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Cover Page Footnote

[1] Nirmita Panchal, Heather Saunders, Robin Rudowitz & Cynthia Cox, The Implications of COVID-19 for Mental Health and Substance Use, KAISER FAMILY FOUNDATION (Mar 20, 2023), https://www.kff.org/coronavirus-covid-19/issue-brief/the-implications-of-covid-19-for-mental-health-and-substance-use/ [2] Jim Ash, New Study Examines the Nation's Courts and Mental Illness, THE FLORIDA BAR (Aug. 11, 2022), https://www.floridabar.org/the-florida-bar-news/new-study-examines-the-nations-courts-and-mental-illness/ [3] FLA. STAT. § 39.806(1) (2023). [4] Sam Ogozalek, A Lot of Thought, Little Action: Proposals About Mental Health Go Unheeded, KAISER FAMILY FOUNDATION (Mar. 22, 2023), https://khn.org/news/article/florida-mental-health-commission-report-2023-access-to-mental-health-care/ [5] § 394.467.

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It is Time for Family Courts to be More Aware of Parental Mental Illness and Substance Abuse

Elaina Larson[*]

ABSTRACT

Since the COVID-19 pandemic and previous years, the mental health and substance abuse crises in Florida are growing at an unprecedent rate.[1] With substantive due process rights under the Fourteenth Amendment as a substantial roadblock, the Florida courts are reluctant to adequately address the mental health and substance abuse needs of individuals.[2] This issue is especially difficult in cases involving the termination of parental rights, leaving children in damaging environments with unfit parents suffering from severe mental illness and substance abuse.[3] To prevent children from growing up under negative conditions and developing mental health problems as well, the Florida courts ought to place heavier weight on mental illness and substance

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[1] Nirmita Panchal, Heather Saunders, Robin Rudowitz & Cynthia Cox, *The Implications of COVID-19 for Mental Health and Substance Use*, KAISER FAM. FOUND. (Mar 20, 2023), https://www.kff.org/coronavirus-covid-19/issue-brief/the-implications-of-covid-19-for-mental-health-and-substance-use/

[2] Jim Ash*, New Study Examines the Nation's Courts and Mental Illness*, FLA. BAR (Aug. 11, 2022), https://www.floridabar.org/the-florida-bar-news/new-study-examines-the-nations-courts-and-mental-illness/

[3] FLA. STAT. § 39.806(1) (2023).

abuse factors when assessing parental capacity. The Commission on Mental Health and Substance Abuse seeks to push Florida's mental health law reform, so individuals can have better access to mental health services.[4] However, reform alone is not enough to ensure adequate mental health treatment since necessary extension of such treatment is determined by mental health courts.[5]

This Note advocates for a bright-line standard for Florida courts to evaluate mental illness and substance abuse factors in determining whether to terminate parental rights, while considering the severity of the mental condition. Accordingly, prioritizing a child's best interests and relevant judicial knowledge over the subject matter becomes an important role in termination proceedings.

[4] Sam Ogozalek, *A Lot of Thought, Little Action: Proposals About Mental Health Go Unheeded*, KAISER FAM. FOUND. (Mar. 22, 2023), https://khn.org/news/article/florida-mental-health-commission-report-2023-access-to-mental-health-care/

[5] § 394.467.

INTRODUCTION

In 2022, Florida ranked 49th nationally on the accessibility of mental health care.[1]

Consequentially, the risk for child maltreatment is higher in families impacted by substance abuse or severe mental health problems.[2] A child's potential socioeconomic and health-related impairments are long-term consequences resulting from such problems.[3] Where a parent suffers from substance abuse or severe mental illness, the lack of capacity for that parent to reasonably care for the child may be questioned.[4] In Florida, the Department of Children and Families ("DCF") or other child protective agencies may find a parent unfit, as a caregiver, for the child and petition for termination of parental rights.[5] However, the grounds for terminating parental rights are not easy to satisfy; DCF has a heavy burden to prove that mental illness or substance abuse substantially impairs the parent's ability to care for the child.[6] The process of terminating parental rights is more difficult when the abuse is not apparent, or the parent is not diagnosed.[7] To advocate for child protection, Florida courts should place higher deference on mental illness and substance abuse factors when assessing parental rights termination cases where substantial harm to the child's being is not immediately apparent.[8] Where child protection agencies cannot prove substantial harm in connection to a parent's mental illness or substance use, the courts

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[1] Mental Health America, *Ranking the States 2022*, https://mhanational.org/issues/2022/ranking-states (last visited Oct. 28, 2022).

[2] Vera Clemens et al., *Lifespan Risks of Growing Up in a Family with Mental Illness or Substance Abuse*, SCIENTIFIC REP. 10, No. 15453, at 2 (2020).

[3] *Id.* at 1.

[4] *See generally* FLA. STAT. § 39.806 (2022).

[5] FLA. STAT. § 39.806(1) (2022).

[6] *In re* T.D., 537 So. 2d 173, 175 (Fla. Dist. Ct. App. 1989).

[7] Samantha Jacobson, *The Impact of Parental Narcissistic Personality Disorder on Children and Why Legal Intervention is Warranted*, 24 CARDOZO J. EQUAL RTS. & SOC. JUST. 315, 316 (2018).

[8] *See generally* Andrea S. Meyer et al, *Substance Using Parents, Foster Care, and Termination of Parental Rights: The Importance of Risk factors for Legal Outcomes*, 32 CHILD. & YOUTH SERV. REV. 639 (2010).

should not automatically dismiss future endangerment to the child.[9] A parent's mental illness or substance use can impair the ability to financially support the child and increase the risk of child maltreatment.[10]

In this note, Part II will provide background on the history and constitutionality surrounding parental rights termination laws, the requirements stated in Florida's termination of parental rights statute regarding mental illness and substance abuse factors, the evaluation of a child's best interest under Florida statute, and the interpretation of those factors by the courts.

Next, Part III will address the issues encompassing strict requirements outlined in Florida's Termination of Parental Rights Statute and the court's narrow interpretation of that statute regarding mental illness and substance abuse factors where parental unfitness is not immediately apparent.[11] Such issues include the adverse effects on children being raised by parent(s) with severe mental health problems or substance use, the stringent criteria for involuntary placement outlined in Florida mental health laws, a court's failure to recognize the link between parental unfitness and the parent's mental illness or substance use, and the balance between the parent's constitutional rights and the protection of the child.[12]

Finally, Part IV of this note will offer solutions to those issues consisting of: (1) the possible enactment of a standard for mental illness and substance use within Florida's parental rights termination statute; (2) court interpretation of the grounds for parental rights termination favoring the best interests of the child over the inherent rights of the parents; (3) judicial training regarding psychological matters; and (4) the potential implementation of court orders requiring psychiatric treatment or rehabilitation.[13]

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[9] *Id*.
[10] *Id*.
[11] *See generally* FLA. STAT. § 39.806 (2022).
[12] *Id*.
[13] *See generally* Legal Info. Inst., *Statutory Construction*, CORNELL UNIV. L. SCH., https://www.law.cornell.edu/wex/statutory_construction#:~:text=To%20find%20the%20true%20meanings,to%20determine%20its%20original%20intent. (last visited Apr. 13, 2023); *see generally* Margareth Etienne, *Managing Parents: Navigating Parental Rights in Juvenile Cases*, 50 CONN. L. REV. 61, 78 (2018); *see generally* Amy Novotney, *Helping Courts and Juries Make Educated Decisions*, 48 MONITOR ON PSYCH. 70 (2017), https://www.apa.org/monitor/2017/09/courts-decisions; FLA. STAT. § 394.4655 (2022).

BACKGROUND

In the United States, the number of individuals suffering from substance use disorder is increasing.[14] In 2020, more than 41 million individuals needed treatment, but only around 6.5% of those individuals actually received services.[15] Moreover, approximately 14.2 million individuals suffered a serious mental illness in 2020.[16] More importantly, children raised in a family with mental health problems or substance abuse issues can experience negative impacts, such as impaired emotional development, mental illness or substance use disorder derived from the experience, lower educational performance, and lower income.[17]

A. History and Purpose of Termination of Parental Rights Laws

As early as the 20th century, the U.S. government began to recognize the importance of child welfare, first by focusing on the issue of child labor.[18] In 1916, Congress passed the Keating-Owen Act to reduce child labor by prohibiting the interstate sale of goods using child labor.[19] During that period, children were exposed to open fires, toxic chemicals, and crude machinery.[20] However, the U.S. Supreme Court declared the Act unconstitutional because it exceeded the scope of Congress's authority in regulating interstate commerce.[21] In 1941, the Supreme Court changed its decision and upheld the constitutionality of the Fair Labor Standards Act, which "prohibit[ed] the shipment in interstate commerce of goods produced for interstate commerce by employees whose wages and hours of employment do not conform to standards prescribed under the Act."[22] The Court reasoned that Congress may regulate the articles of commerce considered injurious to public health, morals, or welfare.[23] Thus, the Court further provided that the

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[14] Malka Berro, *An Economic Response to the Substance Use Crisis*, 29 POL'Y PERSP. 1, 3 (2022).

[15] *Id.*

[16] Nat'l All. on Mental Illness, *Mental Health by the Numbers*, https://nami.org/mhstats?gclid=EAIaIQobChMIj52Lidzx gIVVMeGCh2NbQC4EAAYASAAEgIG7_D_BwE (last visited Oct. 21, 2022).

[17] Clemens, *supra* note 2, at 1.

[18] Admin. for Child. and Fam., *The Story of the Children's Bureau*, https://www.childwelfare.gov/pubPDFs/Story_of_CB.pdf (last visited Feb. 07, 2023).

[19] Child Labor Act, ch. 432, 39 Stat. 675 (1916).

[20] Marina A. Masterson, *When Play Becomes Work: Child Labor Laws in the Era of "Kidfluencers"*, 169 U. PA. L. REV. 577, 585 (2021).

[21] Hammer v. Dagenhart, 247 U.S. 251, 273 (1918).

[22] United States v. Darby, 312 U.S. 100, 112-13 (1941).

[23] *Id.* at 114.

interstate commerce regulations do apply to child labor because child labor involved the engagement in the production of goods for interstate commerce, and such engagement was so related to the commerce and affected it to the extent of being within the power of Congress's commerce power.[24]

Throughout history, Congress continuously enacted various laws seeking to advocate the need for stronger child protection and a safer environment for children.[25] For instance, the Child Abuse Prevention and Treatment Act of 1996 ("CAPTA") dealt with child welfare and provided the states with criteria to receive federal funding for child abuse prevention programs.[26] CAPTA defines child abuse as including physical, mental, and sexual abuse of children.[27] Essentially, this Act included a provision requiring the appointment of an advocate to represent children in abuse and neglect investigations.[28] Such a process can involve the legal severance of the parent-child relationship where the state can successfully prove that the parent cannot properly care for the child.[29] The CAPTA enables the adoption of parental rights termination laws, and many states started executing the laws within their legal system.[30] Moreover, the Adoption and Safe Families Act of 1997 ("ASFA") prioritized the needs of the child and states that "in determining reasonable efforts to be made with respect to a child, . . . the child's health and safety shall be the paramount concern[.]"[31] The State must make reasonable efforts to preserve and rejoin families before placing a child in foster care, to reduce the need for child removal from the child's home, and to increase the possibility for a child to safely return home.[32] Both Acts promote the framework of child welfare and desire adequate parental fitness in efforts to raise the child.[33]

B. Parents' Constitutional Rights Under the Fourteenth Amendment

Substantive Due Process provides that legislation must be fair and reasonable in content and further a legitimate governmental objective.[34]

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[24] *Id*. at 117.
[25] Alicia LeVezu, *Alone and Ignored: Children without Advocacy in Child Abuse and Neglect Courts*, 14 STAN. J. C.R. & C.L. 125, 126-27 (2018).
[26] *Id*. at 127.
[27] 42 U.S.C. § 5102 (1974).
[28] 42 U.S.C. § 5103(a)(3) (1974).
[29] LeVezu, *supra* note 26, at 127.
[30] *Id.*
[31] 42 U.S.C. § 671(a)(15)(A) (2023).
[32] 42 U.S.C. § 671(a)(15)(B) (2023).
[33] *Id*.
[34] Reno v. Flores, 507 U.S. 292, 301-02 (1993).

In reviewing a termination of parental rights proceeding, courts defer to the parents' rights under the Fourteenth Amendment.[35] The Amendment states, in part, that no state shall "deprive any person of life, liberty, or property, without due process of law."[36] Strict scrutiny is justified where legislation is within a specific prohibition of the Constitution.[37] Substantive Due Process recognized "the fundamental right of parents to make decisions concerning the care, custody, and control of their children."[38]

Historically, a parent's right to raise his or her children developed in the context of children's education in the early 20th century; in *Meyer v. Nebraska*, the Supreme Court found that the Constitution protected the right of parents to make decisions for the upbringing of their children.[39] In *Pierce v. Society of Sisters*, the Court expressly found this to be a fundamental liberty on which state governments rest, and such liberty was greater than the state's interest in standardizing the education of children.[40] Furthermore, the Court stated that a child is "not the mere creature of the state," parents "have the right, coupled with the high duty, to . . . prepare" their child for life.[41] This constitutional right is one of the primary reasons why courts are reluctant to impose a lenient test on terminating parents' rights to their children.[42]

To involuntarily terminate parental rights, Substantive Due Process requires that the state show clear and convincing evidence before severing the rights of parents to care for their natural child.[43] For example, a state must provide sufficient evidence of neglect, abuse, or abandonment to terminate a parent's right, and the sole factor of the parent's failure to substantially comply with a performance or permanent placement plan will not typically justify the termination of such rights.[44] In *Santosky v. Kramer*, the Supreme Court held that a parent's private interest carries heavier weight than the use of the preponderance standard in parental termination proceedings due to the importance of parental rights compared to property rights.[45] Furthermore, both federal and state

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[35] *See generally id*.
[36] U.S. CONST. amend. XIV, § 1.
[37] United States v. Carolene Products Co., 304 U.S. 144, 153 (1938).
[38] Troxel v. Granville, 530 U.S. 57, 66 (2000).
[39] Meyer v. Nebraska, 262 U.S. 390, 400 (1923).
[40] Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925).
[41] *Id*. at 535.
[42] *Troxel*, 530 U.S. at 66.
[43] S.M. v. Fla. Dep't of Children & Families, 202 So. 3d 769, 776 (Fla. 2016).
[44] *Id*. at 778.
[45] Santosky v. Kramer, 455 U.S. 745, 749 (1982).

laws regulate parental termination proceedings.[46] These proceedings usually require the satisfaction of two findings: "(1) the parent is unfit to care for the child and (2) termination of the parent-child relationship is in the child's best interest."[47] However, a state can terminate such rights if it has a compelling government interest, and courts determine such a finding by balancing parental interests with government interests in child welfare.[48] The Supreme Court in *Wisconsin v. Yoder* balances the relative strengths of the parent's interest against the state's interest, and commonly gives substantial deference to the parent when considering whether a state law infringes on the parental right to raise one's own children.[49] Overall, precedent indicates that "there is a protected liberty interest in parenting, but that the strength and breadth of that liberty interest are, at the very least, subject to very different interpretations."[50] The protected liberty interest in parenting excluded the implementation of statutes that are found and described as arbitrary and unreasonable.[51]

C. Florida's Termination of Parental Rights Statute

In Florida, the termination of parental rights proceedings is outlined in Florida Statute § 39.806, and provides grounds for voluntary and involuntary termination.[52] Under this statute, an agency, typically the DCF, has the burden of showing clear and convincing evidence that parental incompetence has or would result in serious harm to the child.[53] This statute provides numerous grounds for termination, such as voluntary surrender, child abandonment, egregious conduct, and parental incarceration.[54] Under paragraph (j), the grounds for termination include the abusive use of controlled substances which would render the parent incapable of caring for the child.[55]

However, the statute does not explicitly define and factor in criteria for parental unfitness when it comes to parents suffering from mental

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[46] Bethany Gale Blitchington, *Raising Your Children and Appeals Right: The Importance of Appeals in Parental Termination Proceedings*, 43 S. ILL. U. L.J. 749, 752 (2019).
[47] *Id*. at 753.
[48] Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923).
[49] Wisconsin v. Yoder, 406 U.S. 205 (1972).
[50] Mark Strasser, *Custody, Visitation, and Parental Rights under Scrutiny*, 28 CORNELL J. L. & PUB. POL'Y 289, 294 (2018).
[51] *Id*.
[52] FLA. STAT. § 39.806 (2022).
[53] FLA. STAT. § 39.806(1) (2022).
[54] § 39.806(1).
[55] § 39.806(1)(j).

illness.[56] This type of unfitness may be broadly included under paragraph (c), which states that:

> When the parent or parents engaged in conduct toward the child or toward other children that demonstrates that the continuing involvement of the parent or parents in the parent-child relationship threatens the life, safety, well-being, or physical, mental, or emotional health of the child irrespective of the provision of services.[57]

To evaluate parental capacity, courts make their interpretations based on the best interests of the child or precedent when factoring in mental illness.[58] When parental mental health posed a substantial threat to a child's well-being, family courts found that the legislature sought "not only to protect children who have been harmed, but also to protect children in substantial and imminent danger of being harmed."[59] Although the courts recognize future substantial harm to the child, another concern appears where the substantial harm is not imminent nor apparent. [60]

D. Child's Best Interests Standard

Because Florida Statute § 39.806 does not provide details regarding a child's best interests, courts look at § 61.13 to evaluate the extent of parental incompetence.[61] This chapter is designated for divorce and child support proceedings, but courts generally turn to this section for other matters concerning a child's interests.[62] Historically, the best interests of the child standard derived from the case *Miller v. Miller*, which held the promotion of the health and happiness of the child to be the central consideration.[63] In that case, the Court found that a child is not mere property, so a parent's right to custody is not absolute or uncontrollable.[64] The court also focused on several factors that promote child welfare, such as wealth, social position, health, educational advantages, and moral training.[65] Returning to Florida Statute 61.13, mental illness and substance abuse are explicit factors in considering the

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[56] *See generally* FLA. STAT. § 39.806 (2022).
[57] FLA. STAT. § 39.806(1)(c) (2022).
[58] FLA. STAT. § 61.13(3) (2022).
[59] E.K.B. v. Dep't of Child. & Fam., 724 So. 2d 720, 721 (Fla. Dist. Ct. App. 1999).
[60] Jacobson, *supra* note 7, at 316.
[61] *See generally* FLA. STAT. § 61.13 (2022).
[62] *Id*.
[63] Miller v. Miller, 20 So. 989, 990 (Fla. 1896).
[64] *Id*.
[65] *Id*.

best interests of children.[66] But because the statute does not set forth criteria to establish the extent to which a parent with severe mental illness or substance use is deemed unfit, courts will defer to case law.[67] Typically, courts assess the totality of circumstances, such as nature and severity of mental illness or substance abuse, to determine whether it warrants severance of parental rights.[68] The uniqueness of circumstances involving mental health problems requires the courts to conduct a case-by-case analysis.[69]

Accordingly, courts are not so reluctant to terminate parental rights where "extraordinary circumstances" regarding parental mental health and substance abuse are present, and the least restrictive means prong is met.[70] Least restrictive means prong purports that the government must show it "made a good faith effort to rehabilitate the parent and to reunify the family, often through a case plan and related services."[71] However, reunifying families through reasonable efforts is not required when the continuing involvement of that parent endangers "the life, safety, well-being, or physical, mental, or emotional health of the child irrespective of the provision of services."[72] Termination of parental rights without a case plan is the least restrictive means under "extraordinary circumstances."[73] For instance, in *K.D. v. Department of Children & Families*, the court found that the least restrictive prong was satisfied under "extraordinary circumstances" where the mother ignored her decade-long chronic substance abuse despite having been offered rehabilitative services in the past.[74]

ISSUES

Several issues arise from strictly construing mental illness and substance use factors in assessing parental fitness. These factors are not always readily apparent and can make it difficult to prove substantial harm to the children.[75] Even though the factors are difficult to prove and not visible, they can pose a threat to a child's overall well-being.[76]

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[66] FLA. STAT. § 61.13(3)(g), (q); FLA. STAT. § 39.810 (2022).
[67] *See generally id*.
[68] Florida Dep't of Child. & Fam. v. F.L., 880 So. 2d 602, 608 (Fla. 2004).
[69] *Id*.
[70] K.D. v. Dep't of Child. & Fam., 242 So. 3d 522, 523-24 (Fla. Dist. Ct. App. 2018).
[71] *Id*. at 524-25.
[72] *Id*. at 524 (citing Fla. Stat. § 39.806(c)).
[73] *Id*.
[74] *Id*. at 523-24.
[75] Jacobson, *supra* note 7, at 316.
[76] *Id*. at 317.

Mental illness and substance abuse are a growing epidemic.[77] More importantly, this issue detrimentally impacts children from households where the problems exist.[78] The situation gets worse when the parents remain untreated or refuse to seek treatment for their mental health or substance abuse problems.[79] Moreover, family courts do not place heavy consideration on a parent's mental health and substance abuse when deciding whether to relinquish parental rights.[80]

A. Adverse Effects of Parental Substance Abuse on Children

Children growing up with parents who are addicted to drugs or alcohol are more likely to experience child abuse and develop mental health problems.[81] According to the 2019 National Survey on Drug Use and Health ("NSDUH"), 60.1% of the population aged 12 or older used a substance, such as tobacco, alcohol, or an illicit drug, in the past month, and 50.8% consumed alcohol in the past month.[82] Generally, individuals with substance use disorder ("SUD") lack the control or ability to regulate their substance use.[83] They proceed to use such drugs regardless of the negative consequences on physical and mental health, family relationships, and social function.[84] Exposing children to illegal substances can cause them to become addicts as well.[85] Substance abuse

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[77] *See generally* Berro, *supra* note 14; *see generally* Nat'l All. on Mental Illness, *supra* note 16.

[78] *See generally* Rachel N. Lipari & Struther L. Van Horn, *Children Living with Parents Who Have a Substance Use Disorder*, THE CBHSQ REP. (Aug. 24, 2017), https://www.samhsa.gov/data/sites/default/files/report_3223/ShortReport-3223.html

[79] *See generally* Tuten v. Fariborzian, 84 So. 3d 1063 (Fla. Dist. Ct. App. 2012).

[80] *See generally* Santosky v. Kramer, 455 U.S. 745, 753-54 (1982).

[81] Wendy Bach, Suzanne Weise & Barry Staubus, *Responding to the Impacts of the Opioid Epidemic on Families*, 13 TENN. J.L. & POL'Y 347, 353-57 (2018).

[82] Substance Abuse & Mental Health Serv. Admin., *Key Substance Use and Mental Health Indicators in the United States: Results from the 2019 National Survey on Drug Use and Health* (2020), https://www.samhsa.gov/data/sites/default/files/reports/rpt29393/2019NSDUHFFRPDFWHTML/2019NSDUHFFR1PDFW090120.pdf.

[83] Turid Wangensteen et al, *Growing Up with Parental Substance Use Disorder: The Struggle with Complex Emotions, Regulation of Contact and Lack of Professional Support*, 24(2) CHILD & FAM. SOC. WORK 1, 2 (2018).

[84] *Id*.

[85] Bach, *supra* note 81, at 357.

can impair the parent's judgment, behavior, mental state, and financial stability.[86]

Moreover, problems arise when parents suffering from substance abuse disorder are not seeking treatment, and the parents undergoing rehabilitation often experience relapse.[87] Many parents do not correct their problems because they fear humiliation and intervention by child protection services.[88] Other contributing factors to the low treatment rate involve "lack of awareness of the SUD by the affected person, minimizing the severity of the SUD and need for treatment, low level of motivation to accept help, and being controlled by addictive drugs."[89] Additionally, the strict standard used by family courts to determine parental unfitness does not encourage parents to pursue rehabilitation because of the low risk of parental rights being terminated.[90] The substance abuse crisis affects families in various ways ranging from physical detriment to the child's health to financial instability of the family.[91]

One of the factors that negatively affect children is the severity and type of SUD.[92] Among these dangerous types of drugs are opioids.[93] Opioids are a category of drugs that contain illicit or prescription drugs.[94] The illicit drugs include heroin and fentanyl, while the prescription drugs include oxycodone, codeine, morphine, etc.[95] Furthermore, an increase in the number of overdose deaths and infants born with Neonatal Abstinence Syndrome ("NAS") has resulted from the opioid epidemic.[96] From 2010 to 2017, the rate of NAS substantially increased by 82% from

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[86] Meredith Harbison, *Emerging Mental Health Courts: The Intersection of Mental Illness, Substance Abuse, Poverty, and Incarceration*, 60 U. LOUISVILLE L. REV. 615, 627 (2022).

[87] *Id.* at 626.

[88] Wangensteen, *supra* note 83, at 2.

[89] Dennis C. Daley et al., *Forgotten But Not Gone: The Impact of the Opioid Epidemic and Other Substance Use Disorders on Families and Children*, 20 COMMON. 94, 97 (2018).

[90] *See generally* FLA. STAT. § 39.806 (2022).

[91] Wangensteen, *supra* note 83, at 2.

[92] Lipari, *supra* note 78.

[93] *See generally* Nat'l Inst. on Drug Abuse, *Prescription Opioids DrugFacts*, https://nida.nih.gov/publications/drugfacts/prescription-opioids#:~:text=Opioid%20misuse%20can%20cause%20slowed,permanent%20brain%20damage%2C%20or%20death. (last visited Apr. 13, 2023).

[94] Nat'l Inst. on Drug Abuse, *Opioids*, https://nida.nih.gov/research-topics/opioids (last visited Nov. 1, 2022).

[95] *Id*.

[96] Daley, *supra* note 89, at 94.

4.0 to 7.3 per 1000 birth hospitalizations.[97] Specifically, NAS is a diagnosis of an infant that was exposed prenatally to opioids and experienced symptoms associated with drug withdrawal after birth.[98] Children with NAS also have a higher risk for developmental and psychological issues.[99] Likewise, some courts, outside of Florida, have addressed instances where an infant was born opioid-dependent.[100] For example, the Vermont Supreme Court in 2015 found the fact that a child is born addicted to opioids does not necessarily constitute a finding of child abuse or neglect where the mother consistently and completely complies with a bona fide addiction treatment program.[101]

On the downside, national policies fail to give proper attention to children who are affected by parental SUD.[102] In the textbooks and studies funded by National Institute on Alcohol Abuse and Alcoholism ("NIAAA") and National Institute on Drug Abuse ("NIDA"), "only 4% of the total pages in the textbooks focused on issues related to families or children, and only about 2% of the studies included anything about the family or children in the titles of the research grants."[103] As previously discussed, parental SUD can pose a serious threat to the health and environment of children.[104] For instance, SUDs can inhibit parenting capacity, such as the ability to provide children with a safe and nurturing environment.[105]

Additionally, children of parents with SUDs have a higher risk for physical and mental health problems, abuse, neglect, social skill impairments, behavioral problems, and lower academic performance.[106] Mothers with SUDs tend to be less attentive and involved in interacting with their children thereby causing attachment difficulties, which can adversely influence future adult relationships.[107] Moreover, these children are at a higher risk of addiction since they are exposed to substance use at an early age.[108] The parent's addiction may also

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[97] Ashley H. Hirai et al., *Neonatal Abstinence Syndrome and Maternal Opioid-Related Diagnoses in the US, 2010-2017*, 325(2) JAMA 146, 149 (2021).
[98] Bach, *supra* note 81, at 349.
[99] Daley, *supra* note 89, at 104.
[100] *In re* M.M., 133 A.3d 379, 382 (Vt. 2015).
[101] *Id*. at 386.
[102] Daley, *supra* note 89, at 102.
[103] *Id*. at 102-03.
[104] Jacobson, *supra* note 7, at 316.
[105] Daley, *supra* note 89, at 102-03.
[106] *Id*. at 103.
[107] *Id*.
[108] Micol Parolin et al., *Parental Substance Abuse as an Early Traumatic Event. Preliminary Findings on Neuropsychological and Personality*

encourage the child to pursue similar habits because children are inclined to mimic the behaviors of their parents.[109]

B. Adverse Effects of Severe Parental Mental Illness on Children

In the U.S., mental illnesses are common as approximately one in five adults suffered from a mental illness in 2020.[110] Mental illnesses include various conditions that differ in degree of severity, such as mild, moderate, or severe.[111] Accordingly, two broad categories generally describe these conditions: Any Mental Illness ("AMI") and Serious Mental Illness ("SMI").[112] However, this section will only address SMIs that will substantially interfere with an individual's life and ability to function, such as psychosis.[113] The Diagnostic and Statistical Manual of Mental Disorders ("DSM-5") defines mental disorder as "a syndrome characterized by clinically significant disturbance in an individual's cognition, emotion regulation, or behavior that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning."[114] SMI is "a mental, behavioral, or emotional disorder resulting in serious functional impairment, which substantially interferes with or limits one or more major life activities."[115] The different types of mental disorders are relevant when analyzing the potential infliction of harm to the child.[116]

Mental illness does not only affect the person suffering from the illness but also the entire family dynamic.[117] Hence, it is important to recognize how SMI affects parenting and a child's well-being.[118] While parenting and parental mental health are connected, they are also linked to the child's impaired cognitive, emotional, and behavioral

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Functioning in Young Drug Addicts Exposed to Drugs Early, 7 FRONTIERS PSYCH. 1, 2 (2016).

[109] *Id*.

[110] Nat'l Inst. of Mental Health, *Mental Health Information: Statistics*, https://www.nimh.nih.gov/health/statistics/mental-illness (last visited Nov. 4, 2022).

[111] *Id*.

[112] *Id*.

[113] *Id*.

[114] Dan J. Stein et al., *What is a Mental Disorder? An Exemplar-Focused Approach*, 51(6) PSYCH. MEDICINE 894, 895 (2021) (citing Am. Psychiatric Ass'n, *Diagnostic & Statistical Manual Mental Disorders: DSM-V* (5th ed. 2013) [hereinafter DSM-5]).

[115] Nat'l Inst. of Mental Health, *supra* note 85.

[116] *See generally* Wubalem Fekadu et al, *Multidimensional Impact of Severe Mental Illness on Family Members: Systematic Review*, 9 BMJ OPEN 1, 1-2 (2019).

[117] *Id*. at 1.

[118] *See generally id*. at 4-6.

development.[119] A parent's mental health impacts his or her capacity to care for the child because severe illness can facilitate aggression, poor judgment, bad habits, and poor financial decisions.[120] Additionally, psychological abuse can cause a child to experience constant fear of the parent, low self-esteem, post-traumatic stress, and suicidal thoughts.[121] This section will discuss some of the mental disorders that may have a higher risk of adversely affecting a child's being.

The DSM-5 recognizes the correlation between infanticide and mental illness symptoms surrounding postpartum mood disorders, which include postpartum depression and postpartum psychosis.[122] Particularly, the symptoms attributed to postpartum depression involve mood swings, irritability, changes in appetite, and severe shifts in emotions.[123] Postpartum depression can also cause mothers to feel a sense of inadequacy and anxiety regarding their parental abilities, which may reinforce suicidal thoughts or child abuse.[124] On the other hand, postpartum psychosis is viewed as more severe, and a mother with this disorder generally experiences a psychotic state resulting from several chemical imbalances in the body following birth.[125] Accordingly, mothers with postpartum psychosis often experience delusions, hallucinations, and dissociation, which can be dangerous since these symptoms ensue a serious break from reality and a severely diminished capacity to function.[126]

The *Yates* case portrays an extreme example of filicide caused by postpartum depression or psychosis.[127] In that case, Yates killed five of her children by drowning them individually in the bathtub.[128] In 2002, the jury convicted her of murder, but the decision was reversed and retried three years later to which the jury found her not guilty by reason of insanity.[129] Before the killings, Yates seemed to be a caring,

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[119] Ashley R. Jutchenko, *Parental Mental Illness: The Importance of Requiring Parental Mental Health Evaluations in Child Custody Disputes*, 56 FAM. CT. REV. 664, 668 (2018).
[120] *Id*. at 667.
[121] Jacobson, *supra* note 7, at 323.
[122] Allison Dopazo, *Mommy Dearest?: Postpartum Psychosis, the American Legal System, and the Criminalization of Mental Illness*, 12 U. MIAMI RACE & SOC. JUST. L. REV. 275, 281 (2022) (citing *DSM-5*).
[123] *Id*. at 281-82.
[124] *Id*. at 282.
[125] *Id*.
[126] *Id*.
[127] Dopazo, *supra* note 122, at 283.
[128] Shelby A. D. Moore, *An Act of Resistance: Reconceptualizing Andrea Yates's Killing of Her Children*, 61 S. TEX. L. REV. 431, 432 (2021).
[129] Yates v. State, 171 S.W.3d 215, 222 (Tex. App. 2005).

responsible mother.[130] Nonetheless, after her fourth birth, she experienced depressive episodes and attempted suicide by overdosing on her father's medication and slitting her throat with a knife.[131] Prior to having her fifth child, Yates was admitted to the hospital for attempting suicide by overdosing on her father's antidepressant.[132] After her release, Yates saw her psychiatrist Dr. Starbranch who warned Yates that having another child would lead to a high risk of experiencing another psychotic episode.[133] Despite having knowledge of such risks, Yates eventually stopped taking her medication and became pregnant with her fifth child.[134] After the birth of the fifth child and the death of her father, Yates experienced severe depression and a decline in functioning.[135] Shortly after experiencing symptoms from her depressive episode, Yates was admitted to the mental hospital, and the psychiatrists diagnosed her with severe postpartum depression and psychosis and involuntarily committed her to the hospital.[136] She was released a few weeks later, but her severe symptoms persisted, and she experienced auditory hallucinations involving Satan wanting her to murder her five children, and killing her children was the only way to save them from hell.[137]

Another type of psychological disorder that can negatively impact one's parenting is narcissistic personality disorder ("NPD").[138] In the U.S., roughly 1 to 15% of the population is diagnosed with NPD.[139] According to the DSM-5, individuals with NPD have impaired functioning of self or interpersonal personality and pathological personality traits.[140] These individuals typically lack empathy and feel a sense of entitlement.[141] Their lack of empathy allows them to easily manipulate their family members, coercing beliefs of such behavior is stable and not unusual.[142] Likewise, individuals with NPD often "project

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[130] Dopazo, *supra* note 122, at 283.
[131] *Yates*, 171 S.W.3d at 216-17.
[132] *Id*.
[133] *Id*. at 217.
[134] *Id*.
[135] *Id*.
[136] Dopazo, *supra* note 122, at 283-84.
[137] Emilie Lucchesi, *When Giving Birth Leads to Psychosis, Then to Infanticide*, ATLANTIC (Sept. 6, 2018), https://www.theatlantic.com/family/archive/2018/09/postpartum-psychosis-infanticide-when-mothers-kill-their-children/569386/.
[138] *See generally* Jacobson, *supra* note 7.
[139] Paroma Mitra and Dimy Fluyau, *Narcissistic Personality Disorder*, STATPEARLS para. 5 (Apr. 21, 2020), https://www.ncbi.nlm.nih.gov/books/NBK556001/.
[140] Jacobson, *supra* note 7, at 316.
[141] *Id*. at 317.
[142] *Id*.

their feelings of inadequacy onto others by criticizing or demeaning any alleged failures."[143] Essentially, the toxic nature of NPD can cause a detrimental and "invisible" form of child abuse.[144] Empathy is fundamental to parenting because it affects the emotional connection between the parent and child and the parent's ability to understand the child.[145] Without empathy, the child may not feel loved, which can impede the child's development of empathetic behavior and self-esteem.[146] For instance, instead of providing parental warmth and acceptance, a narcissistic mother may tell her child that the child is better than others.[147] Enforcing this narcissistic perspective can cause the child to feel entitled to admiration and become aggressive if such admiration is not received.[148] Another issue arises when the parent's needs and feelings overshadow the child's.[149] A narcissistic parent's motives for having a child may be based on the automatic power the parent has over the child, where the parent can make up the rules without interference.[150] This can cause the child to experience extreme anxiety and low self-esteem because the child is expected to prioritize and satisfy the parent's needs over his or her own.[151] Compared to children who were physically or sexually abused, children who experienced psychological abuse suffered, at an equal or greater rate, from various mental health problems, such as low self-esteem, anxiety, depression, suicidality, and post-traumatic stress symptoms.[152]

C. Inadequacy of Florida's Mental Health and Substance Abuse Laws

Florida experiences a deficiency in providing adequate mental health treatment to individuals suffering from SMI or SUD, and current mental health and substance abuse laws fail to resolve such a crisis.[153] In 2021, the percentage of need for mental health professionals is 19% in Florida, compared to the national percentage of needs met, which is

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[143] Emily Labatut, *The Effects of Parental Narcissistic Personality Disorder on Families and How to Defend "Invisible Victims" of Abuse in Family Court*, 48 S.U. L. REV. 225, 229 (2021).
[144] Jacobson, *supra* note 7, at 317.
[145] *Id*. at 319.
[146] *Id*.
[147] *Id*. at 320.
[148] *Id*.
[149] *Id*. at 321.
[150] Jacobson, *supra* note 7, at 321.
[151] *Id*.
[152] *Id*. at 323.
[153] *See generally* Kaiser Fam. Found., *Mental Health and Substance Use State Fact Sheets*, https://www.kff.org/statedata/mental-health-and-substance-use-state-fact-sheets/florida/ (last visited Nov. 12, 2022).

28.1%.[154] Moreover, in Florida, data reveals that approximately 835,000 adults reported an unmet need for mental health treatment in 2018-2019.[155] According to Mental Health America, around 63% of adults in Florida did not receive mental health treatment in 2022.[156] These statistics show that mental health and substance abuse laws failed to provide policies that would make mental health services more accessible.[157] Under the current mental health and substance abuse laws, specifically the Florida Mental Health Act ("Baker Act") and the Florida Substance Abuse Act ("Marchman Act"), patients are not getting sufficient treatment for their mental illness or substance abuse because these laws can make getting treatment difficult for parents, especially the ones who refuse such treatment.[158]

In 1971, the Florida Legislature passed Baker Act with the intent to revise the hearing procedures in support of patient rights and correct the injustices the patients previously faced.[159] In 2018, the legislature altered the Act's purpose "to reduce the occurrence, severity, duration, and disabling aspects of mental, emotional, and behavioral disorders."[160] The use of restraint is limited to emergencies involving imminent danger to the patient or others.[161] Involuntary commitment of persons with mental illness is a two-step process involving involuntary examination and involuntary inpatient placement.[162] Florida Statute § 394.463 sets forth the requirements for an involuntary examination. The statute starts by requiring that the person with mental illness and under the influence of that illness refuse voluntary examination despite a complete explanation and disclosure of the examination's purpose, or that the person is unable to understand the necessity of the examination.[163] One of the two following categories must also apply. First, the person will likely neglect self-care, which will pose "a real and present threat of substantial harm

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154 *Id*.
155 *Id*.
156 Mental Health America, *Access to Care Data 2022*, https://mhanational.org/issues/2022/mental-health-america-access-care-data (last visited Nov. 12, 2022).
157 *Id*.
158 *See generally* Norman J. Ornstein, *How a Bad Law and a Big Mistake Drove My Mentally Ill Son Away*, N.Y. TIMES (Mar. 18, 2018), https://www.nytimes.com/2018/03/06/opinion/guns-mental-health-baker-act.html.
159 Alexander E. Lemieux, *The Baker Act: Time for Florida to Get Its Act Together*, 8 CHILD & FAM. L.J. 117, 118 (2020).
160 FLA. STAT. § 394.453(1)(a) (2022).
161 FLA. STAT. § 394.453(2) (2022).
162 *See generally* FLA. STAT. § 394.463 (2022).
163 FLA. STAT. § 394.463(1)(a) (2022).

to his or her well-being," and such harm apparently may not be avoided through the help of family members, friends, or other services.[164] Second, the person, as evidenced by recent behavior, will substantially likely to cause serious bodily harm to himself or others in the near future without care or treatment.[165] This criterion may be difficult to satisfy given the nature and circumstances of the mental illness.[166]

For example, a person suffering from bipolar disorder may not qualify under this rule if the person does not exhibit dangerous behaviors involving substantial harm to himself or others despite experiencing other severe symptoms.[167] The finding of mental illness and harm to themselves or others cannot be grounded on mere suspicion of mental illness or potential risk, but rather substantial evidence.[168] In addition to that, the involuntary examination can only be initiated by appropriate courts, law enforcement officers, a physician, or other relevant health professionals.[169] If a layperson wants to have a family member committed, the layperson must file an ex parte order for involuntary examination "based on written or oral sworn testimony that includes specific facts that support the findings."[170] If the court approves the ex parte order, the psychiatric facility can only hold the person in question for up to 72 hours unless the receiving facility files a petition for involuntary services because it has determined they are necessary for the safety of the patient or others, or the "facility may postpone release of a patient until the next working day thereafter only if a qualified professional documents that adequate discharge planning and procedures in accordance with s. 394.468, and approval pursuant to paragraph (f), are not possible until the next working day."[171]

Once the period for examination has concluded and continued treatment is needed, § 394.467 provides the requirements for involuntary inpatient placement.[172] Only the administrator of the facility can file a petition for involuntary inpatient placement, and there must be a clear and convincing finding of the same criteria as § 394.463 paragraph (1).[173] However, § 394.467 also requires that all available less restrictive

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[164] FLA. STAT. § 394.463(1)(b) (2022).
[165] *Id*.
[166] *See generally* Florida Dep't of Child. & Fam. v. F.L., 880 So. 2d 602, 608 (Fla. 2004).
[167] *See, e.g.*, *id*. at 605-09.
[168] Lemieux, *supra* note 159, at 122.
[169] FLA. STAT. § 394.463(2)(a) (2022).
[170] *Id*.
[171] FLA. STAT. § 394.463(2)(f), (g) (2022).
[172] *See generally* FLA. STAT. § 394.467 (2022).
[173] FLA. STAT. §§ 394.467(1), 394.463(1) (2022).

treatment alternatives have been deemed inappropriate.[174] The petition must be supported by at least two opinions, one from a psychiatrist and the other from a clinical psychologist or another psychiatrist.[175] Both professionals must have personally examined the patient within 72 hours.[176] Lastly, the court must appoint the patient in question a public defender following the filing of a petition for involuntary inpatient placement.[177]

To involuntarily admit someone under the Marchman Act, there must be a good-faith reason to believe that the individual is impaired by substance.[178] The individual must have lost the power of self-control due to substance use, and one of the two following categories must apply.[179] First, that individual, without care or treatment, is likely to suffer from self-neglect or lack of self-care, which poses an imminent threat of substantial harm to his or her well-being, and such harm cannot be avoided by alternative remedies.[180] Second, the individual needs substance abuse services, and the substance abuse impaired his or her judgment to the extent that the person cannot understand the need for such services and make a rational decision in that regard.[181] The petition for involuntary assessment and stabilization may be initiated by "the respondent's spouse or legal guardian, any relative, a private practitioner, the director of a licensed service provider or the director's designee, or an adult who has direct personal knowledge of the respondent's substance abuse impairment."[182] As for the duration of the commitment, this Act allows for an examination period of five days at a hospital or other permitted detoxification facilities.[183] The duration of treatment can be extended by § 394.467.[184] Furthermore, the petition for involuntary assessment and stabilization requires the petitioner to list facts and reasons to support the need for involuntary assessment and stabilization.[185] Upon filing the petition, the court must determine whether the respondent is represented by an attorney and whether an attorney should be appointed if the respondent is not represented.[186] If the

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174 FLA. STAT. § 394.467(1)(b) (2022).
175 FLA. STAT. § 394.467(2) (2022).
176 *Id*.
177 FLA. STAT. § 394.467(4) (2022).
178 FLA. STAT. § 397.675 (2022).
179 FLA. STAT. § 397.675(2) (2022).
180 FLA. STAT. § 397.675(2)(b) (2022).
181 FLA. STAT. § 397.675(2)(a) (2022).
182 FLA. STAT. § 397.6811(1) (2022).
183 FLA. STAT. § 397.6811 (2022).
184 *See generally* FLA. STAT. § 394.467 (2022).
185 FLA. STAT. § 397.6814 (2022).
186 FLA. STAT. § 397.6815 (2022).

respondent is represented or an attorney is appointed, the court must provide the respondent with notice, issue a summons, and conduct a hearing within 10 days.[187] The court can also "enter an ex parte order authorizing the involuntary assessment and stabilization of the respondent" without the appointment of an attorney and relying on the contents of the petition.[188]

Next, a court-appointed professional or a qualified licensed service provider will conduct an examination on the respondent within 5 days.[189] During the examination, the court must "determine whether there is a reasonable basis to believe the respondent meets the involuntary admission criteria" after hearing all the evidence.[190] Following its determination, the court must "either dismiss the petition or immediately enter an order authorizing the involuntary assessment and stabilization of the respondent."[191] If the court authorizes involuntary assessment and stabilization, the order shall include the court's findings regarding "the availability and appropriateness of the least restrictive alternatives and the need for the appointment of an attorney to represent the respondent, and may designate the specific licensed service provider to perform the involuntary assessment and stabilization of the respondent."[192] Upon court-authorized involuntary assessment, a petition can be filed subjecting the respondent to involuntary treatment.[193] The petitioner must include "the findings and recommendations of the assessment performed by the qualified professional; and the factual allegations presented by the petitioner establishing the need for involuntary outpatient services."[194] Once a petition for involuntary services is filed, the court must determine if the respondent is represented by an attorney or if an appointment of an attorney is appropriate.[195] If the court decides to appoint counsel for the respondent, "[t]he office of criminal conflict and civil regional counsel shall represent the person until the petition is dismissed, the court order expires, or the person is discharged from involuntary services."[196] Moreover, the court must schedule a hearing regarding the petition

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[187] FLA. STAT. § 397.6815(1) (2022).
[188] FLA. STAT. § 397.6815(2) (2022).
[189] FLA. STAT. § 397.693(3) (2022).
[190] FLA. STAT. § 397.6818 (2022).
[191] FLA. STAT. § 397.6818(1) (2022).
[192] FLA. STAT. § 397.6818(2) (2022).
[193] FLA. STAT. § 397.693 (2022).
[194] FLA. STAT. § 397.6951 (2022).
[195] FLA. STAT. § 397.6955(1) (2022).
[196] *Id*.

within 5 days, provide the respondent with notice of the hearing, and issue a subpoena on the respondent.[197]

During the hearing, the court must hear and review all relevant evidence, and the petitioner must prove by clear and convincing evidence that the respondent is impaired by substance abuse and has a history of not complying with treatment for substance abuse; the respondent would not voluntarily take part in the recommended services due to the impairment or does not understand that services are necessary; and the respondent is likely to suffer from lack of self-care which presents a real and existing threat of substantial harm to his or her well-being; or "[t]he respondent's refusal to voluntarily receive care is based on judgment so impaired by reason of substance abuse that the respondent is incapable of appreciating his or her need for care and of making a rational decision regarding that need for care."[198] As for testimonial evidence, a witness must be a qualified professional who completed the certificate for involuntary services.[199] If the court finds that the petitioner has met the burden of proving clear and convincing evidence for involuntary services, it may enter an order for the respondent to receive involuntary treatment from a "publicly funded licensed service provider" for a period of 90 days or less.[200]

Yet, involuntary commitment of individuals with SMI or SUD is a struggle, especially when continued placement is necessary.[201] In the petition for involuntary examination, families must provide extrinsic evidence that the mental illness or substance abuse suffered by the respondent will likely inflict physical harm on himself or another.[202] Such evidence may not be easy to prove because it typically requires relevant and credible testimonies and instances of substantial conduct, such as a letter from a psychiatrist or police reports of dangerous behaviors.[203] This strict criteria stemmed from an individual's constitutionally protected liberty interest under the Due Process Clause of the Fourteenth Amendment, which includes reasonably safe conditions of confinement, freedom from unreasonable bodily restraints, and minimally adequate training reasonably required by these interests.[204] Thus, to extend the period of hospitalization, the Fourteenth

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197 FLA. STAT. § 397.6955(2)-(3) (2022).
198 FLA. STAT. § 397.6957(1)-(2) (2022).
199 FLA. STAT. § 397.6957(3) (2022).
200 FLA. STAT. § 397.697(1) (2022).
201 Wade v. Northeast Fla. State Hosp., 655 So. 2d 125, 125 (Fla. Dist. Ct. App. 1995).
202 FLA. STAT. §§ 394.467(1), 397.675(1) (2022).
203 *In re* Beverly, 342 So. 2d 481, 484-85 (Fla. 1977).
204 Youngberg v. Romeo, 457 U.S. 307, 314-25 (1982).

Amendment requires a "clear and convincing" standard of proof in a civil proceeding brought under state law to commit an individual involuntarily.[205] For example, evidence, such as testimonies regarding not imminently dangerous symptoms or letters from a psychiatrist that do not reveal the condition being an immediate threat, do not sufficiently justify involuntary commitment.[206] Moreover, courts have held that involuntarily committed patients have the constitutional right to refuse anti-psychotic medication under the Fourteenth Amendment.[207]

Temporary hospitalization and medication for SMI or SUD do not alleviate the parental fitness problem.[208] Individuals with SMI or SUD will likely experience a relapse during their lifetime.[209] Relapse can be triggered by various occasions, such as comorbidity of another mental illness, non-adherence to medication, shorter duration of treatment, and experiencing stressful life events.[210] In the context of mental disorders, relapse means the return of symptoms following the period of improvement.[211] In cases of psychological disorder involving psychosis, the chance of relapse is common regardless of whether the patient is on treatment.[212] The relapse rate constantly increases year after year during the patient's lifetime.[213] Despite the likelihood of relapse or inadequate duration of treatment, a psychiatrist or mental health center has no affirmative duty, under the Baker Act, to hospitalize a patient or commence proceedings for involuntary placement.[214] To continue involuntary placement in the psychiatric hospital, one of the findings must include the inappropriateness of offering all available less restrictive treatment alternatives as an opportunity for improvement.[215] A patient will be released after the examination period if the patient improves and can function in a less restrictive environment.[216] Release after examination can pose a problem if the patient's condition appeared

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[205] Addington v. Texas, 441 U.S. 418, 425-33 (1979).
[206] *See generally* Lyon v. State, 724 So. 2d 1241 (Fla. Dist. Ct. App.).
[207] *See* Rennie v. Klein, 720 F.2d 266 (3d Cir. 1983).
[208] *See generally* Harbison, *supra* note 86, at 625-27.
[209] *See generally* Solomon Moges et al, *Lifetime Relapse and Its Associated Factors Among People with Schizophrenia Spectrum Disorders Who are on Follow Up at Comprehensive Specialized Hospitals in Amhara Region, Ethiopia: A Cross-Sectional Study*, 15 INT'L. J. MENTAL HEALTH SYS. 42 (2021).
[210] *Id*.
[211] *Id*.
[212] *Id*.
[213] *Id*.
[214] Tuten v. Fariborzian, 84 So. 3d 1063, 1068 (Fla. Dist. Ct. App. 2012).
[215] *Id*. at 1066.
[216] *Id*.

to have improved but did not actually improve: in one case, a patient suffering from severe depression and suicidal ideations was discharged from the mental hospital after appearing competent to provide consent for a release.[217] Not long after being discharged, the patient shot his spouse and committed suicide.[218] Overall, the Baker Act and Marchman Act are insufficient in preventing the occurrence of SMI and SUD.

D. Family Courts' Strict Interpretation of Mental Illness and Substance Use Factors

Although parents with SMI or SUD may be deemed unfit to properly care for their children, their parental rights are unlikely to be terminated. Family courts place heavy standards on petitioners to prove that the mental illness or substance renders the parent incapable of safely raising the child.[219] The courts may concede where there is apparent evidence of parental unfitness and circumstances showing the environment being substantially harmful to the child.[220] Claims of parental unfitness involving mental illness usually occur when the mental illness is noticeable and persistent, thereby causing alarming impairment that substantially affects parenting ability.[221] However, courts typically applied the term mental illness loosely "to describe and generalize clinically diagnosable disorders and less severe mental health troubles."[222] Applying mental illness lightly poses a major problem to the evaluation of a parent's mental health since several parents with SMI remain undiagnosed, and some types of SMI can be difficult to diagnose.[223] In some cases, the ability of a parent with mental illness to gain or lose custody does not differ from parents without mental illness.[224] The courts have discretion in determining the parental capability and applying standards while deferring to the best interests of the child.[225] The unfitness standard is exceedingly high because the determination of unfitness is the essential element in the termination of

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[217] *Id*. at 1065.
[218] *Id*.
[219] Guardian ad Litem Program v. K.H., 276 So. 3d 897, 902 (Fla. Dist. Ct. App. 2019).
[220] *In re* C.W., 616 So. 2d 127, 127 (Fla. Dist. Ct. App. 1993).
[221] Jutchenko, *supra* note 119, at 667.
[222] *Id*.
[223] *See generally* Matthew J. Edlund, *Psychiatric Diagnosis Is Difficult, and So Is Treatment*, PSYCH. TODAY (July 19, 2018), https://www.psychologytoday.com/us/blog/the-power-rest/201807/psychiatric-diagnosis-is-difficult-and-so-is-treatment.
[224] *Id*.
[225] S.M. v. Fla. Dep't of Child. & Fam., 202 So. 3d 769, 776 (Fla. 2016).

parental rights.[226] A parent is not deemed unfit merely for having an SMI or SUD, and the existence of child abuse or neglect does not automatically create a presumption of unfitness.[227]

SOLUTIONS

Florida Statutes fails to set a specific criterion regarding mental health factors for family courts.[228] Typically, family courts in Florida will look at case law and the relevant parts of Florida statutes involving parental rights to generate their decisions based on the overwhelming evidence relating to the severity of the threat to child welfare.[229] Making such determination is done so with the number one factor being parental rights.[230] Hence, Florida lawmakers should implement a definite standard for mental illness and substance use within the Statute to resolve the inconsistent interpretation by the courts regarding parental unfitness. Alternatively, the courts should consider child safety over parental constitutional rights because child protection is of paramount concern. Parents and the judicial system should acquire knowledge regarding mental health and substance abuse and their risks to the family environment. In cases where the parent's mental health stability substantially questions parental fitness, the courts should require the parent to seek treatment or rehabilitation for the child's best interests.

A. Enumeration of Mental Illness and Substance Abuse Criteria in Florida Statute 39.806

Without the enactment of a definite standard, the courts will have to base their decisions

on precedents, purpose of the statute, canons of construction, and other relevant statutes.[231] Having no clear-cut standard can present complications in novel or unclear circumstances that case law and other statutes fail to address. Therefore, the Florida legislature should codify a

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[226] Margareth Etienne, *Managing Parents: Navigating Parental Rights in Juvenile Cases*, 50 CONN. L. REV. 61, 78 (2018).

[227] *Id*.

[228] *See generally* FLA. STAT. §§ 61.13, 39.810, 39.806 (2022).

[229] Child Welfare Info. Gateway, *Overview: Courts*, https://www.childwelfare.gov/topics/systemwide/courts/overview/ (last visited Apr. 13, 2023).

[230] *See generally* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925).

[231] *See generally* Legal Info. Inst., *Statutory Construction*, CORNELL UNIV. L. SCH., https://www.law.cornell.edu/wex/statutory_construction#:~:text=To%20find%20the%20true%20meanings,to%20determine%20its%20original%20intent. (last visited Apr. 13, 2023).

standard about mental illnesses and substance abuse. The implementation of a specific standard within the statute can achieve uniformity and alleviate ambiguity.[232] Without a specific set of guidelines, numerous courts can establish conflicting approaches, and there cannot be clearly established principles of law governing a broad range of legal issues.[233] Accordingly, courts have based statutory interpretations on the statutory language, legislative history, and similar statutes.[234] However, some courts fail to correctly interpret the controlling statute or rule causing a deviation from the requirements of the law.[235] One of the primary purposes of statutory interpretation is to determine the legislature's intent for enacting the statute and apply that intent to understand a statute's meaning.[236] Conflicting approaches to interpreting statutory language will depart from the original legislative intent.

For Florida Statute 39.806, the text fails to enumerate mental illness as a factor in the grounds for parental rights termination.[237] As a result, courts look at the statutes concerning a child's best interest when determining parenting capacity.[238] On the other hand, the standards for the best interests of the child, under Florida Statute § 61.13, do not establish specific criteria for interpreting how mental illness or substance use equates to parental unfitness. Therefore, the legislature should implement criteria based on consistent precedents for mental illness or substance use factors. For example, the statute can limit the type of mental illnesses to chronic and severe to avoid ambiguity and narrow the list of mental disorders that possibly contribute to parental unfitness.[239]

B. Best Interest of the Child Over Parental Constitutional Rights

In Florida, courts constantly face conflicting interests between the constitutional rights of

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[232] *Id*.

[233] Sylvia H. Walbolt & Leah A. Sevi, *The "Essential Requirements of the Law" — When are They Violated*?, FLA. BAR J. (2011), https://www.floridabar.org/the-florida-bar-journal/the-essential-requirements-of-the-law-when-are-they-violated/.

[234] *Id*.

[235] *Id*.

[236] The Writing Center, *A Guide to Reading, Interpreting and Applying Statutes*, GEO. UNIV. L. CENTER 1, 9 (2017), https://www.law.georgetown.edu/wp-content/uploads/2018/12/A-Guide-to-Reading-Interpreting-and-Applying-Statutes-1.pdf.

[237] *See generally* FLA. STAT. § 39.806 (2022).

[238] *See generally* FLA. STAT. § 61.13 (2022).

[239] P.A. v. Dep't of Health & Rehab. Servs., 685 So. 2d 92, 92 (Fla. Dist. Ct. App. 1997).

Parents and the government's interest in promoting child safety.[240] Due to the compelling interest for child protection, judicial interpretation should favor the child's best interest over parental substantive due process rights.[241] The framework of federal legislation seems to prioritize child safety and the prevention of child abuse. The termination of parental rights based on SMI or SUD is narrowly tailored to advance a compelling interest in protecting children while reducing the prevalence of the mental health crisis. [242]

Generally, courts can overrule parental rights "when a parent has been legally declared unfit, or a judicial determination is made that the state's *parens patriae* or police power supersedes the parent's substantive due process rights."[243] The doctrine of *parens patriae* gives courts "the power and the duty to protect children from abuse or neglect."[244] The doctrine argues that parental rights must sometimes yield to the predominant interest of the states in protecting children.[245] Interestingly, Lewis Hochheimer described in his famous treatise on children that the power and authority over children are merely delegated by the sovereign state to the parents, and the state can revoke its delegation through its tribunals.[246] This means that parental rights are intended to be subordinate to the overriding direction of the state.[247] In *Prince v. Massachusetts*, the Supreme Court supported the states' authority over parental rights by holding that the duty to care for a child belongs first to the parents, but the state has a right to act as *parens patriae* and infringe on family autonomy when necessary for child protection.[248] Hence, where a parent's ability to care for the child is substantially questioned and the best interest of the child is to be removed from that environment, *parens patriae* allows the state to intervene and protect the child's well-being. [249]

In addition to the *parens patriae* doctrine, states have police power, which is a broader authority to regulate individual conduct to promote

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[240] *See generally* Richardson v. Richardson, 766 So. 2d 1036, 1037-39 (Fla. 2000); *see generally* Von Eiff v. Azicri, 720 So. 2d 510, 513-16 (Fla. 1998).
[241] *See generally* Miller v. Miller, 20 So. 989, 990 (Fla. 1896).
[242] *See generally* Fla. Dep't of Child. & Fam. v. F.L., 880 So. 2d 602 (Fla. 2004).
[243] Etienne, *supra* note 226, at 76-77.
[244] Michael J. Higdon, *Parens Patriae and the Disinherited Child*, 95 WASH. L. REV. 619, 623 (2020).
[245] *Id*. at 624.
[246] *Id*.
[247] *Id*.
[248] Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944).
[249] *Id*. at 166.

the general welfare of society.[250] Nevertheless, this authority is limited to cases where it is reasonably required, and "there must be a reasonable relationship between the public health intervention and the achievement of the legitimate public health objective."[251] Under this authority, the liberty secured by the U.S. Constitution does not guarantee an absolute right for each person to be entirely freed from restraint at all times and in all circumstances.[252] As discussed previously, the mental illness and substance use epidemic is constantly growing.[253] Parents with SMI or SUD contribute to this crisis because parents influence and play an essential role in child health and development.[254] Moreover, child protection is a major government interest because the effects of child maltreatment are intense.[255] Child maltreatment can lead to harmful physical and mental health consequences in children and families, which can last a lifetime.[256]

C. Judicial Education and Training

Judicial training and continuing education are essential for judges to acquire and retain the necessary skills, knowledge, and attitudes to satisfy their roles.[257] Judicial education focuses on improving judicial performance through the preparation of new judges for executing their duties, encouraging a higher consistency in judicial decisions, and updating judges on new laws, practices, and other knowledge.[258] For judicial education, the National Association of State Judicial Educators ("NASJE") seeks to "[h]elp judicial branch personnel acquire the knowledge and skills required to perform their judicial branch responsibilities fairly, correctly, and efficiently."[259] Several states require judges to take, on average, 12 hours of continuing education annually.[260]

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[250] Elias Feldman, *Vaccination and the Child's Right to an Open Future*, 25 LEWIS & CLARK L. REV. 209, 218 (2021).
[251] *Id*.
[252] Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905).
[253] *See generally* Nat'l Inst. of Mental Health, *supra* note 100; *see generally* Substance Abuse & Mental Health Serv. Admin., *supra* note 76.
[254] *See generally* Clemens, *supra* note 2.
[255] Child Welfare Info. Gateway, *What Is Prevention and Why Is it Important?*, https://www.childwelfare.gov/topics/preventing/overview/whatiscap/ (last visited Nov. 23, 2022).
[256] *Id*.
[257] Evan Murphy, Markus Kemmelmeier & Patrick Grimes, *Motivations, Barriers, and Impact of Continuing Judicial Education: A Survey of U.S. Judges*, 57 CT. REV. 40, 40 (2021).
[258] *Id*.
[259] *Id*.
[260] *Id*.

Therefore, the implementation of psychology courses in judicial training programs can help facilitate judicial knowledge on psychological matters.[261] These courses can be taken through the continuing judicial education requirement.[262] The Office of the State Courts Administrator ("OSCA") can also coordinate and implement such courses in their judicial training programs.[263] OSCA can also offer these courses through online training, publications, and videos for family courts and judges.[264]

Knowing and understanding psychology is important because judges are key players in determining the treatment of SMI defendants, and these judges play a direct role in ruling over or significantly influencing the outcome of a case.[265] This type of judicial training will provide judges "with an overall comprehension of symptoms and behaviors of certain mental illnesses, probable effects on parenting abilities, and possible side effects of prescribed medications."[266] When mental illness or substance abuse is at issue, judges should be given academic resources written by medical and legal professionals that relate to psychology concepts.[267] Therefore, judicial training on psychological matters will improve the judges' knowledge, expand the understanding of the necessary material, and advance the assessment of testimonies and expert recommendations.[268]

D. Court Order for Psychiatric Evaluation and Treatment Requirement

A substantial contributor to the current mental illness and substance abuse crises is deinstitutionalization, which is the policy of removing patients with SMI from state psychiatric institutions and ending such institutions.[269] Deinstitutionalization discharges people from psychiatric institutions "without ensuring that they received the medication and

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[261] *See generally* Amy Novotney, *Helping Courts and Juries Make Educated Decisions*, 48 MONITOR ON PSYCH. 70, 71 (2017).

[262] FLA. R. JUD. ADMIN. 2.320.

[263] Fla. Off. of the State Courts Admin., *Maintain a Professional, Ethical, and Skilled Judiciary and Workforce*, https://www.flcourts.org/Publications-Statistics/Publications/Short-History/Maintaining-a-Professional-Judiciary-Workforce (last visited Oct. 23, 2022).

[264] *Id*.

[265] Ashley B. Batastini, Michael E. Lester & Alan Thompson, *Mental Illness in the Eyes of the Law: Examining Perceptions of Stigma Among Judges and Attorneys*, 24 PSYCH., CRIME & L. 673, 675 (2018).

[266] Jutchenko, *supra* note 119, at 670.

[267] *Id*. at 671.

[268] *Id*.

[269] Samantha M. Caspar & Artem M. Joukov, *Mental Health and the Constitution: How Incarcerating the Mentally Ill Might Pave the Way to Treatment*, 20 NEV. L.J. 547, 570 (2020).

rehabilitation services necessary for them to live successfully in the community."[270] In the mid-1950s, deinstitutionalization was the response to the introduction of effective antipsychotic medication and the desire to place individuals suffering from mental illness back into their communities.[271] Following deinstitutionalization, roughly half of the people with SMI or SUD were not receiving treatment for their psychiatric illnesses, despite having access to medical professionals who can offer such treatment in the community.[272] Therefore, family courts should also require an extensive psychiatric evaluation of parents to ensure that they are fit to care for the child. Article V § 20 of the Florida Constitution grants circuit courts the power to hear all actions at law, including proceedings relating to involuntary hospitalization and the determination of incompetency.[273] Florida Statute § 394.467(4)(h) requires the hearing examiner to consider testimony and evidence regarding the competence of the patient to consent to treatment at any hearing.[274] The examiner must appoint a guardian advocate to act on the patient's behalf in providing consent to treatment if the patient is found incompetent to consent to treatment.[275] Additionally, Florida Statute § 394.4655 provides the criteria for judicial-ordered involuntary outpatient services.[276] Under the statute, a judge may enter an order that subjects an individual to an involuntary mental health examination and, if necessary, outpatient treatment.[277] When a court finds that a parent's mental health is a major concern in considering parental capacity, the requirement of examination and preventative treatment may be necessary to determine the extent of the mental illness or substance abuse affecting parental responsibilities.[278] Such examination can isolate SMI or SUD from other mental illnesses or substance uses that do not impact parental fitness.[279] Additionally, court-ordered examinations and treatments can encourage and motivate parents to seek help in treating their conditions to prevent the possibility of losing parental rights to their children.[280]

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[270] *Id*. at 573.
[271] *Id*. at 570-71.
[272] *Id*. at 573.
[273] Bentley v. State, 398 So. 2d 992, 994-95 (Fla. Dist. Ct. App. 1981).
[274] FLA. STAT. § 394.467(4)(h) (2022).
[275] *Id*.
[276] *See generally* FLA. STAT. § 394.4655 (2022).
[277] C. Joseph II Boatwright, *Solving the Problem of Criminalizing the Mentally Ill: The Miami Model,* 56 AM. CRIM. L. REV. 135, 179 (2019).
[278] *Id*.
[279] *See generally* FLA. STAT. § 394.4655 (2022).
[280] *See generally* Mental Health America, *Parenting with a Mental Health Condition*, https://mhanational.org/parenting-mental-health-condition (last visited Apr. 14, 2023).

CONCLUSION

Mental illness and substance abuse place a heavy burden on the welfare of society, especially children. Unresolved SMI and SUD can lead to repetitive cycles of not receiving treatment and passing mental health problems to the next generation.[281] Specifically, Florida is one of the states that does not adequately respond nor attempt to resolve the increasing mental health crisis.[282] Society should properly address this problem and prevent the problem from continuing in the future. First and foremost, family courts ought to place greater consideration on SMI and SUD when determining parental fitness and a child's best interests. Throughout history, the legislature starts and continues to implement policies to protect children from maltreatment.[283] However, such policies conflict with parents' constitutional right to direct the rearing of their children under the Fourteenth Amendment of the U.S. Constitution.[284] To accurately determine whether parental SMI or SUD adversely affects the welfare of children, courts can acquire proper education through judicial training to become well-versed in the subject and recognize the detriments influenced by mental health problems.[285] The courts can also require parents in question to undergo mental health examinations or treatments.[286] Additionally, the legislature should codify specific criteria for evaluating SMI or SUD to assist courts in their interpretation and promote consistency of decision-making regarding such matters.

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[281] *See generally* Moges, *supra* note 209.
[282] *See generally* Mental Health America, *supra* note 1.
[283] *See generally* 42 U.S.C. §§ 5102, 5103(a)(3) (1974), 42 U.S.C. § 671(a)(15)(A) (2023).
[284] *See generally* Meyer v. Nebraska, 262 U.S. 390 (1923).
[285] Murphy, *supra* note 257, at 40.
[286] *See generally* FLA. STAT. § 394.4655 (2022).