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The Death Penalty of Civil Cases: The Need for Individualized Assessment & Judicial Education When Terminating Parental Rights of Mentally Ill Individuals

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**THE DEATH PENALTY OF CIVIL CASES: THE NEED FOR
INDIVIDUALIZED ASSESSMENT & JUDICIAL EDUCATION WHEN
TERMINATING PARENTAL RIGHTS OF MENTALLY ILL
INDIVIDUALS**

I. INTRODUCTION: THE PROBLEM

The minute the ultrasound revealed that he was a boy, [I] decided to name him after Christopher Robin in *Winnie the Pooh*. In anticipation of the birth, [I] bought stuffed Tiggers for the nursery, a room the young boy would[n't] see in person [until years later] [N]urses whisked Christopher out of the delivery room instead of laying him in [my] waiting arms The whole thing didn't happen until an hour before I was leaving the hospital. . . I had a car seat and everything. I was already discharged when they said, "Sorry, he's not leaving."¹

Angela Williams's parental rights were terminated by the Circuit Court of St. Francois County based almost exclusively on generalized statements about her Bipolar Disorder² and a two and a half year old psychological evaluation.³

1. Susan C. Thomson, *About a Boy*, ST. LOUIS MAG., Oct. 2007, at 158, available at <http://www.stlmag.com/media/St-Louis-Magazine/October-2007/About-A-Boy/>.

2. "Bipolar I Disorder" is characterized by one or more Manic or Mixed Episodes, usually accompanied by Major Depressive Episodes. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 382 (4th ed. 2000). A Bipolar II Disorder is characterized as "one or more Major Depressive Episodes . . . accompanied by at least one Hypomanic Episode." *Id.* at 392. In other words, "bipolar disorder" is "any of several mood disorders characterized usually by alternating episodes of depression and mania or by episodes of depression alternating with mild nonpsychotic excitement." MERRIAM WEBSTER'S MEDICAL DICTIONARY 73 (2005), available at <http://www2.merriam-webster.com/cgi-bin/mwmednlm?book=Medical&va=bipolar+disorder>. The Mayo Clinic explains that "[t]he deep mood swings of bipolar disorder may last for weeks or months. . . . Today, a growing volume of research suggests that . . . many people aren't correctly diagnosed [with bipolar disorder]. Left untreated, bipolar disorder generally worsens . . . [b]ut with effective treatment, you can live an enjoyable and productive life" Mayo Clinic Staff, *Bipolar Disorder Definition* (2009), <http://www.mayoclinic.com/health/bipolar-disorder/DS00356>. "[Bipolar disorder] affects approximately 5.7 million American adults in a given year, or about 2.6% of the U.S. population age 18 and older." DIANE S. ASCHENBRENNER & SAMANTHA J. VENABLE, DRUG THERAPY IN NURSING 282 (Hilarie Surrena et al. eds., Wolters Kluwer Health & Lippincott, Williams & Wilkins 2009) (2002). See also NAT'L INST. OF MENTAL HEALTH, BIPOLAR DISORDER (2009), <http://www.nimh.nih.gov/health/publications/bipolar-disorder/nimh-bipolar-adults.pdf> [hereinafter BIPOLAR DISORDER].

3. See *In re C.W.*, 211 S.W.3d 93, 99–100 (Mo. banc 2007).

The Eastern District transferred the case to the Supreme Court of Missouri,⁴ which reversed and remanded, holding that an inquiry into a parent's current ability to parent was necessary before allowing for termination of parental rights (TPR),⁵ and that strict compliance with statutory mandates is required for TPR.⁶ It has been nearly seven years since Angela and Christopher were separated. Today, Angela visits with Christopher approximately sixteen to twenty hours a month in her home, plus one eight to twelve hour weekend visit per month.⁷ In order for the judge to make a competent decision, a new assessment of Angela's current mental health, her current ability to parent, and the potential for future harm to Christopher would need to be assessed, and proper procedure would need to be followed.

At this point you may be thinking: "*Isn't it common sense that a court needs to look to the ability of the parent at issue when deciding whether or not that parent can adequately care for their child?*" The Supreme Court of Missouri's decision—which may appear to most as a commonsensical ruling—is actually a progressive move away from railroading mentally ill parents through the child welfare system,⁸ towards requiring a more individualized assessment of a parent's ability to care for their child.

In re C.W. has far reaching implications for Missouri parents with mental illness and will ideally prompt more courts to discard stereotyped notions of individuals with disabilities as inherently incapable of being good parents. Angela and Christopher's story is an all-too-common depiction of how the court system has failed mentally disabled individuals. However, their story also gives hope, as it demonstrates that courts are demanding an inquiry into individual ability and are casting aside sweeping claims of inability based on disability.

4. *In re C.W.*, No. ED 87800, 2006 WL 2728583, at *12 (Mo. Ct. App. Sept. 26, 2006).

5. *See In re C.W.*, 211 S.W.3d at 102.

6. *Id.* at 98.

7. Telephone Interview with David Orzel, Angela Williams's Attorney (Feb. 9, 2009). This is substantial improvement from the visitation reported in the 2007 interview, reported in *About a Boy* stating that Angela saw Christopher for two hours a week. Thomson, *supra* note 1, at 160.

8. *See generally In re C.W.*, 211 S.W.3d 93, *e.g.*, Theresa Glennon, *Walking With Them: Advocating for Parents with Mental Illnesses in the Child Welfare System*, 12 TEMP. POL. & CIV. RTS. L. REV. 273, 280 (2003) ("While some substance abuse treatment programs now accept mothers who retain custody of their children, there do not appear to be any inpatient mental health treatment programs that permit mothers to enter a facility with their children."). Individuals with mental illness are not treated in their role as parents, but instead are only treated for their conditions. *See id.* at 296–97.

Research shows that “the number of families headed by a parent with a disability has increased substantially during the past century.”⁹ “[M]any women with severe mental illness . . . wish to experience motherhood and do in fact give birth.”¹⁰ In fact, of the five million Americans diagnosed as mentally ill annually, researchers estimate that as many as one million of these parents have children under the age of eighteen.¹¹ Thus, the implications of state decisions to terminate parental rights on the basis of mental illness are central to a significant segment of the American population. As a result, it is vital that our court systems are educated to understand the special circumstances of parents with mental disabilities and to adjudicate them appropriately.

Three major problems have contributed to the countless and continuing violations of the rights of mentally disabled individuals’ fundamental right to parent.¹² First, the legal protections for parents with mental disabilities under state and federal law are insufficient. Further, the social stigma of being a parent with a mental disability, generalized statistical data, age-old stereotypes, and horrific news stories may affect court determinations about a parent’s ability to raise a child based on their condition instead of their conduct. Finally, insufficient judicial education of family court judges may contribute to unequal or ineffective treatment of parents with mental disabilities in the court system. As these problems demonstrate, a more informed individualized inquiry is required before terminating a parent’s right to his or her child, and judicial education is necessary to aid family court judges in weighing the sufficiency of evidence presented.

9. Elizabeth Lightfoot & Traci LaLiberte, *The Inclusion of Disability as Grounds for Termination of Parental Rights in State Codes*, 17 POL’Y RES. BRIEF 1 (2006) [hereinafter *The Inclusion of Disability*].

10. Katherine A. Judge, *Serving Children, Siblings, and Spouses: Understanding the Needs of Other Family Members*, in HELPING FAMILIES COPE WITH MENTAL ILLNESS 161, 164 (Harriet P. Lefley et al. eds., 1994).

11. JOANNE NICHOLSON ET AL., CRITICAL ISSUES FOR PARENTS WITH MENTAL ILLNESS AND THEIR FAMILIES 4 (2001), <http://www.parentingwell.info/critical.pdf> [hereinafter NICHOLSON, CRITICAL ISSUES]; see also Jung Min Park et al., *Involvement in the Child Welfare System Among Mothers with Serious Mental Illness*, 57 PSYCHIATRIC SERVICES 493, 493 (2006) (stating that women with psychiatric disabilities are reproducing at approximately the same rate as women without mental illness); see also Glennon, *supra* note 9, at 273 (“Yet, at least one million parents of children under 18, and perhaps many more, have a serious psychiatric disorder.”).

12. *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (“[T]he Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”).

II. TPR: THE DEATH PENALTY OF CIVIL CASES

Termination of Parental Rights (TPR) is the death penalty of civil cases.¹³ Once a parent's rights to his or her child are terminated, that parent's right to care for, visit, or make decisions for the child are gone forever: the legal parent-child relationship has ended.¹⁴ The parent cannot seek a modification of the permanent custody order after his or her rights have been terminated.¹⁵ The child can immediately be put up for adoption and a biological parent may never see their child again.¹⁶

Parents have a fundamental constitutional right to raise and make decisions for their children under the Due Process Clause of the Fourteenth Amendment.¹⁷ The United States Supreme Court has stated that "it is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."¹⁸ Establishing a home and raising children are "among the most basic civil rights, long recognized as essential to the orderly pursuit of happiness."¹⁹

13. See *In re K.A.W.*, 133 S.W.3d 1, 12 (Mo. banc 2004) ("The termination of parental rights has been characterized as tantamount to a 'civil death penalty.'"); see also NICHOLSON, CRITICAL ISSUES, *supra* note 12, at 10 (parents have said that when their parental rights are terminated, "the pain never goes away"); Joanne Nicholson et al., *Focus on Women: Mothers with Mental Illness: I. The Competing Demands of Parenting and Living With Mental Illness*, 49 PSYCHIATRIC SERVICES 635, 635 (1998) ("[F]ailure as a parent contributes to never-ending shame and humiliation.").

14. See U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: SUMMARY OF STATE LAWS 1 (2007), http://www.childwelfare.gov/systemwide/laws_policies/statutes/groundterminall.pdf [hereinafter GROUNDS FOR INVOLUNTARY TPR].

15. See, e.g., *In re McBride*, 850 N.E.2d 43, 44–47 (Ohio 2006) (holding that a parent who has lost permanent custody of a child does not have standing as a non-parent to file a petition for custody of that child).

16. GROUNDS FOR INVOLUNTARY TPR, *supra* note 15, at 1.

17. *Troxel v. Granville*, 530 U.S. at 66; see also *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925) ("[The state's law] unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control. . . . [R]ights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State.") (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923)); see also *In re K.A.W.*, 133 S.W.3d at 12 ("A parent's right to raise her children is a fundamental liberty interest protected by the constitutional guarantee of due process.").

18. *Prince v. Mass.*, 321 U.S. 158, 166 (1944) (citing *Pierce*, 268 U.S. at 534–35); see also *Meyer v. Neb.*, 262 U.S. 390, 399 (1923) (explaining rights included under the Fourteenth Amendment: The Fourteenth Amendment "denotes . . . the right of the individual to . . . establish a home and bring up children . . .").

19. Dave Shade, *Empowerment for the Pursuit of Happiness: Parents with Disabilities and the Americans with Disabilities Act*, 16 LAW & INEQUALITY 153, 153 (1998). Shade goes on to cite numerous examples of discrimination towards parents with disabilities including a case where the California Supreme Court reversed the lower court's determination that a man's

TPR is a clear intrusion into a parent's fundamental liberty interest in raising children without state interference,²⁰ yet caselaw and journal articles are littered with examples of how fear and stereotypes about the disabled have affected their rights to bear and parent children.²¹ Even Congress, in passing the Americans with Disabilities Act, recognized that "individuals with disabilities . . . have been faced with restrictions and limitations [and] subjected to a history of purposeful unequal treatment . . . based on characteristics that are beyond [their] control . . . resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society."²² Today, disproportionately high numbers of mentally ill individuals are losing their parental rights²³ despite the fact that child abuse and neglect among mentally ill parents is low.²⁴ Mothers with mental illness are "three times as likely as other mothers without serious

physical handicap was a sufficient reason for awarding custody of his children to his wife who had not seen the children in five years. *Id.* at 159 (citing *In re Carney*, 598 P.2d 36 (Cal. 1979)).

20. See *Jonathan H. v. Margaret H.*, 771 S.W.2d 111, 114 (Mo. Ct. App. 1989) (TPR is "a drastic intrusion into the sacred parent-child relationship.").

21. The Supreme Court has even gone so far as to uphold a statute that provided for the compulsory sterilization of the mentally retarded. See *Buck v. Bell*, 274 U.S. 200, 207 (1927) ("It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind."). Justice Holmes is famous for his bold statement that "[t]hree generations of imbeciles are enough." *Id.* See also Susan Kerr, *The Application of the Americans with Disabilities Act to the Termination of the Parental Rights of Individuals with Mental Disabilities*, 16 J. CONTEMP. HEALTH L. & POL'Y 387, 387-88 (2000) ("[T]he underlying belief that persons with mental disabilities should not reproduce and are inherently unable to provide proper parenting to their children survives today."); Shade, *supra* note 20, at 153 (explaining that the right to a family is fundamental, but has been historically "violated, abused or just ignored for people with disabilities"); Joanne Nicholson et al., *State Policies and Programs That Address the Needs of Mentally Ill Mothers in the Public Sector*, 44 HOSP. & COMMUNITY PSYCHIATRY 484, 484 (1993) ("Sexuality, birth control, and abortion are controversial areas in the care of chronic mentally ill patients, who are often thought to be unable to make decisions about their behavior, health care, and treatment.").

22. Equal Opportunity for Individuals with Disabilities, 42 U.S.C. § 12101(a)(7) (2006). "[H]istorically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." § 12101(a)(2).

23. See *The Inclusion of Disability*, *supra* note 10, at 1 (citing a 1994-1995 National Health Interview Survey-Disability Supplement study stating "only 51% of parents with intellectual and/or developmental disabilities were currently living with their children . . .").

24. Judge, *supra* note 11, at 164; see also JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW, TERMINATION OF PARENTAL RIGHTS OF PARENTS WITH MENTAL DISABILITIES 2 n.3 (2008) (citing Judge, *supra* note 11), <http://www.bazelon.org/pdf/TPRpaper5-08.pdf> [hereinafter BAZELON]; NICHOLSON, CRITICAL ISSUES, *supra* note 12, at 8 (stating that the general public assumes that parents who have mental illness abuse or neglect their children, but that these high profile incidents are rare); Park, *supra* note 12, at 493.

mental illness to have come to the attention of the child welfare system or to have lost custody of their children.”²⁵ In 1994, mentally ill parents made up twenty-two percent of parents involved in child welfare systems nationwide.²⁶ Reports of parents with mental illness losing their children have reached rates as high as seventy to eighty percent.²⁷

“In many states, the diagnosis of mental illness alone justifies the removal of children from their parents’ care, and the termination of parental rights.”²⁸ Missouri is one of thirty-seven states that allow termination of parental rights for disability-related reasons, including a parent’s mental condition or illness.²⁹ Many states have specifically ruled that mental disability alone is insufficient to interfere with the parent-child relationship, and the majority of state codes specify that the disability must impact the parent’s ability to care for his or her child, or that the court should take the parent’s condition into consideration in determining whether a person is unfit to parent.³⁰

Both the United States Supreme Court and the Supreme Court of Missouri have held that “the fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.”³¹ Despite these rulings, studies have shown that state statutes improperly “emphasize disability status rather than behavior” in TPR proceedings.³²

25. Park, *supra* note 12, at 496 (“[H]aving experienced a psychiatric inpatient episode . . . conferred a twofold higher risk of involvement in the child welfare system and a nearly threefold higher risk of having a child placed in out-of-home-care.”).

26. Glennon, *supra* note 11, at 277 (citing U.S. DEPT. OF HEALTH & HUM. SERVS., CHILDREN’S BUREAU, NATIONAL STUDY OF PROTECTIVE, PREVENTIVE, AND REUNIFICATION SERVICES DELIVERED TO CHILDREN AND THEIR FAMILIES (1997), available at <http://www.acf.hhs.gov/programs/cb/pubs/97natstudy/index.htm> (now contained in U.S. DEPT. OF HEALTH & HUM. SERVS., PROFILE OF THE 1994 CHILD WELFARE POPULATION USING POINT IN TIME DATA, tbl. 3-10 (1997), available at <http://www.acf.hhs.gov/programs/cb/pubs/97natstudy/profile.htm>)).

27. NICHOLSON, CRITICAL ISSUES, *supra* note 12, at 10 (citing Jill G. Joseph et al., *Characteristics and Perceived Needs of Mothers With Serious Mental Illness*, 50 PSYCHIATRIC SERVICES 1357, 1358 (1999)); see also *The Inclusion of Disability*, *supra* note 10, at 1 (estimating that “40-60% of parents with developmental disabilities have had their children removed from their care at some point in time”); see also Teresa Jacobsen & Laura J. Miller, *Focus on Women: Mentally Ill Mothers Who Have Killed: Three Cases Addressing the Issue of Future Parenting Capability*, 49 PSYCHIATRIC SERVICES 650, 650 (1998) (“60 percent of mothers with chronic mental illness do not raise their own children.”).

28. NICHOLSON, CRITICAL ISSUES, *supra* note 12, at 43.

29. *The Inclusion of Disability*, *supra* note 10, at 2, 7–10 (data as of August 2005).

30. *Id.* at 2.

31. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *In re K.A.W.*, 133 S.W.3d 1, 12 (Mo. banc 2004).

32. *The Inclusion of Disability*, *supra* note 10, at 5.

III. MISSOURI TPR LAW

In Missouri, mental illness does not *per se* render a parent unfit or justify, by itself, a judicial determination of neglect or abuse.³³ In order to terminate parental rights, a trial court must first find the existence of at least one statutory ground for TPR and also find that TPR is in the child's best interest.³⁴ Missouri Revised Statute 211.447.5(2)(a) states that one factor the court can consider is the mental health of the parent:

The juvenile officer or the division may file a petition to terminate the parental rights of the child's parent when it appears that . . . [t]he child has been abused or neglected. In determining whether to terminate parental rights pursuant to this subdivision, the court shall consider . . . [a] mental condition which is shown by competent evidence either to be permanent or such that there is *no reasonable likelihood that the condition can be reversed and which renders the parent unable to knowingly provide the child the necessary care, custody and control . . .*³⁵

The Supreme Court of Missouri has interpreted this statute as a three pronged test to terminate parental rights for a mental or emotional condition:

1. Documentation: [Is the condition] supported by competent evidence;
2. Duration: [Is the condition] permanent or such that there is no reasonable likelihood that it can be reversed; and
3. Severity of Effect: [Is the condition] so severe as to render the parent unable to knowingly provide the child necessary care, custody and control.³⁶

TPR statutes are "strictly construed in favor of the parent and preservation of the natural parent-child relationship."³⁷ Thus, before a state may sever parental rights, due process requires that a state support its allegations by at

33. See, e.g., *In re A.M.F.*, 140 S.W.3d 201, 207 (Mo. Ct. App. 2004); *In re C.P.B.*, 641 S.W.2d 456, 460 (Mo. Ct. App. 1982) ("Unlike neglect, abandonment, abuse, or nonsupport, the mental illness of a parent is not *per se* harmful to a child.").

34. MO. REV. STAT. § 211.447.5 (2008). Note that the case law discusses section 211.447.4 in connection with the juvenile officer or the division may file a petition to terminate parental rights. However, amendments to the statute have changed the section number to 211.447.5. (There were no substantive changes to the statutory provisions stemming from the amendments; only the section number changed). See, e.g., *In re E.L.B.*, 103 S.W.3d 774, 776 (Mo. banc 2003).

35. § 211.447.5(2)(a) (emphasis added); see also *In re J.K.*, 38 S.W.3d 495, 502 (Mo. Ct. App. 2001) (upholding termination of mother's parental rights where the mother's mental condition – Battered Women's Syndrome – was harmful to the children and unlikely to be remedied in the near future).

36. *In re K.A.W.*, 133 S.W.3d 1, 14 (Mo. banc 2004). The Court recognized that a cited condition of a parent must be severe enough to constitute abuse or neglect in order to TPR and that "[s]ome parental conduct will harm a child without constituting abuse or neglect." *Id.* at 11.

37. *Id.* at 12 (citing *In re Adoption of W.B.L.*, 681 S.W.2d 452, 455 (Mo. banc 1984)).

least clear and convincing evidence.³⁸ To terminate a parent's parental rights due to mental illness, it must be shown that the child was harmed or is likely to be harmed in the future.³⁹ Parental rights may not be severed simply because a child would be "better off" in another home.⁴⁰ TPR in Missouri "requires a showing of more than merely the presence of mental or emotional instability or problems; the incapacity must be so severe that it renders the parent incapable of providing minimally acceptable care and the condition cannot be reversed or improved in a reasonable time."⁴¹

A court must look to the parent's current ability to parent in determining whether or not TPR is appropriate; the court must further "determine that the parent is *currently* unfit to be a party to the parent-child relationship."⁴² A court should look to both past and present conduct in determining whether or not TPR is appropriate.⁴³ A charge of abuse or neglect must be based on parental behavior at the time of termination, not just at the time the juvenile court initially took jurisdiction.⁴⁴ While no actual abuse needs to occur for a court to grant a request for TPR,⁴⁵ one or more statutory grounds under Section 211.447 subsection 2, 3, or 4 must exist before the court may inquire into the best interests of the child.⁴⁶

38. *Santosky v. Kramer*, 455 U.S. 745, 747–48 (1982); § 211.447.6; *see also In re Adoption of W.B.L.*, 681 S.W.2d at 454 ("[C]lear, cogent and convincing standard of proof is met when the evidence 'instantly tilt[s] the scales in the affirmative when weighted against the evidence in opposition and the fact finder's mind is left with an abiding conviction that the evidence is true.'") (quoting *In re O'Brien*, 600 S.W.2d 695, 697 (Mo. Ct. App. 1980)).

39. *In re A.M.F.*, 140 S.W.3d 201, 207 (Mo. Ct. App. 2004); *see also In re D.L.M.*, 31 S.W.3d 64, 69–70 (Mo. Ct. App. 2000).

40. *In re D.C.H.*, 835 S.W.2d 533, 534 (Mo. Ct. App. 1992); *see also Troxel v. Granville*, 530 U.S. 57, 72–73 (2000) ("[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made.").

41. *In re S.M.H.*, 160 S.W.3d 355, 371 (Mo. banc 2005).

42. *In re C.W.*, 211 S.W.3d 93, 98 (Mo. banc 2007) (citing *In re K.A.W.*, 133 S.W.3d 1, 20–21 (Mo. banc 2004)) (emphasis added).

43. *In re K.A.W.*, 133 S.W.3d at 9–10 ("Past behavior can support grounds for termination, but only if it is convincingly linked to predicted future behavior.").

44. *Id.* at 10.

45. *See In re M.H.*, 859 S.W.2d 888, 894 (Mo. Ct. App. 1993) (stating that a parent's rights may be terminated even if there is not conclusive evidence as to how a child's injury was caused – as long as the injuries occurred while the child was in parent's custody); *In re M.W.S.*, 160 S.W.3d 435, 438 (Mo. Ct. App. 2005) ("Contrary to Mother's argument on appeal, a termination of parental rights under Section 211.447.4(2) does not require proof that the child has actually suffered abuse or neglect as a result of the parent's mental condition.").

46. MO. REV. STAT. § 211.447.6 (2008).

IV. FOR EXAMPLE: *IN RE C.W.*

In *In re C.W.*,⁴⁷ the Supreme Court of Missouri reversed the Circuit Court of St. Francois County and held that a mother with Bipolar Disorder could not have her parental rights terminated without an inquiry into her current ability to parent.⁴⁸ Angela Jean Williams gave birth to Christopher Robin Williams on June 19, 2003.⁴⁹ Christopher was born with special needs stemming from his cleft palate⁵⁰ and micrognathia,⁵¹ requiring him to be fed with special nipples and bottles.⁵² A neonatologist at the hospital “hotlined”⁵³ the Missouri Department of Social Services, and reported that Angela “did not follow through with feedings. . . and [had] a significant clinical psychiatric diagnosis which impaired [her] ability to take care of Christopher.”⁵⁴ Five days after Christopher’s birth, Missouri’s Children’s Division removed Christopher from Angela’s care, basing the removal on “concerns that [Angela] could not adequately care for [Christopher] given his special needs and [Angela’s] Bipolar Disorder and mild cerebral palsy.”⁵⁵ The juvenile court judge ordered that Christopher be placed in foster care and required Angela to participate in mental health counseling to receive parenting classes.⁵⁶ Further, the court ordered that Angela receive a psychological evaluation.⁵⁷ The psychologist, Dr. Walker, concluded in her August 25, 2003 report that Angela was, *at that time*, “not mature enough to care for her baby”, but that Angela may be able to care for Christopher in the future if she “work[ed] through her issues.”⁵⁸

47. *In re C.W.*, 211 S.W.3d 93, 93 (Mo. banc 2007).

48. *Id.* at 102.

49. *Id.* at 96.

50. “Cleft Palate” is defined as “congenital fissure of the roof of the mouth produced by failure of the two maxillae to unite during embryonic development and often associated with cleft lip.” MERRIAM-WEBSTER’S MEDICAL DICTIONARY (1995).

51. “Micrognathia” is defined as “[a]bnormal smallness of the jaws, especially the lower jaw (mandible).” ATTORNEY’S ILLUSTRATED MEDICAL DICTIONARY M33 (West 1997).

52. Thomson, *supra* note 1, at 158.

53. A 24/7 phone center (The Children’s Division Child Abuse and Neglect Hotline) takes calls from individuals reporting suspected child abuse or neglect. “Members of certain occupational groups, such as teachers, social workers, and physicians, are mandated by law to make reports to the Hotline. Any person may report, and anonymous reports are accepted from individuals who are not mandated by occupation to report.” The Missouri Dep’t of Social Services, Child Abuse and Neglect Hotline, <http://www.dss.mo.gov/cd/can.htm> (last visited Feb. 8, 2009).

54. Thomson, *supra* note 1, at 158.

55. *In re C.W.*, 211 S.W.3d 93, 96 (Mo. banc 2007); *see also In re C.W.*, No. ED 87800 2006 Mo. App. LEXIS 1430, at *2 (Mo. Ct. App. Sept. 26, 2006) (“Due to Mother’s physical and psychological conditions, it was concluded that she could not properly care for C.W.”).

56. Thomson, *supra* note 1, at 158.

57. *In re C.W.*, 211 S.W.3d at 96.

58. *Id.* (emphasis added).

In July 2005, the Children's Division sought leave to file a petition for TPR which was granted.⁵⁹ On October 17, 2005, the Children's Division filed a "Termination of Parental Rights Investigation and Social Study – 211.455.3," and four days later filed a petition for TPR.⁶⁰ Angela filed a Motion in Limine, arguing that 211.455 required that the Children's Division file a petition for TPR before they order an Investigation and Social Study.⁶¹ The circuit court overruled the motion and proceeded to trial.⁶²

On February 3, 2006, the circuit court entered judgment terminating Angela Williams's parental rights.⁶³ The circuit court determined that termination of parental rights would be in the best interest of Christopher for three reasons:⁶⁴ (1) Angela abused and neglected Christopher;⁶⁵ (2) Angela failed to rectify the conditions which caused the court to assume jurisdiction;⁶⁶ and (3) Angela was unfit to be a parent.⁶⁷

Missouri Revised Statute 211.447 allows for termination of parental rights when a child has been abused or neglected.⁶⁸ Abuse or neglect can be shown in various ways including a failure to provide necessary care for the child, a severe act or recurrent acts of physical, emotional or sexual abuse, and chemical dependency which interferes with the parent's ability to care for the

59. *In re C.W.*, No. ED 87800, 2006 Mo. App. LEXIS 1430, at *2 (Mo Ct. App. Sept. 26, 2006).

60. *Id.* at *2–3.

61. *Id.* at *3.

62. *Id.*

63. *In re C.W.*, 211 S.W.3d 93, 97 (Mo. banc 2007).

64. *Id.* at 99–102.

65. MO. REV. STAT. § 211.447.4(2) (2000) ("The juvenile officer or the division may file a petition to terminate the parental rights of the child's parent when it appears that . . . [t]he child has been abused or neglected."). This section has been revised and is now section 211.447.5(2) (2008).

66. § 211.447.4(3) (2000) (allows for termination of parental rights when: "[t]he child has been under the jurisdiction of the juvenile court for a period of one year, and the court finds that the conditions which led to the assumption of jurisdiction still persist, or conditions of a potentially harmful nature continue to exist, that there is little likelihood that those conditions will be remedied at an early date so that the child can be returned to the parent in the near future, or the continuation of the parent-child relationship greatly diminishes the child's prospects for early integration into a stable and permanent home."). This section has been revised and is now section 211.447.5(3) (2008).

67. § 211.447.4(6) (2000) ("The juvenile officer or the division may file a petition to terminate the parental rights of the child's parent when it appears that . . . [t]he parent is unfit to be a party to the parent and child relationship because of . . . specific conditions directly relating to the parent and child relationship either of which are determined by the court to be of a duration or nature that renders the parent unable, for the reasonably foreseeable future, to care appropriately for the ongoing physical, mental or emotional needs of the child."). This section has been revised and is now section 211.447.5(6) (2008).

68. § 211.447.4(2) (2000); § 211.447.5(2) (2008).

child.⁶⁹ However, the circuit court in *C.W.* found that it was Angela's mental condition that rendered her unable to properly care for Christopher.⁷⁰

The circuit court relied almost exclusively upon the testimony of Dr. Walker and her 2003 mental health evaluation.⁷¹ Walker met with Angela shortly after Angela gave birth to Christopher in 2003; Walker testified at trial in 2006 that she had not spoken with Angela since their 2003 meeting.⁷² At the TPR hearing, Dr. Walker admitted that she was not aware of Angela's current mental health status, and that the evaluation submitted to the court was *twenty-nine months old*.⁷³ Further, Walker testified the evaluation of Angela was based on "generalized conclusions regarding the effects of Bipolar Disorder and not any specific instance of neglect by mother."⁷⁴ Despite the generalized testimony, the circuit court terminated Angela's parental rights.⁷⁵ Angela appealed to the Eastern District, and the case was transferred to the Supreme Court of Missouri due to "the general interest and importance of the issues involved."⁷⁶

V. THE SUPREME COURT OF MISSOURI'S ANALYSIS

On transfer, the Supreme Court of Missouri reversed the circuit court's decision, finding that the evidence was insufficient to terminate Angela Williams's parental rights, addressing each of the trial court's findings in turn.⁷⁷ First, the court addressed the State's contention that Angela abused and neglected Christopher. The court noted the significance of the twenty-nine months between the doctor's evaluation and trial.⁷⁸ The court observed that Angela underwent treatment, resumed her physician-prescribed medication for her Bipolar Disorder, and complied with court orders to receive mental health counseling.⁷⁹ Also during that time, Christopher had corrective surgery for his cleft palate, which lessened the need for "specialized feeding."⁸⁰ The Supreme Court of Missouri concluded that the lower court's findings were insufficient to support a finding of abuse and neglect under Missouri law.⁸¹ The court

69. § 211.447.4(2) (2000); § 211.447.5(2) (2008).

70. *In re C.W.*, 211 S.W.3d at 99.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 99–100.

75. *In re C.W.*, 211 S.W.3d at 99.

76. *In re C.W.*, No. ED 87800, 2006 Mo. App. LEXIS 1430, at *12 (Mo. Ct. App. Sept. 26, 2006).

77. *In re C.W.*, 211 S.W.3d at 102.

78. *Id.* at 100.

79. *Id.*

80. *Id.*

81. *Id.*

relied primarily on the fact that the State failed to prove by competent documented evidence that Angela's mental condition affected her current ability to parent.⁸² Generalized conclusions about Angela's condition and a two and a half year old mental health evaluation did not add up to sufficient evidence to TPR.⁸³

Next, the court addressed the lower court's finding that Angela failed to rectify the conditions that caused the court to assume jurisdiction. The lower court used the outdated mental health evaluation by Dr. Walker to argue that Angela's mental health issues had not changed and plagued her ability to parent.⁸⁴ The lower court noted, *inter alia*, that Angela had not taken her medication for her Bipolar Disorder for several months during 2004, that as a teenager her "mental health issues were out of control," and that Angela "continues to deal with her mental health disorder and cerebral palsy."⁸⁵ The lower court held that there was little likelihood that Angela's mental condition would be remedied "at an early date" to allow her to parent.⁸⁶ The court noted that a charge of failure to rectify must be based on a determination that the child would be placed in a harmful situation if returned to the parent immediately, rather than a mere finding that the mother still had a mental condition.⁸⁷ The Supreme Court of Missouri ultimately found that because there was no updated expert testimony about Angela's current mental health status or a prognosis for future recovery, the State failed to prove by clear and convincing evidence that Angela failed to rectify.⁸⁸

Finally, the court addressed the contention that Angela was unfit to be a parent. The lower court based its finding that Angela was unfit on Dr. Walker's two and a half year old evaluation, Angela's admission that she needed help raising Christopher, and her failure to form a bond with Christopher after two years of visitation.⁸⁹ The Supreme Court of Missouri noted that Dr. Walker's dated evaluation did not establish that Angela was unfit, nor did the fact that Angela admitted that she needed help caring for

82. *In re C.W.*, 211 S.W.3d at 99–100.

83. *Id.*

84. *Id.* at 100.

85. *Id.*

86. *Id.*

87. *In re C.W.*, 211 S.W.3d at 100 (citing *In re K.A.W.*, 133 S.W.3d 1, 10 (Mo. banc 2004)).

Note: a parent seeking treatment may or may not be enough to combat a charge of failure to rectify. However, "[a] parent's efforts to comply with . . . a [treatment] plan will provide the court with an indication of the parent's likely efforts in the future to care for the child. . . . A lack of effort to comply with a plan, or a lack of success despite effort, can predict future problems." See *In re K.A.W.*, 133 S.W.3d at 10.

88. *In re C.W.*, 211 S.W.3d at 100–101.

89. *Id.* at 101.

Christopher.⁹⁰ Further, the court was not persuaded that Angela failed to form a bond with Christopher.⁹¹ Angela attended all of her scheduled visits with her son and was making efforts to bond with him.⁹² However, the court observed that “it is almost a foregone conclusion that the bond between parent and child will not be as strong as it otherwise would” when a child is taken from his mother five days after birth.⁹³ The court encouraged other courts to “take into account this reality when passing judgment upon the bond between parent and child.”⁹⁴ The court held that there was not sufficient documentation to support a finding that Angela Williams was an unfit parent.⁹⁵

The Supreme Court of Missouri found that without current, expert testimony establishing Angela’s ability to parent Christopher, there was no basis to assess whether services would help Angela in parenting.⁹⁶ Thus, the finding that termination was in the best interest of Christopher was not supported by clear and convincing evidence.⁹⁷ Looking to what current information they had about Angela’s parenting, the court cited numerous ways in which Angela and Christopher’s relationship was growing.⁹⁸ The Supreme Court of Missouri reversed and remanded the cause for further proceedings, as the circuit court failed to establish a ground for termination and the petition for TPR should have been filed before the investigation and social study.⁹⁹

VI. ANALYSIS

Unfortunately, decisions like the circuit court’s decision in *In re C.W.* are not uncommon, but are illustrative of a nationwide epidemic of courts allowing stereotypes to inform their decisions.¹⁰⁰ An individual’s mental condition often clouds a court’s judgment and shifts the focus from the parent’s current ability to parent.¹⁰¹ This is not a new problem: researchers and authors have recognized that mentally disabled individuals have been discriminated against and stereotyped for decades.¹⁰² We are aware of the problem – so why are courts still treating parents with mental disabilities differently?

90. *Id.*

91. *Id.*

92. *Id.*

93. *In re C.W.*, 211 S.W.3d at 101.

94. *Id.*

95. *Id.* at 102.

96. *Id.*

97. *Id.*

98. *In re C.W.*, 211 S.W.3d at 102.

99. *Id.*

100. See generally *The Inclusion of Disability*, *supra* note 10.

101. *Id.* at 4.

102. See Shade, *supra* note 20; Kerr, *supra* note 22.

A. *The Legal Protections for Parents with Mental Illness are Insufficient*

Although there are protections for parents with mental disabilities under the Americans with Disabilities Act (ADA),¹⁰³ Section 504 of the Rehabilitation Act,¹⁰⁴ the Adoption and Safe Families Act (ASFA),¹⁰⁵ and the 14th Amendment Equal Protection Clause,¹⁰⁶ rarely do parents raise such protections in TPR proceedings.¹⁰⁷ Instead of using federal protections in TPR proceedings, parents generally rely solely upon state statutes, as “ADA and constitutional claims. . . generally do not add anything to state law arguments raised in such situations.”¹⁰⁸ Unfortunately, however, state law does not provide adequate protections for mentally disabled parents either.

1. TPR Statutes Contain Unclear, Outdated Language and Do Not Sufficiently Define Statutory Terminology

A University of Minnesota study analyzing state TPR statutes found that “many states include disability inappropriately in their TPR statutes, including using inappropriate, outdated terminology to refer to a person’s disability, using imprecise definitions of disability, and often focusing on disability rather than behavior.”¹⁰⁹

Mental illness is an “ambiguous concept. . . which proves difficult to define or quantify.”¹¹⁰ However, “mental illness,” the condition most commonly

103. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (1994).

104. Rehabilitation Act of 1973, 29 U.S.C. § 794 (1976 & Supp. 1981).

105. Adoption and Safe Families Act of 1997, 42 U.S.C.A. § 629 (2003).

106. U.S. CONST. amend. XIV, § 1.

107. Bazelon, *supra* note 25, at 3–4 n.5. For example, Title II of the ADA protects disabled parents’ right to participate in public programs, services, and activities. 42 U.S.C. § 12132 (1994). Parents with mental disabilities often require such services to assist them in keeping custody of their children. Bazelon, *supra* note 25, at 3. Unfortunately, many courts have found that the ADA cannot be raised as a defense in TPR proceedings because: (1) the court finds that TPR proceedings are not a “service, program, or activity” within the meaning of the ADA; (2) the court finds that their jurisdiction is limited to state child welfare law rather than “an open ended inquiry into how the parents might respond to alternative . . . services and why those services have not been provided,” *In re B.S.*, 693 A.2d 716, 721 (Vt. 1997), or (3) the court finds that Title II provides an affirmative action, not a defense. Bazelon, *supra* note 25, at 4. Even those courts that do allow for ADA claims in TPR proceedings generally do not find ADA violations. *Id.* at 4–5. See also Glennon, *supra* note 9, at 275 (“Almost all state courts to consider the question have ruled that an agency’s failure to adhere to the ADA cannot be asserted as a defense to a termination of parental rights proceeding.”).

108. Bazelon, *supra* note 25, at 3 n.5; see also *The Inclusion of Disability*, *supra* note 10, at 5 (stating that many state appellate courts have held the ADA inapplicable to TPR proceedings because TPR is not a “public service, program, or activity” as defined by the ADA or because TPR is based on the child’s welfare, not the parent’s).

109. *The Inclusion of Disability*, *supra* note 10, at 5.

110. Harvard Law Review Association, *Sixth Amendment: Competency Standard for Self-Representation at Trial*, 122 HARV. L. REV. 316, 323 (2008).

included in state TPR statutes, is often left undefined or given an extremely broad definition.¹¹¹ Mental illness has been defined as a “brain disorder that disrupts an individual’s ability to think, feel, and relate to others and their environment,”¹¹² though the diverse population of individuals with mental illness makes the concept difficult to generalize.¹¹³

Missouri state statute allows for termination of parental rights for reasons of mental conditions, but does not define what constitutes a “mental condition.”¹¹⁴ “Mental condition” can imply either a mental illness or an intellectual/developmental disability.¹¹⁵ Because “mental condition” is undefined, a court can interpret it as broadly or loosely as it wants.¹¹⁶ Section 211.447 of the Missouri Revised Statutes attempts to clarify, stating that in order for a mental disability to allow for termination of parental rights, “more than merely the presence of mental or emotional instability or problems [must be shown]; the incapacity must be so severe that it renders the parent incapable of providing minimally acceptable care and the condition cannot be reversed or improved in a reasonable time.”¹¹⁷

Under Missouri law, a judge must first find a statutory ground for termination (e.g. “mental condition”) before subjectively looking to the best interest of the child.¹¹⁸ Because Missouri statute leaves judges with discretion to interpret “mental condition,” judges are able to exercise discretion in finding the statutory ground *and* in analyzing the child’s best interests. While judicial discretion is a vital part of the American court system, the judicial discretion in interpreting “mental condition” essentially allows the judge to circumvent the law. In theory, the judge could consider the child’s best interests *in conjunction* with finding a statutory ground for termination (instead of finding a statutory ground first and then considering “best interests” *separately*, as

111. *The Inclusion of Disability*, *supra* note 10, at 3.

112. Krista A. Gallagher, *Parents in Distress: A State’s Duty to Provide Reunification Services to Mentally Ill Parents*, FAM. & CONCILIATION CTS. REV. 234, 235 (2000) (quoting National Alliance for the Mentally Ill, What is Mental Illness: Mental Illness Facts, http://www.nami.org/Content/NavigationMenu/Inform_Yourself/About_Mental_Illness/About_Mental_Illness.htm (last visited Feb. 9, 2009)). Note also that Department of Justice regulations under Title II of the Americans with Disabilities Act has specifically enumerated “mental illness” as a “mental impairment” for purposes of proving disability under the Act. 28 C.F.R. § 35.104(1)(i)(B) (2008).

113. RUTH COLKER, THE LAW OF DISABILITY DISCRIMINATION I (2009).

114. *See* MO. REV. STAT. § 211.447.5(2)(a) (2008); *see also* Lightfoot & LaLiberte, *supra* note 10, at 8.

115. Lightfoot & LaLiberte, *supra* note 10, at 3.

116. *See* Meriwether v. Garrett, 102 U.S. 472, 515 (1880) (“It is the province of the courts to decide causes between parties, and, in so doing, to construe the Constitution and the statutes of the United States. . . .”).

117. *In re S.M.H.*, 160 S.W.3d 355, 371 (Mo. banc 2005).

118. § 211.447.6.

required by law). Unfortunately, societal prejudices exist in judges too.¹¹⁹ Allowing for discretion in both parts of the TPR analysis can lead to inconsistent results and allow judges to predetermine the outcome of cases.

Some disability advocacy groups like the Disability and Parental Rights Legislative Change Project (The Project) argue that disability language should be removed from TPR statutes entirely.¹²⁰ The Project seeks to “ensure fair treatment of parents or guardians with disabilities in child custody and child protection cases, while promoting the safety, stability, and well being of their children.”¹²¹ In order to achieve their goal, The Project urges states to explicitly affirm that their TPR statutes are not to be construed to allow discrimination on the basis of disability.¹²² Further, The Project would require that courts focus on parental behavior and not the parent’s disability.¹²³ However, assuming that the thirty-seven states that currently include disability language in their statutes¹²⁴ do not remove the language entirely, a surefire way to promote just outcomes in TPR cases is to demand a case-by-case analysis of each parent’s current and future ability to parent without specifically focusing on the parent’s mental condition.

Many parents fail to fit the ideal image of what society thinks a parent should be. The law acknowledges that parents are not perfect and states that parental rights may not be severed simply because a child would be “better off” in another home;¹²⁵ statutes are to be strictly construed to preserve the parent-child relationship.¹²⁶ Some state courts have gone so far as to hold that “even where the parent-child relationship is ‘marginal,’ it is usually in the best interests of the child to remain at home and still benefit from a family environment.”¹²⁷ Research shows that most criteria courts use in terminating

119. See Rachael Andersen-Watts, *Recognizing Our Dangerous Gifts: Applying the Social Model to Individuals with Mental Illness*, 12 MICH. ST. U. J. MED. & L. 141, 159 (2008) (“A psychiatric label also has serious implications in family law, especially in child custody proceedings and the best-interests of the child standards that are used therein. . . . [A] parent who has been given a psychiatric label would benefit from the judge’s education on the many forms of treatment that may be successfully used in order to cope with mental illness . . .”).

120. E. LIGHTFOOT ET AL., GUIDE FOR CREATIVE LEGISLATIVE CHANGE: DISABILITY STATUS IN TERMINATION OF PARENTAL RIGHTS AND OTHER CHILD CUSTODY STATUTES 1 (2007).

121. *Id.* at 3.

122. *Id.*

123. *Id.* at 4.

124. Lightfoot & LaLiberte, *supra* note 10, at 2.

125. *In re D.C.H.*, 835 S.W.2d 533, 534 (Mo. Ct. App. 1992); *Troxel v. Granville*, 530 U.S. 57, 72–73 (2000).

126. *In re K.A.W.*, 133 S.W.3d 1, 12 (Mo. banc 2004) (citing *In re W.B.L.*, 681 S.W.2d 452, 455 (Mo. banc 1984)).

127. Glennon, *supra* note 9, at 294 (citing *In re Juvenile Appeal*, 455 A.2d 1313, 1319 (Conn. 1983)).

parental rights focuses on past and current parental *behavior*.¹²⁸ However, when courts focus on the parent's mental condition, the court is looking to "contributing factors[s] of the parent's behavior rather than the parent's behavior itself."¹²⁹ The inclusion of mental illness or mental conditions in TPR statutes tends to shift the focus of the proceeding from the individual parent's conduct to the parent's generic mental condition.¹³⁰

As demonstrated in the circuit court's decision in *In re C.W.*, undefined statutory terms lead courts to focus the parent's condition rather than conduct and lead to inconsistent and unjust results in TPR proceedings. Although further legislative clarification limiting judicial discretion (or removing disability language) is ideal, at the very least it is imperative that courts make individual assessments of each parent's individual ability to care for his or her child.

2. TPR Law Fails to Provide Standards Regarding the Nature of Evidence Required in a TPR Proceeding

Missouri does not have statutory guidelines to help courts in determining what kind of evidence must be presented to prove that a "mental condition" is severe enough to terminate a parent's rights to his or her child. The State must prove by clear and convincing evidence that a mental condition exists,¹³¹ though expert testimony is not statutorily required. Does the State need an expert to testify to the "mental condition" of the parent? If so, who qualifies as an expert? A psychiatrist? A psychologist? A social worker? And how long does the expert have to interact with the parent to assess his or her ability to parent? A year? A day? An hour? Further, what are "minimally acceptable" standards of care? Does that mean that the child just needs food, shelter, and clothing? Or does it mean that the parent must maintain a healthy relationship with the child? If so, what does a "healthy relationship" mean?

Statutes and procedures providing for termination of parental rights must not be vague.¹³² Missouri's legislature, however, has left countless questions unanswered, leaving courts with excessive discretion in determining that a parent has a mental condition which renders them unable to provide for the care, custody, or control of the child.

The statutory vagueness in many TPR statutes is dangerous. It leaves courts with vast discretion to determine how much evidence is "enough" to inflict the death penalty of civil cases and permanently sever the rights of a

128. Lightfoot & LaLiberte, *supra* note 10, at 4.

129. *Id.*

130. *Id.*

131. MO. REV. STAT. § 211-447.6 (2008).

132. Rosemary Shaw Sackett, *Terminating Parental Rights of the Handicapped*, 25 FAM. L.Q. 253, 260 (1991).

parent to their child. Such discretion is inappropriately left in the hands of a judge who likely has no specific knowledge about the condition at issue or its ability to be effectively medically treated, and can lead a court to improperly deem a parent to have a “mental condition” that inhibits their ability to parent. Unless courts demand more specific evidentiary criteria to be met when deciding to terminate a parent’s rights due to a mental condition, the danger of elevating condition over individual behavior in TPR proceedings will continue.

In *C.W.*, the circuit court cited Angela’s condition and past effects of her condition as a reason for terminating her parental rights.¹³³ The court changed the lives of Angela and her son, admittedly based on what the “expert,” Dr. Walker, described as “generalized conclusions regarding the effects of Bipolar Disorder and not any specific instance of neglect by [Angela].”¹³⁴ Had the court taken a closer look at Angela Williams as an individual, as opposed to looking solely to her “condition,” they would have found that Angela had sought and received treatment and medication for her Bipolar Disorder.¹³⁵ Additionally, Christopher’s needs were no longer as demanding, as he underwent surgery for his cleft palate.¹³⁶ Angela had complied with court orders requiring her to receive mental health counseling¹³⁷ and was taking all of the right steps to prove herself as a capable parent.

Although the Supreme Court of Missouri ultimately got it right, the circuit court’s focus on Angela’s condition rather than her behavior changed the lives of Angela and her son forever and cost them both precious years of their lives together. Shifting the analysis to an individualized assessment and requiring more or different evidence of Angela’s ability to parent could have prevented many years of disruption and heartache for the Williams family.

B. The “Best Interest of the Child” Analysis should be Based on the Individual Circumstances of Each Family

An essential consideration of any court in a TPR proceeding is whether the conduct of the parent that has brought them under the court’s jurisdiction has had or will have a negative effect on the child.¹³⁸ If a court determines by clear and convincing evidence that a parent has a statutory “mental condition” that is either “permanent or such that there is no reasonable likelihood that the condition can be reversed” and that the condition “renders the parent unable to

133. *In re C.W.*, No. ED87800, 2006 Mo. App. LEXIS 1430, at *2 (Mo. Ct. App. Sept. 26, 2006) (“Due to Mother’s physical and psychological conditions, it was concluded that she could not properly care for C.W.”).

134. *In re C.W.*, 211 S.W.3d at 99–100.

135. *Id.* at 100.

136. *Id.*

137. *Id.*

138. *In re K.A.W.*, 133 S.W.3d 1, 10–11 (Mo. banc 2004).

knowingly provide the child the necessary care, custody and control,”¹³⁹ the door is open for the court to consider the best interests of the child.¹⁴⁰ The “best interest” analysis is a subjective analysis based on the totality of the circumstances, allowing for a fair amount of judicial discretion.¹⁴¹

The mental health statuses of a parent and her child are intimately connected.¹⁴² Research shows that children raised by parents with serious mental illness have a higher risk of developing mental illness than children raised by parents without mental illness.¹⁴³ The risk of a child developing a mental illness is heightened when a parent has Bipolar Disorder,¹⁴⁴ an anxiety disorder,¹⁴⁵ Attention-Deficit Hyperactivity Disorder (ADHD),¹⁴⁶ schizophrenia,¹⁴⁷ alcoholism¹⁴⁸ or other drug abuse, or depression.^{149, 150} Being raised by a parent with mental illness can create a stressful environment for the

139. MO. REV. STAT. § 211.447.5(2)(a) (2008).

140. See § 211.447.6.

141. *In re A.A.T.N.*, 181 S.W.3d 161, 167 (Mo. Ct. App. 2005).

142. Carol M. Anderson et al., *Why Lower Income Mothers Do Not Engage With the Formal Mental Health Care System: Perceived Barriers to Care*, 16 QUALITATIVE HEALTH RES. 926, 926 (2006).

143. Judge, *supra* note 11, at 164.

144. “Bipolar I Disorder” is characterized by one or more Manic or Mixed Episodes, usually accompanied by Major Depressive Episodes.” AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 2, at 382.

145. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 225 (3d ed. 1980).

In this group of disorders, anxiety is either the predominant disturbance, as in a Panic Disorder and Generalized Anxiety Disorder, or anxiety is experienced if the individual attempts to master the symptoms, as in confronting the dreaded object or situation in a Phobic Disorder or resisting the obsessions or compulsions in Obsessive Compulsive Disorder. Diagnosis of an anxiety disorder is not made if the anxiety is due to another disorder such as Schizophrenia, an Affective Disorder, or an Organic Mental Disorder.

Id.

146. The essential features of ADHD are developmentally-inappropriate inattention and/or hyperactivity-impulsivity. *Id.* at 41.

147. Schizophrenic disorders feature “the presence of certain psychotic features during the active phase of the illness, characteristic symptoms involving multiple psychological processes, deterioration from a previous level of functioning, onset before age 45, and a duration of at least six months.” *Id.* at 181.

148. “The essential feature of Alcohol Abuse is a pattern of pathological use for at least a month that causes impairment in social or occupational functioning.” AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 146, at 169.

149. Diagnostic criteria for major depression includes (a) one or more depressive episodes and (b) no occurrence of a manic episode or hypomanic episode. AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 2, at 369.

150. AM. ACAD. OF CHILD AND ADOLESCENT PSYCHIATRY, AACAP FACTS FOR FAMILIES NO. 39: CHILDREN OF PARENTS WITH MENTAL ILLNESS (Dec. 2008), available at http://www.aacap.org/galleries/FactsForFamilies/39_children_of_parents_with_mental_illness.pdf.

child and can cause the child to have adjustment and/or developmental problems.¹⁵¹ Additionally, because of the social stigma associated with mental illness, parents often choose to forego treatment to avoid having their parenting abilities scrutinized.¹⁵²

Despite the increased risks associated with having a parent with a mental illness, the majority of children raised by parents with mental illness will never develop the psychiatric disorder of their parents.¹⁵³ In fact, research has suggested that children are at heightened risk for psychopathology when taken from their parents and put into foster care.¹⁵⁴ Long-term separation from a parent can result in a negative impact on the well-being and functioning of both children and parents.¹⁵⁵ Thus, removing a child from his or her parent – in some situations – can ultimately cause more harm than good.

Although research shows increased risk to children in certain scenarios, substantial empirical evidence has shown that mental illness affects every parent in a unique way, as every parent's situation is different.¹⁵⁶ Thus, it is essential that every situation be individually scrutinized when determining whether ending the parent-child relationship is in the best interest of the child. Even though Bipolar Disorder may cause sporadic shifts in Angela Williams's mood, energy, and ability to function, with proper treatment and services Angela can control the symptoms, lead a normal life, and raise a family.¹⁵⁷ The stigma of mental illness puts mentally ill parents at a severe disadvantage in TPR cases, despite the fact that many individuals who have a mental illness are able to lead productive and healthy lifestyles.¹⁵⁸

Another stereotype that parents with mental illness are constantly combating is that mentally ill individuals are inherently dangerous.¹⁵⁹ Highly publicized, sensationalized news stories of mentally ill parents abusing or killing their children fuel the public's perception that mentally ill individuals

151. Judge, *supra* note 11, at 164 (citing Marian Radke-Yarrow et al., *Young Children of Affectively Ill Parents: A Longitudinal Study of Psychosocial Development*, 31 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 68, 68–77 (1992)).

152. Glennon, *supra* note 9, at 293.

153. Judge, *supra* note 11, at 164.

154. Jacobsen & Miller, *supra* note 28, at 650.

155. *Id.*

156. *Id.* at 650–51 (citing APFEL & HANDEL, MADNESS AND LOSS OF MOTHERHOOD: SEXUALITY, REPRODUCTION, AND LONG-TERM MENTAL ILLNESS (1993)); J. BOWLBY, A SECURE BASE: CLINICAL APPLICATIONS OF ATTACHMENT THEORY (Routledge & Kegan Paul 1988); FA Rogosch et al., *Determinants of Parenting Attitudes in Mothers with Severe Psychopathology*, 4 DEV. & PSYCHOPATHOLOGY 469 (1992)).

157. See generally BIPOLAR DISORDER, *supra* note 2, at 1.

158. *Id.*

159. Gallager, *supra* note 113, at 239. See also Glennon, *supra* note 9, at 292 (stating that studies showed that mental illness “continued to carry a social stigma, and was perceived to be linked to violent behavior”).

are unfit parents.¹⁶⁰ However, “the vast majority of mentally ill individuals are not more dangerous than others in the general population.”¹⁶¹ As a result of this misplaced fear, parents with mental illness have difficulty convincing child welfare caseworkers that they are able to be good parents.¹⁶² Negative perceptions about the mentally ill may blind caseworkers, causing the focus to shift from preservation of the parent-child relationship to termination of parental rights.¹⁶³ The child welfare system as a whole has moved its focus “away from preserving the biological family to providing children safety and ‘permanent’ adoptive families, despite the human cost of disrupting the child’s original family.”¹⁶⁴

It is important for courts to recognize published research that clearly disproves stereotypes about the “certain danger” that parents with mental illness pose to their children. By ridding the courts of bias through education, parents with mental illness have a better chance at being seen as individuals instead of stereotypes.

C. Judicial Education on Mental Illness Will Help Judges Interpret the Best Interests Standard

Missouri Supreme Court Rule 15.05(g) states that “[e]ach judge of the family court division . . . shall complete . . . a course of training in family law accredited by this Court’s judicial education committee Each year thereafter, such judges . . . shall complete at least six hours of continuing legal education courses . . . relating to family court issues and law.”¹⁶⁵ As of this writing, however, there are no specific requirements that judges be educated about mental health issues or how to appropriately adjudicate cases involving individuals with mental illness.

160. Gallagher, *supra* note 113, at 234. See, e.g., Jim Yardley, *Texas Jury Convicts Mother Who Drowned Her Children*, N.Y. TIMES, Mar. 13, 2002, at A23; Angela K. Brown, *Psychiatrist Says Yates Was Psychotic*, WASH. POST ONLINE, June 29, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/29/AR200606062900411.html> (last visited Feb. 9, 2009).

161. Gallagher, *supra* note 113, at 239 (quoting HARRIET P. LEFLEY, FAMILY CAREGIVING IN MENTAL ILLNESS 72 (Diane S. Foster ed., 1996)).

162. Glennon, *supra* note 9, at 291–92 (“These attitudes may make child welfare caseworkers less likely to take steps to preserve or reunify families where parents have mental illnesses. Most damaging to parents involve in the child welfare system is the deeply embedded belief that individuals with mental illnesses are unpredictable and dangerous.”).

163. *Id.* at 274 (“Child welfare services are often ill-suited to the needs of parents with mental illnesses, and their cases are managed by child welfare workers with little understanding of mental illness Moreover, many child welfare caseworkers often have excessive caseloads and few effective services to which to refer families.”).

164. *Id.* at 277.

165. MO. SUP. CT. R. 15.05(g) (2005).

Scholars have deemed judicial education regarding mental health issues and the efficacy of alternative treatment programs as “haphazard.”¹⁶⁶ Judicial education on mental health often consists of a judge “absorbing expertise” from information presented in court.¹⁶⁷ This type of on-the-job training is dangerous, as it does not ensure that judges are aware of the most recent, highest quality data and may lead to inconsistent treatment of parents with mental disabilities.¹⁶⁸

Some Missouri courts have recognized the need for more specialized education for judges dealing with mentally ill individuals. As of April 2003, five counties in Missouri have Mental Health Court Divisions.¹⁶⁹ The focus of Mental Health Court has been on “root causes that contribute to criminal involvement of persons in the criminal justice population.”¹⁷⁰ The criminal courts in Missouri have recognized that individuals with mental disabilities have unique needs in the justice system.¹⁷¹ Thus, judges in Mental Health Courts receive training on mental health issues of criminal offenders and take an active, therapeutically oriented role in their treatment.¹⁷² Unfortunately, this trend towards focusing on special needs of the mentally disabled has not extended to family courts and, in Missouri, is available only in criminal courts.

Currently in Missouri there are minimal standards for judges in determining a parent has a mental condition. No expert is statutorily required to come into court to prove a mental condition. A social worker fresh out of college, having had little or no special training in mental illness, is often the individual doing the investigation and social study of the mentally ill parent.¹⁷³ Judges may be given incomplete or incorrect information at trial. While scholars advocate that case workers in the child welfare system must be

166. See, e.g., Jessie B. Gunther, *Reflections on the Challenging Proliferation of Mental Health Issues in the District Court and the Need for Judicial Education*, 57 ME. L. REV. 541, 549 (2005).

167. *Id.*

168. *Id.* at 550.

169. Your Missouri Courts, Mental Health Court Divisions, <http://www.courts.mo.gov/page.jsp?id=310> (last visited Jan. 27, 2009) (including St. Louis City Municipal Court, Jackson County, St. Louis County, Greene County, and Boone County).

170. *Id.*

171. *Id.*

172. U.S. DEPARTMENT OF JUSTICE, EMERGING JUDICIAL STRATEGIES FOR THE MENTALLY ILL IN THE CRIMINAL CASELOAD: MENTAL HEALTH COURTS IN FORT LAUDERDALE, SEATTLE, SAN BERNARDINO, AND ANCHORAGE 66 (Apr. 2000), <http://www.ncjrs.gov/pdffiles1/bja/182504.pdf> (“The judge deals and interacts with the participant directly, and assigns rewards and sanctions as may be appropriate, including selective use of jail or changes in placement options.”).

173. *In re C.W.*, No. ED 87800 2006 Mo. App. LEXIS 1430, at *2 (Mo. Ct. App. Sept. 26, 2006) (stating that Lindsay Ulen, a recent social work graduate, was assigned to Angela and Christopher’s case).

educated about the mental illness, its treatment, recovery, and support services,¹⁷⁴ judicial education should also be increased to assist judges in weighing evidence presented in court.

General continuing legal education (CLE) is required for judges, though there are no specific requirements for training on mental illness.¹⁷⁵ Two national organizations, the National Judicial College¹⁷⁶ (NJC) and the National Council of Juvenile and Family Court Judges¹⁷⁷ (NCJFCJ) sponsor training programs for judges, as do many state programs. The NJC offers judicial education programs focusing on managing cases involving individuals with mental disabilities in an attempt to help judges “identify and assess individuals with mental health disorders and employ judicial strategies to address them effectively.”¹⁷⁸ As of this writing, the NCJFCJ does not have any trainings or conferences relating to mental illness scheduled (though traditionally “hot topics” like drug court and domestic violence are addressed).¹⁷⁹ Unfortunately, mental health education is often overlooked,¹⁸⁰ and Missouri judges are not required to participate specifically in CLEs focusing on mental health issues.

As TPR is the most extreme of civil judgments for a parent and child, judicial education must be correspondingly extreme. Some states require that judges complete specific education courses for handling capital cases immediately upon being seated on the criminal bench.¹⁸¹ These courses are required before a judge can hear a capital case.¹⁸² Further, judges are required to take follow up CLE “refresher” courses to stay up to date on death penalty happenings.¹⁸³ Trial judges should be required to participate in similar training regarding mental illness and termination of parental rights before they can preside over a TPR proceeding.

Judicial education about mentally ill conditions and effectiveness of treatment is necessary to prevent inconsistent treatment and to promote confidence in the outcomes of TPR proceedings.¹⁸⁴ Although judges are generally expected to be neutral arbiters, some juvenile cases give the court an

174. Glennon, *supra* note 9, at 298.

175. MO. SUP. CT. R. 15.05(g) (2005).

176. The National Judicial College, Managing Cases Involving Persons with Mental Disabilities, http://www.judges.org/planned_2009.html (last visited Feb. 9, 2009).

177. National Council of Juvenile and Family Court Judges, Training and Conferences, <http://www.ncjfcj.org/content/blogcategory/267/315/> (last visited Feb. 9, 2009).

178. The National Judicial College, *supra* note 177.

179. National Council of Juvenile and Family Court Judges, *supra* note 178.

180. See Gunther, *supra* note 167, at 549.

181. FL. R. JUD. ADMIN. 2.215(b)(10)(A) (2009).

182. *Id.*

183. *Id.*

184. Gunther, *supra* note 167, at 551.

affirmative duty to enter a decree that is in the best interests of the children.¹⁸⁵ While judges must ultimately defer to available expert evidence,¹⁸⁶ requiring judicial education on mental illness can assist trial court judges in weighing expert testimony's credibility and ultimately guide the court to a situation that is *truly* in the best interest of the child.

VII. CONCLUSION

Individuals with mental illness are still people; they are not faceless statistics, but are mothers, fathers, friends, and lovers.¹⁸⁷ Individuals with mental illness are able to hold jobs, take care of responsibilities, and maintain a quote "normal" existence.¹⁸⁸ Most mental illnesses, including Bipolar Disorder, are treatable.¹⁸⁹ However, stereotypes and stigma rear their ugly heads when individuals with mental illness decide to become parents.

Currently, legal protections for parents with mental illness are insufficient under both state and federal law.¹⁹⁰ Fortunately, inconsistent results in TPR cases can be avoided. Simply by using more precise terminology in statutes, increasing statutory guidance and limiting judicial discretion in interpreting "mental condition," and calling for legislative elaboration regarding evidentiary requirements necessary to prove duration and severity of mental conditions, will enable trial court judges to look specifically to the parent's ability to care for their child rather than that parent's generic condition.

In order to ensure that judges consider individual circumstances of each family in TPR cases, it is essential that courts are aware of the risks and non-risks of children raised by parents with mental illness. In many cases, benefits of being raised by a parent outweigh the risks to the child stemming from mental illness. Courts need to understand the research disproving stereotyped notions of inherently "dangerous" mentally ill parents and acknowledge that mentally ill individuals can lead healthy, productive lives. Finally, because insufficient judicial education of family court judges may contribute to unequal or ineffective treatment of parents with mental disabilities in the court system,

185. See e.g., *K.O.H. ex rel. Bax v. Huhn*, 69 S.W.3d 142, 145 (Mo. Ct. App. 2002).

186. Gunther, *supra* note 167, at 551.

187. See generally BIPOLAR DISORDER, *supra* note 2, at 1.

188. *Id.*

189. See Kristine Bell, *Pennsylvania's Act 21: The Legal & Social Implications of Allowing the Juvenile System to Commit Sexual Offenders Indefinitely*, 27 J. JUV. L. 56, 60 (2006) ("[M]ental illness is a 'biologically based brain disorder' that can be treated."); SAMHSA's National Mental Health Information Center, Mood Disorders, <http://mentalhealth.samhsa.gov/publications/allpubs/ken98-0049/default.asp> (last visited Feb. 9, 2009) ("Like other diseases, mental illnesses can be treated. The good news is that most people who have mental illnesses, even serious ones, can lead productive lives with proper treatment.").

190. See generally Bazelon, *supra* note 25, at 3.

the need for judicial education on mental health issues is necessary to aid family court judges in weighing the sufficiency of evidence presented.

The decision in *In re C.W.* marked the Supreme Court of Missouri's commitment to casting the decades of stigma aside and assessing each parent's individual ability to provide for the care, custody, and control of their child.¹⁹¹ Unfortunately, Angela Williams has had to wait far too long to be treated like an individual. The circuit court failed to look at Angela as a parent, and instead regarded her as a condition or disorder.¹⁹² The circuit court relied on appallingly outdated, generalized statements about Bipolar Disorder in an effort to permanently sever the relationship between Angela and her son.¹⁹³ Perhaps if the trial judge had been exposed to the literature regarding the reasons that an individualized assessment is necessary and appropriate and/or evidence of the effectiveness of treatment for Bipolar disorder, Angela and Christopher may not have been separated for nearly seven years.¹⁹⁴

In the fall of 2009, Angela entered into an out-of-court agreement with Christopher's foster family, granting the foster family guardianship over Christopher.¹⁹⁵ Pursuant to the agreement, Angela enjoys unsupervised weekday visits with Christopher for approximately sixteen to twenty hours per month, plus one eight to twelve hour weekend visit per month.¹⁹⁶ Angela receives mental health assessments quarterly, and continues to work to manage her Bipolar Disorder.¹⁹⁷ The guardianship agreement leaves the door open for Angela to seek full parental rights in the future.¹⁹⁸

Though nearly seven years of foster care and a rollercoaster ride through the court system have made it difficult,¹⁹⁹ Angela continues to work to build a bond with her son. While the juvenile court still monitors both Angela and Christopher's guardians, hopes are high that the family court will release jurisdiction in 2010.²⁰⁰ Judicial education paired with the Supreme Court of Missouri's demand for individualized assessments will ideally serve to prevent

191. See *In re C.W.*, 211 S.W.3d at 102 (remanding the circuit court's decision to terminate parental rights based on outdated expert testimony and improper procedure).

192. See, e.g., *id.* at 99 (describing the lower court's analysis based on Angela's past mental health issues as the basis for removal of Christopher from her care).

193. *Id.*

194. See *id.* at 96 (stating that Angela and Christopher have been separated since Christopher's birth in June of 2003).

195. Telephone Interview with David Orzel, *supra* note 7. Because Angela and the foster family reached an agreement out of court, the court did not make an individualized assessment of Angela's current ability to parent.

196. *Id.*

197. *Id.*

198. *Id.* Angela has expressed that she would only seek to terminate the guardianship if it is something that both she and Christopher want in the future.

199. See *In re C.W.*, 211 S.W.3d at 101.

200. Telephone Interview with David Orzel, *supra* note 7.

this kind of drawn-out family disruption and to ensure fair process in future TPR cases.

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