necessity of appellate review. *In re* Miller, 40 Wash. 2d 319, 242 P.2d 1016 (1952). The supreme court rejected this argument, stating that certiorari is available to review all orders of the juvenile court. Certiorari did not depend on any power of modification in the juvenile court. *Id.* at 321, 242 P.2d at 1017.

39. Many Washington cases cite parental behavior to support termination orders. *In re* Sego, 82 Wash. 2d 736, 513 P.2d 831 (1973) (alcoholism, including cases where the parent is a recovering alcoholic); *In re* Russell, 70 Wash. 2d 451, 423 P.2d 640 (1967) (refusal of psychiatric treatment); *In re* Hauser, 15 Wash. App. 231, 548 P.2d 333 (1976) (mental disorder); *In re* Gillespie, 14 Wash. App. 512, 543 P.2d 249 (1975)(criminal activity); *In re* Price, 13 Wash. App. 437, 535 P.2d 475 (1975) (resisting help from the state, failure to administer needed medication to the child, low intellect, bad judgment, poverty, and distrust of public officials). Other factors Washington courts relied upon in deciding termination cases included whether the parental lifestyle improved between the time the child was removed and the termination hearing, *In re* Three Minors, 50 Wash. 2d 653, 314 P.2d 423 (1957); whether the parent was ever given the opportunity to care for the child, *In re* May, 14 Wash. App. 765, 545 P.2d 25 (1976); and whether the parent produced a definite and realistic plan to care for the child, *In re* Gillespie, 14 Wash. App. 512, 543 P.2d 249 (1975).

40. *See* STANDARDS, *supra* note 10, at 120-22; Mnookin, *Child-Custody Adjudication: Judicial Functions In the Face of Indeterminacy*, 39 LAW & CONTEMP. PROB. 226, 249-60 (Summer 1975).

cases primarily on personal bias toward maintenance of the natural family unit;[41] (2) it contributed to the system of long-term foster care[42] because judges were reluctant to order termination unless the state proved intentional parental fault.[43]

The American Bar Association's Juvenile Justice Standards Project proposed a termination system narrowing judicial discretion and limiting both the number and length of foster placements. The standards limit the number of initial foster placements by removing children from their natural home only when serious harm to the child is imminent,[44] thus avoiding the trauma of removal in all but the most extreme cases of potential harm to the child.[45] Once the court removes a child from the home, the Juvenile Justice Standards recommend that:

> in general, a child either should be returned home or freed for adoption or other permanent placement within a year of the time he/she enters foster care. The preferred disposition is to return a child to his/her natural parents . . . . However, in a number of cases, perhaps even the majority of cases, if children are removed only as a last resort, return will not be possible. In such cases termination of parental rights may be essential in order to provide a child with a permanent home.[46]

The ABA proposal seeks to end long term foster placements by facilitating early return to the parents if return is possible, and early termination if return is not possible. If return is impossible, the proposal requires termination after an established length of time unless the case falls within certain exceptions.[47] For children

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41. Wald, *supra* note 12, at 688; Note, *supra* note 38, at 463-64.

42. Wald, *supra* note 12, at 693.

43. *See* STANDARDS, *supra* note 10, at 148-49. Opponents of broad discretion also attack several termination statutes as unconstitutionally vague, alleging the statutes violate the due process clause of the fourteenth amendment by permitting arbitrary terminations and by failing to warn parents of the conduct proscribed. *See* Alsager v. District Court, 406 F. Supp. 10 (S.D. Iowa 1975); *In re* Cager, 251 Md. 473, 248 A.2d 384 (1968); State v. McMaster, 259 Or. 291, 486 P.2d 567 (1971); Levine, *Foundations for Drafting a Model Statute to Terminate Parental Rights: A Select Bibliography*, 26 JUV. JUST. 42, 43 n.2 (1975).

44. STANDARDS, *supra* note 10, at 39-40, 42-43.

45. *Id.* at 40-44.

46. *Id.* at 149.

47. The ABA proposes exceptions to the termination requirement where the court finds by clear and convincing evidence:

> A. because of the closeness of the parent-child relationship, it would be detrimental to the child to terminate parental rights; B. the child is placed with a relative who does not wish to adopt the child; C. because of the nature of the child's problems, the child is placed in a residential treatment facility, and continuation of parental rights will not prevent finding the child a permanent family placement if the parents cannot resume custody when residential care is

under three, the proposal requires termination if the court cannot return children to their natural home after a six month placement.[48] For children over three, the proposal requires termination after placement for a year.[49] In establishing this different treatment based on the age of the child, the proposal relies on research[50] indicating that extended foster placements are more damaging to children under three.[51]

Like the ABA proposal, the Juvenile Court Act removes children from their natural homes only in circumstances of extreme risk to the child.[52] The Washington Legislature relied, at least in part, on the Juvenile Justice Standards in authorizing removal only when children are seriously endangered.[53] Limiting state intervention in the home conforms with the legislative intent expressed in the Juvenile Court Act to preserve the natural family unit unless compelling evidence requires removal.[54]

The Juvenile Court Act limits intervention through provisions carefully restricting the state's ability to remove children from their homes. The Act forbids the state to hold a child longer than seventy-two hours in the absence of a court order for continued shelter care.[55] The parents have a right to a preliminary shelter care hearing, and the court must release the child at the hearing unless release would present a serious threat of substan-

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no longer needed; D. the child cannot be placed permanently in a family environment and failure to terminate will not impair the child's opportunity for a permanent placement in a family setting; E. a child over ten objects to termination.

Id. at 157-58.

48. *Id.* at 154.

49. *Id.*

50. A correlation exists between the age of the child and the damage caused by multiple foster placements. Separation from the home, followed by separation from the new foster home, creates even greater psychological difficulties for children under three than for older children. N. LITTNER, *supra* note 18, at 20. Research indicates children under three cannot retain an attachment to absent parents longer than six months, but older children can better retain these emotional ties. *See* STANDARDS, *supra* note 10, at 156-57. Psychiatrists also believe that children under three have even greater need for stable, permanent homes than older children. *See* Note, *Psychological v. Biological Parenthood in Determining the Best Interests of the Child,* 3 SETON HALL L. REV. 130, 137-38 (1972).

51. STANDARDS, *supra* note 10, at 148-49.

52. *See* text accompanying notes 55-71 *supra.*

53. Several statutory provisions adopt the language proposed by the ABA verbatim. *Compare* WASH. REV. CODE § 13.34.130(2)(a)-(c) *with* STANDARDS, *supra* note 10, at 28 (§ 6.5B 1-3).

54. WASH. REV. CODE § 13.34.020 (Supp. 1977).

55. The Act defines "shelter care" as a foster family home or licensed receiving home but specifically excludes the use of a secured detention facility to house an abused or neglected child. *Id.* § 13.34.060.

tial harm to the child.[56] Construed in light of the legislative intent expressed in the statute, the "substantial harm" test prevents the removal of children for longer than seventy-two hours except in the most extreme circumstances. Although this approach does not protect children from all harm, it recognizes the state's inability to intervene in every situation of possible child harm,[57] and generally promotes child welfare by limiting the initial separation experience and the number of foster placements.

The Act requires the court to hold a factfinding hearing to determine whether a child is dependent.[58] Even if the court finds dependency, the Act carefully restricts the circumstances under which a court can place the child outside the natural home.[59] To aid the court in ordering a disposition of the child, the new law requires the Department of Social and Health Services[60] to submit a written social study.[61] If the parents allegedly abused or neglected the child, DSHS also must submit a predisposition study[62] containing six specific findings: (1) the danger the agency seeks to alleviate by intervention; (2) the specific services the agency will provide parent and child; (3) reasons why the child cannot be adequately protected in the home; (4) likely harm to the child from removal; (5) how the agency will minimize that harm; and (6) parental behavior expected before the placement will end.[63] Not only do these provisions substantively allow removal only in limited situations, the administrative burden involved in making these findings could create institutional pressure within the agency to remove children only infrequently from the home.

When a court considers the disposition of a dependent child, the statute not only requires DSHS to submit the written studies discussed above, it also carefully restricts the court's power to order a disposition removing the child from the home. The court must return the child to its natural parents unless (1) no parent or guardian will accept custody, or (2) the child is unwilling to return, or (3) there is a "manifest danger"[64] the child would suffer further abuse or neglect in the home.[65] Thus, the court must find

56. *Id.* § 13.34.060(6)(b).

57. *See* Wald, *supra* note 13, at 987.

58. WASH. REV. CODE § 13.34.110 (Supp. 1977).

59. *Id.* § 13.34.130.

60. The Department of Social and Health Services (DSHS) is the Washington state agency empowered to deal with child welfare.

61. WASH. REV. CODE § 13.34.120(1) (Supp. 1977).

62. *Id.* § 13.34.120(2)(a)-(f).

63. *Id.*

64. *Id.* § 13.34.130(1)(b)(iv).

65. *Id.*

both dependency and a manifest danger of harm before placing the child in foster care against the wishes of parent and child. These requirements further limit the courts' power to place the child in foster care, and help to ensure removal only in situations of grave potential harm to the child.

If the court does order a disposition placing the dependent child outside the natural home, the statute requires DSHS to submit a further plan stating where the agency will place the child, what steps the agency will take to return the child home, and what action the agency will take to maintain parent-child ties.[66] The plan must specify the agency services the parent will receive, encourage maximum parent-child contact, and provide for the child's placement as close to home as possible.[67] The Act also requires the court to review the child's status in foster care every six months[68] and to return the child home at the time of review unless the "manifest danger"[69] of abuse or neglect still exists. If the court does not return the child home, it must establish in writing several factors detailing why return is impossible and when return is expected.[70] Both the ABA proposal and the Juvenile Court Act require the agency to plan and work toward returning children to their natural parents and the court to order the child's return unless it continues to find a manifest danger of potential harm in the home environment. These return provisions both ensure continuing court review of foster care placements, and promote child welfare in situations where the home environment improves and the child returns to the parents within six months to a year.[71]

Although the Juvenile Court Act follows the ABA approach concerning the child's removal and early return, the two take very dissimilar positions regarding termination of parental rights. Rather than adopting the ABA approach of facilitating termination when return is impossible, the Act makes termination extremely difficult to obtain. The new law establishes seven specific elements an individual or agency[72] must prove by substantial

66. *Id.* § 13.34.130(2).

67. *Id.* § 13.34.130(2)(c).

68. *Id.* § 13.34.130(3).

69. *Id.* § 13.34.130(1)(b)(iv), (3)(a).

70. *Id.* § 13.34.130(3)(b).

71. The damaging effects of foster care increase signficantly after six months to a year depending on the age of the child. *See* note 50 *supra.*

72. A petition seeking termination of parental rights must conform to WASH. REV. CODE § 13.34.040 (Supp. 1977), which provides that any person may file a petition with the clerk of the superior court showing that there is a delinquent or dependent child within the county. Thus, individuals, as well as state agencies, may seek termination of parental

evidence before a court may terminate parental rights. The Act also requires the court to find termination "in the best interests of the child."[73] These seven elements and the best interest test are new statutory prerequisites for termination that place a tremendous burden of proof on the state before it can obtain any termination of parental rights.

The first element requires the court to declare the child dependent and remove him from parental custody for a minimum of six months prior to the termination hearing.[74] This element precludes the trial court from acting precipitously and guarantees parents an opportunity to demonstrate their fitness to care for the child.[75] Although the legislature generally agrees with modern sociological data in selecting six months and not a longer waiting period,[76] some commentators suggest that in cases where parental rehabilitation appears hopeless, the court should order termination immediately to avoid unnecessary short-term placement of the child.[77]

To satisfy the second termination element the moving party must prove the conditions leading to the removal still persist.[78] If parents rectify the conditions that caused the court to remove the child, a court could not grant a termination order despite severe new problems in the home environment. Thus, the Act suggests that where home problems change but remain adverse to the child, a subsequent "removal" of the child under the new adverse home conditions and another six month waiting period[79] is necessary before the court can sever the parental rights. This provision guarantees parents at least six months to rectify any adverse home conditions identified by the agency, but may needlessly delay termination where the child's return is hopeless.

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rights. The Act also provides that the court may, at a hearing to review the status of a dependent child, order that a petition seeking termination of parental rights be filed. *Id.* § 13.34.130(3)(d).

73. *Id.* § 13.34.190(2).

74. *Id.* § 13.34.180(1).

75. The court overturned a termination order where the agency removed the child from the mother at birth, and the trial court ordered termination four months later. *In re* May, 14 Wash. App. 765, 545 P.2d 25 (1976).

76. *See* Gordon, *Terminal Placements of Children and Permanent Termination of Parental Rights: The New York Permanent Neglect Statute,* 46 ST. JOHNS L. REV. 215, 232 (1971). Critics maintain that two-year waiting periods are too long, because within six months foster parents are likely to become the "psychological parents" of an infant in their care. Longer waiting periods also reduce the chance for a permanent placement, particularly where the child is under three. *See, e.g.,* Wald, *supra* note 12, at 689-90.

77. *See, e.g.,* STANDARDS, *supra* note 10, at 151-52. *See also* Mnookin, *supra* note 40, at 261.

78. WASH. REV. CODE § 13.34.180(2) (Supp. 1977).

79. *Id.* § 13.34.180(1).

The third termination element requires the trial court to not only examine the parents' past behavior, but also find "little likelihood that those conditions [which led to the removal] will be remedied so that the child can be returned to the parent in the near future."[80] This language is sufficiently broad to allow the trial judge some leeway in determining when termination is proper. In construing whether there is "little likelihood" of return "in the near future," the judge could consider the age of the child as an important variable in determining the urgency of a termination order. As recognized in the ABA standards,[81] an infant's need for a stable, permanent home is greater than that of a child over three. This greater need might lead a trial judge to recognize that the "near future" is a shorter length of time for a child under three, thus facilitating permanent placement of infants.

Not only must parents be progressing so slowly that return in the near future is impossible, the fourth termination element requires the court to find the parent-child relationship "clearly diminishes the child's prospects for early integration into a stable and permanent home."[82] If no adoptive home is currently available, the court might find the parental relationship did not "clearly diminish" the child's opportunity for permanent placement. This construction is reasonable because the parents' continuing interest does not damage the child if it does not obstruct a permanent placement. A subsequent termination hearing would be necessary, however, if an adoptive home later becomes available.

Imposing upon the state an affirmative duty to try to reestablish the parent-child relationship, the fifth termination element commands the agency to provide or offer "necessary services"[83] to the parent to facilitate a reunion. Parental failure of any type or degree will not justify termination unless the agency offers these services.[84] The agency plan required by the Act whenever the court orders a dependent child placed outside the home[85] includes the opportunity for regular parent-child visits. This requirement[86] adopts the ABA standard nearly verbatim, but deletes the following language: "unless the court finds that visita-

80. *Id.* § 13.34.180(3), (4).

81. STANDARDS, *supra* note 10, at 154.

82. WASH. REV. CODE § 13.34.180(4) (Supp. 1977).

83. *Id.* § 13.34.180(5). *See* Gordon, *supra* note 76, at 237-38; Levine, *supra* note 43, at 45 (the author advocates a "right to treatment" philosophy in termination statutes).

84. *See* Gordon, *supra* note 76, at 237-38.

85. *See* text accompanying notes 66-67 *supra*.

86. WASH. REV. CODE § 13.34.130(2)(b) (Supp. 1977).

tion should be limited because it will be seriously detrimental to the child."[87] The Juvenile Court Act substitutes an inflexible parental visitation requirement, allowing the agency no choice other than to proceed with parental visits even if they damage the child.[88] If Washington courts accept this provision as indicating parent-child visits are part of the "necessary services" that must be provided the parent prior to termination, they will place the agency in a very difficult position where parental visits damage the child. For example, *In re Hauser*,[89] decided prior to the 1977 Act, affirmed a termination order where the agency limited parental visits because the emotionally disturbed parents frightened the child.[90] The Juvenile Court Act might force the agency in a *Hauser* situation to choose between allowing parental visits detrimental to the child, or making termination impossible by failing to provide services.[91]

The requirement of providing parental services also may create difficulties if the agency stops trying to facilitate a reunion and starts planning for termination and adoption. If the agency believes return is hopeless, the statute requires the agency to seek termination rather than encourage voluntary adoption. In *In re Clear*,[92] a New York agency reasonably decided to encourage the mother to allow voluntary adoption.[93] The family court, however, found the agency had not met the statutory requirement of diligent efforts to strengthen the parent-child relationship. Washington's similar requirement[94] might mean that if the agency encouraged the parents to allow adoption, the agency could not later obtain termination. The agency could not easily argue it is providing services to facilitate a reunion when, in fact, it is encouraging the parents to give up their legal rights in the child.

The sixth termination element requires a finding that "the

87. STANDARDS, *supra* note 10, at 130.

88. "The agency shall be required to encourage the maximum parent-child contact possible, including regular visitation and participation by the parents in the care of the child while the child is in placement." WASH. REV. CODE § 13.34.130(2)(b) (Supp. 1977).

89. 15 Wash. App. 231, 548 P.2d 333 (1976).

90. *Id.* at 236, 548 P.2d at 337.

91. WASH. REV. CODE § 13.34.180(5) (Supp. 1977).

92. 58 Misc. 2d 699, 296 N.Y.S. 2d 184 (Fam. Ct.), *rev'd and remanded sub nom, In re* Klug, 32 App. Div. 2d 915, 302 N.Y.S. 2d 418 (1969), *on remand*, 65 Misc. 2d 323, 318 N.Y.S. 2d 876 (Fam. Ct. 1970). The opinion reversing the Family Court added little analytically, but did broaden the Act's construction by stating that the lower court placed too much weight on the statutory requirement to encourage the parental relationship. Given this broadened construction, on remand the Family Court terminated the parental rights.

93. 58 Misc. 2d 699, 708, 296 N.Y.S. 2d 184, 192 (Fam. Ct. 1969).

94. WASH. REV. CODE § 13.34.180(5) (Supp. 1977).

parent has substantially failed to accept such services."[95] To a degree, this provision takes the termination decision from the judge and places it with the parents. By accepting services, parents can prevent termination regardless of the circumstances. This requirement appears to go beyond the statement of legislative intent in the Juvenile Court Act[96] because it may deny termination even when compelling evidence demonstrates the family cannot remain intact. The court may be unable to terminate the parent-child relationship regardless of extreme problems in the home that make return impossible. The sixth requirement disregards the likelihood of return and diminishes the child's prospect of integrating into a new permanent home.

Courts should construe the sixth element so as to prevent parents from delaying termination by accepting agency services in bad faith. Parents may argue that the legislative purpose is to hold the family intact, and thus the court should maintain parental rights without regard to the parents' motivation in accepting services. Although the statute does not mention good faith, a court rationally could hold that where parents do not cooperate in good faith, they "substantially"[97] fail to accept agency services. This construction requires the agency to prove by substantial evidence the parents' motivation in accepting services. This would be particularly difficult, however, because proof of a motivation to block termination tends to show a genuine parental desire to reunite with the child, which may support the position that acceptance was indeed in good faith. In response, the agency could argue the parents were motivated not by a desire to foster a reunion with the child, but rather by a desire to resist the state, and assert control and dominion over the child. Despite evidentiary problems, however, courts should construe the statute to deny parents the ability to prevent termination when they fail to cooperate with agency services in good faith. This construction promotes child welfare by increasing the court's power to order termination when there is little likelihood a child in long-term foster care can ever be returned home.

The seventh termination element permits the court to order termination only if the parents have substantially failed to comply with any order of disposition pursuant to the finding of dependency.[98] This provision enables parents subject to a disposi-

95. *Id.* § 13.34.180(6).
96. *Id.* § 13.34.020.
97. *Id.* § 13.34.180(6).
98. *Id.* § 13.34.180(7).

tion order to prevent termination by complying with that order. If a court deems a disposition order necessary, it must draw the order so parental compliance realistically ensures a home situation to which the court can return the child. If not, the parents will be able to prevent termination by compliance with the order, yet the child may remain in extended foster care because the court is unable to sever the parents' rights or return the child home.

Finally, the Juvenile Court Act requires termination orders to be in the "best interests of the child."[99] Some statutory schemes employ this test as virtually the sole criterion for termination.[100] One commentator describes the use of the best interests test in these systems as a "mandate from the legislature, directing the judge to use his discretion in making a disposition."[101] The Juvenile Court Act narrows this discretion through the seven requirements described above, which require a court to focus on certain factors in deciding whether to terminate parental rights. The best interests test in the Washington scheme, however, does provide another ground upon which a court may deny termination, because notwithstanding the statute's seven termination elements, a court may still deny termination on the ground it is not in the child's "best interests."

The seven requirements for termination in the Juvenile Court Act embody a completely different approach to termination than do the ABA standards. The ABA proposal requires termination of parental rights after six months or a year unless the court finds by clear and cogent evidence that one of five exceptions is applicable.[102] The Washington statute disallows termination in all cases unless the agency proves the seven elements by clear, cogent, and convincing evidence[103] and the court finds the child's best interests require termination. The ABA proposal consistently seeks to reduce the number and length of foster placements by limiting state intervention to cases of imminent serious harm to the child, and then by requiring termination if home conditions do not permit return. Although Washington sim-

99. *Id.* § 13.34.190(2).

100. *See, e.g.*, CONN. GEN. STAT. § 46-42 (1975); MONT. REV. CODE § 10-1314(3), (5) (Supp. 1977).

101. Katz, *Foster Parents Versus Agencies: A Case Study in the Judicial Application of "The Best Interests of the Child" Doctrine*, 65 MICH. L. REV. 145, 153 (1966). Michigan narrows this discretion by statutorily defining the child's best interest. MICH. COMP. LAWS § 722.23 (1978).

102. STANDARDS, *supra* note 10, at 157-58.

103. WASH. REV. CODE § 13.34.190 (Supp. 1977).

ilarly limits state intervention, the new law perpetuates lengthy foster placements by making termination extremely difficult to obtain.

The Juvenile Court Act provides needed standards for terminating parental rights but restricts too severely a court's power to sever the parent-child relationship. The statute facilitates the child's early return home and, in situations where return is possible, promotes child welfare. If the home environment seriously endangers the child, however, and the parents refuse to allow adoption, the Washington law severely restricts the court's ability to place the child in a permanent home. By allowing removal only when a child faces imminent danger of serious harm, mandating agency efforts to maintain the parent-child relationship, providing procedural protections for parents, and requiring a high standard of proof, the Act represents a potent statutory scheme to preserve the family unit. The Act, however, also perpetuates the damaging system of long-term foster care by making termination difficult, if not impossible, even where families are experiencing hopeless conflict.[104]

At a minimum, the legislature should change the Washington law by deleting the last three termination requirements,[105] and by modifying the parental visitation requirement to conform to the language of the ABA proposal.[106] This revision would at least expand the trial court's power to order termination where there is little chance of return. The legislature could better improve the statute, however, by consistently following the ABA termination proposal, which better protects the interests of both family and child. Not only does the ABA approach keep families intact by removing children only as a last resort, it also protects those children ultimately removed by ensuring they are not denied a permanent adoptive home because of a remaining legal relationship with their natural parents.

Sandy D. McDade

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104. Commentators recognize that in certain situations the decision to terminate is relatively "easy" because of serious and insoluble problems in the home environment. "While there is no consensus about what is best for a child, there is much consensus about what is very bad *(e.g.,* physical abuse); some short-term predictions about human behavior can be reliably made *(e.g.,* chronic alcoholism or psychosis is difficult quickly to modify)." Mnookin, *supra* note 40, at 261.

105. WASH. REV. CODE § 13.34.180(5)(7) (Supp. 1977).

106. STANDARDS, *supra* note 10, at 130.