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Parental Compliance: Its Role in Termination of Parental Rights Cases

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I. INTRODUCTION

The United States Supreme Court has recognized the right of parenthood as a protected liberty.[1] In the landmark case of *Skinner v. Oklahoma*,[2] the Court held that procreation was one of the basic civil rights of man. The Court acknowledged this right by invalidating a statute that provided for the sterilization of habitual criminals. Parental choice to procreate was held to be such a fundamental right, the Court stated that laws pertaining to it are to be examined at the highest level of scrutiny.[3] Additionally, the right of a parent to maintain custody of his or her child is considered a natural right.[4]

Parental rights, however, are not absolute. Laws against child maltreatment demonstrate this, as statutorily defined regulations permit states to interfere in the parent-child relationship in certain situations.[5] For instance, parents open the metaphorical door of the family home to the State when they abandon or seriously injure their children. Once a statutorily defined threshold is met, the court may permanently sever a parent's legal rights in an effort to serve what the court deems to be in the best interest of the child. Due to recent changes in the law in this area, these cases, called termination of parental rights (TPR) cases, have become an area of increased interest among courts, legislatures, and policy analysts, and will be the topic of this Article.

This Article examines the current state of termination of parental rights law, along with the results of an appellate case review, an exploratory project, and an empirical investigation of decision-making related to these cases. Section I begins with an overview of termination of parental rights law. The focus of this section will be recent statutory changes in the area, highlighting some key differences between the former and the current law. In Section II, the focus shifts to a review of the foundations for the empirical study that will be described later in the Article. Section III more specifically addresses the main areas that will be explored in the empirical study, including descriptions of case plans, parental compliance with case plans, and the mental status of parents. Section IV describes the empirical study,

1. *See, e.g.*, Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925) (finding a state statute requiring parents to send their children to public schools unconstitutional as an unreasonable interference with the liberty of the parents to direct the upbringing and education of their children); Meyers v. Nebraska, 262 U.S. 390, 399 (1923) (holding that the right to "establish a home and bring up children" is a fundamental right).
2. 316 U.S. 535 (1942).
3. *See id.* at 541.
4. *In re* Hitt, 209 Neb. 900, 901, 312 N.W.2d 297, 298 (1981).
5. *See* Douglas J. Besharov, *The Need to Narrow the Grounds for State Intervention*, *in* PROTECTING CHILDREN FROM ABUSE AND NEGLECT: POLICY AND PRACTICE 47, 62 (1988).

which addressed whether certain factors contribute to TPRs. Finally, sections V and VI discuss the conclusions that can be drawn from the empirical study.

II. AN OVERVIEW OF TERMINATION OF PARENTAL RIGHTS

In general, state statutes require that parents commit some flagrant violation before state prosecutors can seek a termination of parental rights.[6] These statutes generally require one of the following as a basis for a termination: abandonment, child abuse, severe neglect, non-support, or the inability to parent adequately because of a physical or mental deficiency.[7] In addition, the statutes usually require a finding that the problem is likely to continue for an indeterminate period.[8] The United States Supreme Court requires that the State prove the grounds for a termination by "clear and convincing evidence," a more stringent requirement than the "preponderance of the evidence" standard a plaintiff must prove in a typical civil case.[9]

A. Recent Statutory Developments Related to Termination of Parental Rights

In 1997, the United States Congress passed the Adoption and Safe Families Act (ASFA).[10] This Act changed the paramount objective from family reunification to the child's health and safety.[11] This federal legislation requires the State to file a petition (or join if another party moves to do so) to terminate parental rights when the child has been in an out-of-home placement for fifteen of the most recent twenty-two months. Additionally, the State is to file a petition if the parent has inflicted serious bodily injury upon the juvenile (other than accidental); if the parent has subjected the juvenile to aggravated circumstances including abandonment, torture, chronic abuse, or sexual abuse; or if the parent has murdered another one of his or her children.[12] These situations do not automatically result in a termination; however, they do require the State to *initiate* the TPR process.[13]

6. *See* Martin R. Gardner, *The Child and the Family*, *in* UNDERSTANDING JUVENILE LAW 19, 39 (1997).
7. *See* JOHN DEWITT GREGORY ET AL., UNDERSTANDING FAMILY LAW § 3.02, at 144-145 (2d ed. 1993).
8. *See id.*
9. Santosky v. Kramer, 455 U.S. 745, 753 (1982); *see also* Gardner, *supra* note 6, at 39-40.
10. The President signed the bill into law on November 19, 1997 as the "Adoption & Safe Families Act of 1997," Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified in scattered sections of 42 U.S.C.)
11. *Id.*
12. *Id.*
13. *Id.*

However, there are some exceptions to this law. For example, ASFA does not require the State to file a petition for termination if the child has been in the care of a relative, if the state agency involved has documented that a termination would not be in the best interest of the child, or if the family has not had a reasonable opportunity to avail themselves of the necessary services.[14] In addition, the federal legislation provides that the availability of an adoptive home should not have any bearing on whether the State terminates parental rights.[15] The federal legislation also includes fiscal incentives for states that adopt ASFA.[16] As a result, many states have moved quickly and enacted similar state legislation.[17]

B. Key Differences Between the Former and Current Law in Nebraska

The implementation of ASFA resulted in many changes in Nebraska law.[18] One key difference is that under the current law the State must proceed to file a TPR on a more aggressive time schedule than it did in the past.[19] The former statute gave the court authority to terminate parental rights when it was in the "best interest of the child" and the child had been in out-of-home placement for eighteen or more consecutive months.[20] The former law also required local authorities to make "reasonable efforts" to preserve biological families before placing a child in foster care or freeing a foster child for adoption.[21] However, many researchers concluded that states had misinterpreted this requirement, which resulted in states making *unreasonable* efforts to keep children with unfit parents.[22] One study revealed that children were languishing in foster care and being harmed by the State's excessive efforts to keep families together.[23] In

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14. *Id.*
15. *Id.*
16. *Id.*
17. Statutory schemes are similar across the country on this issue. Because Nebraska was the site of the current research, its statute will be used as the example. In Nebraska, the termination of parental rights statute is NEB. REV. STAT. § 42-292 (Reissue 1998).
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *See generally* Mark Hardin & Robert Lancour, *Early Termination of Parental Rights: Developing Appropriate Statutory Grounds*, 1996 A.B.A. CENTER ON CHILDREN & L. 12; L. W. Rohman et al., *The Best Interest Standard in Child Custody Cases, in* 5 LAW AND MENTAL HEALTH: INTERNATIONAL PERSPECTIVES 40 (David Weisstub ed., 1998); Marcia Sprague & Mark Hardin, *Coordination of Juvenile and Criminal Court Child Abuse and Neglect Proceedings*, 35 U. LOUISVILLE J. FAM. L. 239 (1996-1997).
23. The median length of stay in foster care grew from 15 months in 1987 to more than two years in 1994. *See* Hardin & Lancour, *supra* note 22, at 14.

response, the new statutory provisions *require* the State to file (or join as a party if a petition has already been filed) a petition for a termination when a child has been in foster care for fifteen of the most recent twenty-two months.[24] Thus, not only did ASFA reduce the time frame for filing a TPR petition, it also created an affirmative duty for the State to file.

Even under the less stringent former statute, however, 3,508 Nebraskan children were in out-of-home care in 1998.[25] Of those, 1,656 (47.2%) had been in such care for eighteen or more consecutive months, and 1,278 (36.4%) had been in out-of-home care for at least twenty-four months.[26] Nationwide, the number of foster children rose 19% from 1990 to 1995 (from 403,242 foster children to 480,249) with 18% of the children having spent five or more years in foster care.[27] It is evident from these numbers that in order to be in compliance with ASFA, an enormous increase in the number of TPR petitions would need to take place. Because of the increased time demands placed on those involved with these cases, as well as the tremendous impact each one of these cases has on the life of a child, the area of focus for the current study is on the decision-making involved in the TPR process.

III. BACKGROUND FOR THE CURRENT EMPIRICAL RESEARCH

The current research initially began with a manual review of a decade of Nebraska's termination of parental rights appellate case law.[28] This review revealed that there were recurring factors used in support of upholding the trial courts' terminations, including parent/child bonding,[29] parental compliance with the court rehabilitation plan,[30] abandonment by the parents,[31] terminations of parental rights for

24. As mentioned in the previous section, *see supra* note 14 and accompanying text, the exceptions to this requirement occur when a relative is caring for the child, there is a compelling reason not to file, or the family has not had a reasonable opportunity to participate in the services provided in the court plan.
25. Carol K. Stitts, Fact Sheet: The Adoption and Safe Children's Act, Nebraska State Foster Care Review Board (1998).
26. *Id.*
27. U.S. Dept. of Health and Human Servs. Admin. for Children and Families, Foster Care and Adoption Statistics Current Report (2000), *available at* http://www.acf.dhhs.gov/programs/cb. The estimate for the number of children in foster care nationwide in March of 1999 was approximately 547,000. *See id.*
28. Appellate cases from 1988 to 1998 were collected through the Westlaw database by the current researchers. Approximately 180 cases were reviewed.
29. *See In re* Interest of J.H., 242 Neb. 906, 497 N.W.2d 346 (1993).
30. *See In re* Interest of Lindsay M., No. A-96-809, 1997 WL 249435 (Neb. Ct. App. May 6, 1997); *see also In re* Interest of Kantril P., 257 Neb. 450, 465, 598 N.W.2d 729, 740-42 (1999).
31. *See In re* Interest of Theodore W., 4 Neb. Ct. App. 428, 545 N.W.2d 119 (1996).

other children,[32] the age of the child,[33] and the mental deficiency of the parent.[34]

Based on this case review, the current researchers developed an exploratory project that aimed to study attorney decision-making in TPR cases.[35] A list of thirty-three factors was developed from the factors that were frequently mentioned in the appellate case review, described above. These factors focused primarily on qualities of the parent or the child, ranging from the special needs of the child to the severity of maltreatment in the case. Next, a questionnaire was developed that asked prosecuting attorneys and attorney guardians ad litem (GALs) in Nebraska to select an actual case that he or she was considering for a TPR petition. One hundred sixty-three respondents (53 county attorneys and 110 GALs) then rated the importance they would give to each factor that was relevant to their decision to file, or recommend filing, a termination petition. In addition, the questionnaire asked the respondents to indicate what type of abuse was involved in the case. Results indicated that respondents gave "lack of court plan compliance" great consideration in determining whether or not they should file a termination petition.[36]

Of the factors given the highest ratings,[37] "court plan compliance" may be the factor least directly related to the child's safety and permanence. This is perhaps due in part to the fact that some rehabilitation plans may not be appropriately or specifically matched to the needs of the family. In fact, the appellate case review revealed instances when

32. *See In re* Interest of Mark B., No. A-93-916, 1994 WL 237340 (Neb. Ct. App. May 31, 1992).
33. *See In re* Interest of J.H., 242 Neb. 906, 497 N.W.2d 346 (1993).
34. *See In re* Interest of R.M., No. A-91-1188, 1992 WL 238584 (Neb. Ct. App. Sept. 29, 1992); *see also In re* Interest of C.M., No. A-91-947, 1992 WL 211298 (Neb. Ct. App. Sept. 1, 1992).
35. Eve M. Brank, Angela L. Williams, & Victoria Weisz, Attorney Decision Making Regarding Termination of Parental Rights (unpublished manuscript, on file with the authors).
36. *Id.* Mean (hereinafter *M*) = 2.4, Standard Deviation (hereinafter *SD*) = .83, on a scale of 0 to 3, with 3 being "contributes to a great degree" and 0 being "does not contribute."
37. Again, a higher ranking means that respondents viewed the factor as more important in their decision on whether to file a TPR petition in the case they chose. The highest rated factor was the "failure of the parent to provide care/protect"; the second highest factor was the "severity of the maltreatment"; the third highest factor was the "lack of court plan compliance"; and the fourth highest factor was the length of time the child was in out-of-home placement. *Id.* Each of these factors has a correlate in the Nebraska statute as grounds for termination. *See* Neb. Rev. Stat. §§ 42-292(2) and (3) (addressing the failure to provide care); (2), (8), and (9) (addressing the severity of the maltreatment); (7) (addressing the length of time in out-of-home placement); and (6) (addressing the issue of parents failing to correct the conditions that led to the determination that the child should be under the juvenile court jurisdiction, which is similar to "lack of court compliance").

the court plans appeared exceptionally demanding and broad.[38] The concern is that parental compliance with such case plans may be serving as a proxy for actual parental improvement. The danger is that mere compliance with a case plan does not automatically equate to an amelioration of the risks of future harm to the child.

The current researchers speculate that reliance on whether or not parents comply with their particular court plan might become even more important under ASFA due to the expected increase in termination filings. Further, the current researchers hypothesize that the increase in TPR cases will increase caseloads and decrease the time the service providers and attorneys have for each case. Court plan compliance is a more concrete and easier to prove method than the "risk reduction" or "best interests" methods. It is likely that increased demands on the system to pursue TPR cases will result in increased reliance on court plan compliance in termination decisions. For this reason, the current researchers explored how significant a factor court plan compliance was in TPR determinations.

The appellate case review also revealed several situations where the mental status of the parent played an integral role in the lower courts' decisions to terminate parental rights. For instance, one case involved a mother who was diagnosed with mild mental retardation.[39] The State made a series of attempts to show the mother how to properly care for her children. Despite these efforts, the mother demonstrated little improvement.[40] The Nebraska Supreme Court affirmed the lower court's decision to terminate the mother's parental rights because the children were suffering in an unsanitary, neglectful home, with no indication that it would improve in the future.[41] Because mental status seemed to not only be a factor repeatedly mentioned by the court, but directly related to court plan compliance, the current study also examined the mental status of the parent in TPR determinations.

The results of the exploratory project indicated that the "intellectual capacity/limitations of the parents" was not a high consideration when attorneys were determining whether to file for a termination of

38. *See In re* Interest of Angelaura P., No. A-95-565, 1996 WL 45200 (Neb. Ct. App. Feb. 6, 1996). The case plan in this case required the mother to participate in and complete an approved parenting class, obtain a GED, participate in a counseling program, participate in a psychological evaluation, maintain a minimum of 20 hours per week employment, participate in a job training program, locate and maintain safe and appropriate sanitary housing, provide the caseworker with a current address, provide a budget to the caseworker, participate in a nutrition class, refrain from any further law violations, and notify the caseworker of any further law violations. *See id.*

39. *See In re* D.A.B., 240 Neb. 653, 483 N.W.2d 550 (1992).

40. *Id.*

41. *Id.*

parental rights.[42] On the other hand, the respondents gave the "mental health of the parent" a moderate rating in relation to the other factors.[43] Thus, in their decision to file a termination petition, the attorneys and GALs rated the mental health of the parent as a more dominant consideration than the parent's intellectual limitations. However, due to limitations in the methodology of the exploratory project, researchers could not determine whether the cases that the respondents chose to report had intellectual capacity issues as often as mental illness, or whether the different scores reflected that the respondents viewed these factors differently in termination cases. For this reason, the experimental manipulation presented in the current research was intended to remedy this ambiguity. The following sections focus more specifically on the issues of court plans and compliance, along with the mental deficiency or illness of the parent in an effort to explain the manipulations of the current study.

IV. SPECIFIC ISSUES EXAMINED IN THE CURRENT STUDY

The following three subsections are designed to describe the main areas that were explored in the empirical study. As described above, the researchers derived these main areas from the appellate case review research project and the exploratory decision-making project.

A. Court Plans

Most child maltreatment cases result in some form of a treatment plan developed by child protective services.[44] In Nebraska, after a child has been adjudicated as a child in need of services, the Department of Health and Human Services submits a proposed plan to the court for the care of the child and the rehabilitation of the parent.[45] The court may accept the proposed plan, modify the plan, order the development of a new plan, or create an alternative plan that would be in the best interest of the child.[46] This court plan then becomes integral in determining how a termination case will proceed and ultimately be resolved. Clearly, the intention of the court is for these case plans to be fitted to the individual needs of the parents. For example,

42. *See* BRANK ET AL., *supra* note 35. $M = 1.4$, $SD = .98$, on a scale of 0 to 3, with 3 being "contributes to a great degree." This factor was twenty-third in order of ratings given by the respondents out of thirty-three total factors.
43. *Id.* $M = 1.8$, $SD = 1$, on a scale of 0 to 3, with 3 being "contributes to a great degree." This factor was thirteenth in order of ratings given by the respondents out of thirty-three total factors.
44. *See* Patricia G. Tjaden & Nancy Thoennes, *Predictors of Legal Intervention in Child Maltreatment Cases*, 16 CHILD ABUSE & NEGLECT 807, 812 (1992). This research examined 833 child maltreatment cases in Denver, Los Angeles, and Newcastle to identify factors associated with dependency and criminal filings.
45. *See* NEB. REV. STAT. § 43-285 (Reissue 1998).
46. *See id.*

one court noted, "Where the failure of a parent to comply with a rehabilitation plan is a ground for termination of parental rights, the rehabilitative plan must be reasonably related to the objective of reuniting the parent with his or her child."[47]

In addition, researchers have noted the importance of tailoring the court plan to the parents' specific needs in order to maximize the effects of court intervention.[48] Optimal case planning would include developing a hierarchy of parental needs, and focusing first on satisfying the needs that solve the most critical problems, rather than simply making multiple referrals all at once. Without such service planning, some case plans may be setting the parents up for failure.[49] For instance, parents with severe mental illnesses should be psychiatrically treated *before* they are required to secure employment.

Evidence suggests, however, that court plans do not always fit the needs of the parent or the child. One commentator describes a case where two children were removed from their mother's care because of "inadequate housing, without hot water or cooking facilities."[50] Strikingly, the appellate opinion did not state that the inadequate housing was the result of the family home being destroyed by a flood that had damaged the entire community.[51] And although the poor housing condition was the cause of the removal of her children, the State made no efforts to help this mother secure adequate housing. Instead, the court plan required the mother to undergo extensive psychological evaluations.[52] Despite evidence that court plans do not always specifically address the needs of the parent(s),[53] courts nonetheless appear to base termination decisions on compliance with these plans.

B. Court Plan Compliance

Parents who do not comply with court-ordered services are extremely likely to lose custody of their children.[54] However, if they do

47. *In re* Kantril P., 257 Neb. 450, 465, 598 N.W.2d 729, 740 (1999).
48. *See* Richard Famularo et al., *Parental Compliance to Court-Ordered Treatment Interventions in Cases of Child Maltreatment*, 13 CHILD ABUSE & NEGLECT 507, 510 (1989).
49. *See id.*
50. Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protections System, An Essay*, 48 S.C. L. REV. 577, 590 (1997).
51. *See id.*
52. *See id.*
53. *See, e.g., In re* Constance G., 254 Neb. 96, 575 N.W.2d 133 (1998).
54. *See* Michael S. Jellinek et al., *Serious Child Mistreatment in Massachusetts: The Course of 206 Children Through the Courts*, 16 CHILD ABUSE & NEGLECT 179, 182 (1992). A study of 206 severely maltreated children in the Boston Juvenile Court revealed that parents lost custody of their children in 97% of the cases when they failed to comply with the court's recommendations. *See also* Leslie Atkinson & Stephen Butler, *Court-Ordered Assessment: Impact of Maternal Noncompliance in Child Maltreatment Cases*, 20 CHILD ABUSE & NEGLECT 185, 188 (1996) (dis-

comply with the court-ordered plan it is more than likely their children will stay with them.[55] Researchers have found that maternal noncompliance with court-ordered assessments relates to maladaptive behaviors.[56] For example, one study found that those mothers who were not compliant with the court-ordered assessment were also more likely to have a transient lifestyle, substance abuse problems, involvement in criminal behavior and violent relationships.[57] In addition, the mothers the researchers defined as noncompliant were also more likely to expose their children to physical neglect.[58] However, this study found no significant differences between compliant and noncompliant mothers and the rates of physical abuse or psychological maltreatment noted in their case files.[59]

Court plan compliance is also often at the center of termination appeals. In a recent case, the Nebraska Court of Appeals recognized the importance of compliance with the court plan: "The question is not whether Joseph has problems with alcohol, but rather, whether he is complying with the rehabilitation plan imposed by the court and the effect of those problems upon the best interests of [the child]."[60] In this case, Joseph was the father of a young child, Joey. Joseph and his wife had been accused of leaving Joey and his sister alone overnight. At the dispositional hearing, the court ordered that Joseph and the children's mother participate in counseling, abstain from alcohol and non-prescribed controlled substances, and participate in chemical dependency programs.[61] The couple continued to struggle with chemical dependency and their parental rights were eventually terminated.

On appeal, the Nebraska Court of Appeals reversed the termination of Joseph's parental rights. According to the court, the more important consideration pursuant to Nebraska Revised Statute § 43-

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cussing how researchers found that when a mother was noncompliant with court or clinical recommendations she was more likely to lose custody of her child).

55. *See* Atkinson & Butler, *supra* note 54, at 182 (noting that in 67% of the cases in which parents complied with the court's orders their children were returned to them).

56. *See* Stephen M. Butler et al., *Maternal Compliance to Court-Ordered Assessment in Cases of Child Maltreatment*, 18 CHILD ABUSE & NEGLECT 203 (1994). This study reviewed the clinical records of mothers who were involved in court-ordered assessments designed to provide the court with clinical evaluations for the disposition hearing regarding the children's custody and care. The researchers defined compliance as attending 67% or more of the scheduled psychological assessment meetings, and the noncompliant mothers were those who failed to show for 33% or more of the scheduled meetings.

57. *See id.* at 207.

58. *See id.*

59. *See id.*

60. *In re* Joseph L., 8 Neb. Ct. App. 539, 551, 598 N.W.2d 464, 473 (1999).

61. *See id.* at 541.

292(6) was whether the father was complying with the rehabilitation plan, not whether his alcohol problem was under control.[62]

C. Mental Illness and Mental Deficiency

In addition to the issues surrounding case plans, the current study was designed to determine if, for the purposes of a termination recommendation, respondents viewed people with mental illness differently than people with mental retardation. The Nebraska termination statute specifically addresses the issue of parental mental deficiency or mental illness as a reason for terminating parental rights.[63] The statute does not differentiate between the two, despite the inherent distinctions between these mental statuses.[64] However, the exploratory decision-making project described above yielded ambiguous results relating to the issue of parents' mental illness or intellectual abilities. To restate the findings, the attorneys and GALs rated the mental health of the parent as a more dominant consideration in their decision to file a termination petition than the parent's intellectual limitations.[65] However, the results were difficult to interpret because of the methodology employed for that project. The question then arose as to whether the respondents might have been viewing all mental illnesses as more serious threats to the well being of the child than mental deficiency. This question was of particular interest because of the relationship these two conditions have with long-term prognoses or amenability to treatment.

Amenability to treatment or prognosis is, conceptually, the factor that would most predict whether a parent's engagement with services will result in safety and permanence for the child with that parent. Differences are well documented for the long-term prognosis of the two parental conditions presented in this research. Many people with mental retardation could probably learn the skills necessary to function in daily life and even parent a child. Nonetheless, the underlying condition will continue throughout their lifetime and these parents will continue to need assistance. In contrast, mental illnesses such as depression are more transient. For example, a person who has a bout with depression could, in all likelihood and under the appropriate treatment, make a full recovery.

62. *See id.* at 551.

63. *See* NEB. REV. STAT. § 43-292(5) (Reissue 1998).

64. In general, mental illness can be improved by a drug/therapy regimen, while mental deficiency typically is a chronic, stable condition.

65. *See supra* text accompanying notes 39-43.

V. THE EMPIRICAL STUDY

The current study explored attorney and protection and safety worker decision-making in a hypothetical TPR case. Researchers chose this population since judges can only decide cases that a lawyer has actually filed; and judges typically rely upon recommendations from the child-protection worker or the GAL in determining whether to terminate parental rights.[66]

Further, TPR filings set into motion a series of events and considerations that do not necessarily result in a trial. For example, because the law has established that a formal termination of parental rights to a previous child is grounds for termination of rights to a future child, the current researchers suspect that parents may voluntarily relinquish their parental rights.[67] Therefore, an attorney's decision, or a recommendation by either a CPS worker or GAL, to file a TPR petition could potentially have a large impact on the lives of children and parents. Additionally, appellate opinions provide insight into the judicial decision-making in these cases.[68] Hence, the current study explores attorneys' decisions, and CPS workers' recommendations, to file a TPR petition.

A. Hypotheses

The current study was designed to investigate two main issues. The first was to determine whether court plan compliance is used as a proxy for actual parental improvement, even when the court plans do not correctly match the presenting problem. Researchers hypothesized that respondents would be more likely to recommend a termination petition when the mother was described as noncompliant with the court plan. Researchers also predicted that the type of court plan (broad or narrow) would not affect this pattern. Secondly, the researchers sought to determine whether those deciding or recommending a TPR would be less likely to do so when the mother's problem was one that was generally accepted as having a positive long-term prognosis (e.g., depression as opposed to mental retardation). Specifically, researchers hypothesized that respondents would be less likely to express a need to terminate parental rights when the scenario described the mother as depressed rather than mentally retarded.[69]

66. NAT'L COUNCIL OF FAMILY AND JUVENILE COURT JUDGES ET AL., MAKING REASONABLE EFFORTS: STEPS FOR KEEPING FAMILIES TOGETHER, 55.
67. The voluntary relinquishment may occur because it could not be used in the same way as a formal TPR could be in a future TPR case.
68. For this reason, judicial decision-making is not examined in this study.
69. This hypothesis was also based on the findings from the exploratory study that found mental illness to be a greater consideration than the intellectual capacity of the parents.

B. Method

One hundred forty-eight attorneys and Department of Health and Human Service (DHSS) employees participated in the study (fifty-seven attorneys and ninety-one DHHS employees). Researchers distributed stimulus materials at a statewide educational conference[70] and through the mail.[71]

The study utilized a hypothetical case vignette about a possible TPR case. The vignette described a single mother of one child who had neglected, but not physically abused, that child.[72] In the vignette, researchers included examples of the mother's neglect and other behaviors. Researchers presented eight versions of the vignette;[73] all eight versions were identical, except for the description of the mother's mental status, the court ordered plan, and the description of the mother's compliance with that court plan. The mother's men tal status was described as either clinically depressed or mildly mentally retarded.[74] The court plan was either broad or narrow.[75] The mother was described as either compliant or non-compliant.[76]

The participants were asked to indicate if they would recommend that the mother's parental rights be terminated,[77] and their reasons

70. The conference, called "Y2Kids: Protecting Nebraska's Children in the 21st Century," was held in Kearney, Nebraska, from October 25 through October 29, 1999, and was a multi-disciplinary child-abuse training conference.
71. Researchers obtained forty-eight responses at the conference, and 100 responses through the mail.
72. The exploratory study had shown that when neglect was involved in a case, as compared to when neglect was not involved, respondents gave significantly more weight to the lack of court plan compliance by the parents. *See* BRANK ET AL., *supra* note 35.
73. *See infra*, Table 1.
74. This variation was an attempt to explain the findings from the exploratory project that participants may view mental illness and mental retardation differently. *See supra* notes 42-43 and accompanying text.
75. The broad court plan for the depressed mother ordered the mother to meet with a psychiatrist two times per week, take prescription anti-depressants, attend parent training classes two times per week, take anger management classes, and attend parent support group meetings two times per week. The narrow court plan for the depressed mother required her to meet with a psychiatrist twice per week and take prescribed medication. The broad court plan for the mentally retarded mother required her to attend family service visits three times per week in order to teach her life skills, attend parent training classes twice per week, and attend an anger management class once per week. The narrow court plan for the mentally retarded mother required her to attend three family service visits per week.
76. The "compliant mother" followed the court plan for the entire eighteen months her child was in foster care. The "noncompliant mother" stopped attending or participating in all of the court ordered requirements.
77. Judges actually have the final authority on this issue; however, attorneys and health and human service workers play the important role of recommending these cases to judges.

for doing so. In addition, they were asked to provide their profession and how long they had been in that profession. The vignettes were randomly assigned to the participants with great efforts taken to insure that the eight conditions were equally represented.[78]

Ninety-one (61.5%) of the respondents were child-protection workers, while fifty-seven (38.5%) of the respondents were attorneys. The average length of time in their current profession was approximately eleven years (ranging from one to thirty-five years).[79] On average, the attorneys had been in their profession longer than the child-protection workers.[80]

C. Results

Overall, 38.5% of the respondents indicated that they would recommend a termination of parental rights for their particular vignette.[81] The study revealed no significant difference in termination recommendations between attorneys and the child-protection workers.[82] There was, however, a significant correlation between the duration of one's current profession and likelihood of a termination recommendation.[83] The study seemed to suggest that the longer one was in his or her current profession, the more likely that person was to recommend a TPR.[84]

The percentages of those recommending a TPR for each of the eight cases are provided in Table 1 and range from 0 to 28%. As the percentages indicate, when the mother was compliant with the court plan, across all other conditions, it was less likely for the participant to recommend a termination (from 0 to 5%). However, when the mother was described as non-compliant, the participants were more

78. In order to fill each of the cells of the design with the maximum number of participants, an additional mailing took place after the initial meeting. Each cell had between sixteen and twenty-one participants.
79. $M = 10.77$, $SD = 7.48$.
80. The attorneys had a mean length of time in current profession of 13.37 ($SD = 7.69$), whereas the DHHS employees had a mean of 9.13 ($SD = 6.86$). There was a significant difference between the length of time in the current profession for the two professions; $F\ (1,146) = 12.2$, $p = .001$.
81. Fifty-seven of the 148 respondents indicated that they would recommend a termination.
82. $X^2(1) = 1.97$, $p = .16$. Fifty-four percent of the HHS employees and 46% of the attorneys recommended a termination.
83. The mean length of time in their profession for those recommending a termination was significantly higher ($M = 12.32$, $SD = 8.56$) than for those who did not recommend a termination ($M = 9.78$, $SD = 6.53$).
84. $F\ (1,146) = 4.17$, $p. = .04$, $Mse = 54.45$. However, this is most likely a function of the large standard deviations because the overall time range was quite similar for those recommending a TPR (from one to thirty-five years) and those not recommending a TPR (from one to twenty-eight years).

likely to recommend a termination.[85] Independent chi square analyses also confirmed that there was a significant pattern of relationship between court plan compliance and termination recommendations.[86] Notably, there was no significant pattern of relationship between termination recommendations and court plan type[87] or mental status.[88]

In addition to the independent chi square analyses performed, a logit analysis was conducted to determine if there were any main effects of court plan type, compliance to court plan, or mental status.[89] The two-way and three-way interactions of these variables were also examined. A main effect for court plan compliance was found, such that the number of TPR recommendations was higher when the mother was described as noncompliant.[90] However, there was no main effect for mental status[91] or court plan type.[92] In addition, there was no interaction of compliance with court plan type[93] or mental status.[94] Nor was there an interaction between court plan type and mental status.[95] There was also no three-way interaction between the court plan compliance, court plan type, and mental status.[96]

Two independent raters coded the responses of the open-ended question that asked the participants to provide their reasons for either recommending, or refusing to recommend, a termination. The answers were classified into eleven distinct categories. Overall, the agreement level for these two raters was high.[97] In the order of most to least commonly cited, the participants noted the following reasons (parenthetical numbers represent the percentage of respondents who provided the category as one of their answers to the open-ended question): the mother's court plan compliance (48%), best interest of the child (16%), legal requirements (11%), not enough information provided to decide a TPR (10%), mother in need of more help (8%), mother/child bond (7%), no chronic maltreatment of the child (5%),

85. When the mother was described as noncompliant the percentage of respondents who recommended a termination ranged from 18 to 28%, versus 0 to 5% recommending a termination when the mother was described as compliant.

86. $X^2(1) = 62.832, p < .001$.

87. $X^2(1) = .02, p = .89$.

88. $X^2(1) = 1.83, p = .176$.

89. A logit loglinear analyzes the relationship between the independent and categorical dependent variables.

90. $z = -2.92, SE = .97, p < .001$.

91. $z = .7, SE = .65$, not significant (n.s.).

92. $z = 1.32, SE = .76$, n.s.

93. $z = -.78, SE = 1.4$, n.s.

94. $z = .52, SE = 1.22$, n.s.

95. $z = -.68, SE = 1.04$, n.s.

96. $z = -.62, SE = 2.22$, n.s.

97. Analysts performed Cohen's kappa on each category to determine the agreement level between the two raters. The overall mean of these kappa scores was $M = .7$, which is generally considered an acceptable agreement level.

feasibility of adoption for the child (3%), mother's mental deficiencies (3%), mother's ability to care for the child (3%), and the age of the child (3%). Thus, responses to the open-ended questions also suggest that court plan compliance is the most significant factor in decisions to recommend a TPR. Also, note that the mother's mental deficiencies was an insignificant factor.

VI. DISCUSSION

The results seem to indicate that attorneys and child-protection workers put a great deal of emphasis on court plan compliance in decisions to recommend a TPR, despite the mental condition of the parent or the type of court plan imposed. In support of this hypothesis, participants were more likely to recommend a TPR when the mother was described as noncompliant with the case plan than when she was described as compliant. Additionally, participants' reliance on compliance was not diminished as a function of the type of court plan the mother received, whether it was broad or narrow. Contrary to the other hypothesis, mental status did not appear to have a role in the decision-making of the participants as related to their recommendations to terminate. This was true both as a main effect and as an interaction.

One likely explanation for this reliance on court plan compliance is that it may be serving as an "objective" standard. A TPR case is unquestionably difficult. It seems only natural to try to grasp any shred of objectivity that might be found, and court plan compliance may be the only factor that provides this. After all, relying on compliance shifts the focus to a comparison of missed or attended meetings from a guess at what might happen in a child's future.

The problem is that compliance with a court plan may not be an accurate measure of the possibility of future harm to the children. Simply because parents are able to comply with a court plan does not insure that they will cease harming their children. Similarly, a parent's failure to comply with a court plan does not necessarily mean his or her parental rights should be terminated. In fact, some researchers have found no relationship between parental compliance and maltreatment rates.[98] When the practicality and relevance of the court plan are not considered in the TPR determination, questions naturally arise as to whether parents are being "set-up" for failure without a logical basis of risk reduction for the child.

The findings related to the court plan compliance manipulation were consistent with the previous exploratory project that led to the development of the current study. In the exploratory project, attorneys indicated that court plan compliance was important in their deci-

98. *See* Butler et al., *supra* note 56, at 203.

sion to file a termination.[99] These findings also correspond to case review studies that have found that parents who do not comply with their case plans or court ordered services were more likely to lose custody of their children.[100]

Participants in this study did not distinguish between a highly treatable mental illness and a chronic mental deficiency. Perhaps this is because, overall, little is known about what either of these conditions tells us about maltreatment risks.[101] Nonetheless, if the condition presents a risk in a particular case, it is notable that considerations of the amenability to treatment are apparently unimportant to decision-makers.

Knowing that court plan compliance plays a significant role in TPR decision-making creates important considerations for the child-protection agency as well as for the attorney representing the parents. The child-protection agency wants to insure that parents have ameliorated the situation that contributed to the children's harm. It is thus incumbent upon the worker to develop a case plan that requires changes in behavior rather than attendance at meetings. For example, compliance would more meaningfully relate to risk reduction in a case plan that required a period of sobriety rather than one requiring weekly attendance at Alcoholics Anonymous meetings. Otherwise, it is likely that compliant parents will regain custody of their children even if the real risk factors have not changed.

Similarly, parents' attorneys have a responsibility to insure that case plans are responsive to the underlying problems that have contributed to safety issues and are reasonable in terms of the parents' ability to comply. Not only should parents' attorneys advocate for services that are related to the risks, they should insure that services are likely to result in behavior change that will mitigate risks. Parents' attorneys may need to utilize experts who can report on the effectiveness of various services for each parents' unique problems. Otherwise, attorneys may see their clients lose their parental rights not because they were unfit, but simply failed to comply with an ineffective or an unreasonable court ordered plan.

A limitation to this study is the use of the short written vignettes. Clearly, these short descriptions did not exactly simulate a real termination case, which is a known problem with empirical studies like this one. Therefore, one explanation for these findings might be that the participants relied on compliance because the vignettes did not accurately portray all of the information normally available to an attorney

99. *See* text accompanying *supra* note 36.

100. *See supra* notes 54-55 and accompanying text.

101. *See* GARY B. MELTON ET AL., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS 468-470 (2d ed. 1997).

and caseworker. However, when afforded the opportunity to provide their reasons for or against a TPR recommendation, only 10% of the participants indicated that there was not enough information provided to decide the case.

VII. CONCLUSION

Termination of parental rights cases involve complex legal, social and ethical issues. Attorneys and child-protection workers must make tough and critical decisions when they deal with these cases. In addition, these decisions must be made under time constraints, which have recently been made shorter under the new statutory regulations. In light of each of these factors, it is not surprising that courts utilize the court ordered compliance methodology in determining whether a parent's rights should be terminated. While compliance as a factor in the TPR determination is not inherently irrelevant, there may be a problem when it becomes a proxy for actual parental improvement. This situation becomes especially problematic when a parent's court plan is excessively rigid, superfluous, or not specific to the family's situation.

This area of child welfare law has been brought to the forefront of policy makers' minds with the recent statutory changes implemented by ASFA. The required state involvement on more aggressive timetables will likely force an increase in caseloads and, therefore, a decrease in the time allotted by the attorneys and child-protection workers for each family. This time pressure could result in even more reliance on the documented compliance with a court plan. Additionally, less time may also mean less opportunity to shape case plans to fit the particular needs of each family.

Further research should be conducted that examines the effects of the time pressures resulting from the increased TPR case loads and whether that has translated into standards that are more difficult for the parents to meet. Additionally, research should be conducted that focuses on actual case plans and court outcomes to determine if compliance does play as great a role in the decision to terminate parental rights as it appears to play in this study. Finally, further research is needed to explore the relationship between parental compliance and risk reduction to children.

Table 1. Percentages of Those Recommending a Termination by Mental Status, Court Plan Type, and Court Plan Compliance

Case Vignettes	*Percentage*	*(Actual Number)*
Retarded, Broad plan, Compliant	0	(0)
Retarded, Narrow plan, Compliant	5%	(3)
Depressed, Broad plan, Compliant	2%	(1)
Depressed, Narrow plan, Compliant	2%	(1)
Retarded, Broad plan, Not Compliant	23%	(13)
Retarded, Narrow plan, Not Compliant	28%	(16)
Depressed, Broad plan, Not Compliant	23%	(13)
Depressed, Narrow plan, Not Compliant	18%	(10)
Total	101%[102]	(57)

102. The percentages sum to 101% due to rounding of individual percentages.