Prospective Abuse and Neglect - The Termination of Parental Rights

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Abstract

Immediately after his December 1985 birth, a newborn baby boy, W.L.P., was taken from his parents, through a Florida Department of Health and Rehabilitative Services (hereinafter HRS) proceeding.
the prisoner, conduct a resentencing or resentenced him or grant him a new trial or correct the sentence as may appear appropriate.

(f) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(g) A second or successive motion may be dismissed if the judge court finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge court finds that the failure of the movant or his the movant's attorney to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

(g) An appeal may be taken to the appropriate appellate court from the order entered on the motion as from a final judgment on application for writ of habeas corpus. All orders denying motions for post-conviction relief shall include a statement that the movant has the right to appeal within thirty days of the rendition of the order. The prisoner may file a motion for a reharing of any order denying a motion under this rule within fifteen days of the date of service of the order. The clerk of the court shall promptly serve upon the prisoner a copy of any order denying a motion for post-conviction relief or denying a motion for rehearing noting thereby the date of service by an appropriate certification of service. The clerk shall note on the prisoner's copy the date of service in a certificate of service.

(h) An application for writ of habeas corpus shall not be entertained in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this rule, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him original sentencing court, or that such court has denied him relief to the prisoner, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his the prisoner's detention.

Prospective Abuse and Neglect — The Termination of Parental Rights

Introduction

Immediately after his December 1985 birth, a newborn baby boy, W.L.P., was taken from his parents, through a Florida Department of Health and Rehabilitative Services (hereinafter HRS) proceeding. In Padgett v. Department of Health and Rehabilitative Services, the court determined that if left with his natural parents, who had been guilty of abuse and neglect with other children, W.L.P. would also be abused and/or neglected. However, since the parents, Thomas Padgett and Mary Hartline Padgett, never had custody of W.L.P., there was no evidence that they ever abused or neglected W.L.P. Nonetheless, in August 1988, the final order of permanent commitment was entered, and the case is currently pending appeal.

On June 1, 1989, pursuant to Padgett, the question of whether the concept of "prospective abuse, neglect or abandonment" is a viable one was certified to the Florida Supreme Court as a question of great public importance. The purpose of this article is to evaluate the validity of the concept of "prospective abuse or neglect" and its applicability to the termination of parental rights. Aside from affecting parents and

2. Id.
3. Id.
4. THE FLORIDA BAR CONTINUING LEGAL EDUCATION, FLORIDA JUVENILE LAW AND PRACTICE, §15-5 (2d ed. 1988) [hereinafter FLA. BAR], defines permanent commitment as "the permanent termination of parental rights."
5. Padgett, 543 So. 2d at 1318.
6. Id.
7. This article will only discuss the topics of abuse and neglect because in In re J.L.P., 416 So. 2d 1250 (Fla. 4th Dist. Ct. App. 1982), the court stated: abandonment may not be considered prospectively in view of the language of section 39.01(1), Florida Statutes (Supp. 1980), which provides: 'Abandoned' means a situation in which a parent who, while being able, makes no provision for the child's support and makes no effort to communicate with the child for a period of 6 months or longer . . . .
children, the Florida Supreme Court's response to this certified question will undoubtedly affect many professionals such as lawyers, physicians, nurses, teachers, social workers, child care workers, and police.4

Before discussing "prospective abuse and neglect," this article examines the current United States and Florida laws pertaining to parental termination. This examination will include a brief history of parental rights and termination, as well as the legal and social dilemmas associated with such termination. The next section explores the extent of the child abuse and reabuse problem. Following is a discussion of Florida's parental termination procedures and "prospective abuse" cases and a brief examination of how other states have responded to and analyzed this concept. The next section examines, through the use of psychological articles and studies, the concept of "prospective abuse" to determine if the concept is viable and objective enough to support the termination of an individual's "right" to rear a child. Additionally, this article compares the actual characteristics of individuals whose parental rights have been terminated as a result of actual and prospective child abuse to those characteristics that the psychologists label as predictors of child abuse.

Background - the Right To "Bring Up" Children

In Meyer v. Nebraska,6 the United States Supreme Court held that the fourteenth amendment of the United States Constitution guarantees an individual the liberty to "marry, establish a home and bring up children."7 Later, in Moore v. City of East Cleveland, Ohio,8 the Court held that "the institution of the family is deeply rooted in this

Id. at 1252, n.3.
However, in 1987 the definition of "abandoned" was changed, and the six month requirement was removed. The revised definition states that "[a]bandoned means a situation in which the parent . . . while being able, makes no provision for the child's support and makes no effort to communicate with the child, which situation is sufficient to evince a willful rejection of parental obligations . . . ." FLA. STAT. § 39.01(1) (1987).
Therefore, it is possible that the Florida Supreme Court will find that the revised definition of "abandoned" supports a finding of prospective abandonment.

8. For example, social workers and police officers will have to be extremely knowledgeable of the characteristics to predict child abuse since they are often the first to investigate the situations.

10. Id. at 399.
12. Id. at 503.
14. Id. at 751.
15. Id. at 753.
16. Id. at 747-48.
18. F.LA. BAR, supra note 4, at 15-8; Myers, Abuse and Neglect of the Unborn: Can the State Intervene?, 23 DUQ. L. REV. 1, 21-24 (1984); See also, Wald, supra note 17, at 246.
19. Myers, supra note 18, at 22 (citing Development in the Law - The Constitution and the Family, 93 HARV. L. REV. 1156, 1199 (1980)).
20. Myers, supra note 18, at 23.
21. Id. at 24 (citing Developments in the Law - The Constitution and the Family, 93 HARV. L. REV. 1156, 1198-99 (1980)).
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Parents, then, do not have exclusive control over the lives of their children. When a state intervenes into the “right of family integrity,” it is asserting its parens patriae authority and its police power. “The parens patriae power . . . is the state’s limited paternalistic power to protect or promote the welfare of certain individuals, like young children . . . who lack the capacity to act in their own best interests.” Based on their parens patriae authority, states may enact statutes to govern guardianship, civil commitment of the mentally ill, juvenile courts, and child abuse and neglect.

The police power is the state’s other source of authority allowing it to intervene into the “right of family integrity.” That is the state’s authority “both to prevent its citizens from harming one another and to promote all aspects of the public welfare.” The state’s police power

12. Id. at 503.
14. Id. at 751.
15. Id. at 753.
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allows it to foster the "public health, safety, morals, or general welfare."  

As discussed, when confronted with the threat of parental rights termination, a parent's fourteenth amendment right to rear children is in jeopardy. Consequently, the state may only utilize its powers when it can show a compelling state interest and when no less burdensome alternative is available.**

In addition to the legal concerns involved in removing a child from his home, there are also social dilemmas. For example, "the natural rights of parents and children to family integrity operate against the interest of the state in child protection and, sometimes, against the best interests of the child."*** There are times when a child will definitely be "better off" when parental rights are terminated. However, for that particular child, adoption may not be feasible or available.**

In Santosky, the United States Supreme Court noted that it is a "hazardous assumption" that termination of the natural parents' rights will invariably benefit the child.** "Even when a child's natural home is imperfect, permanent removal from that home will not necessarily improve his welfare."** Although there are no answers to these dilemmas, they are constant concerns of social workers, lawyers, and judges—some of the individuals whose services determine the fate of the parents and the child.

The Problem of Child Abuse and Neglect

Child abuse and neglect are both national and local problems. "One of the most disturbing aspects of child abuse is its tendency to reoccur."** Reabuse rates of abusers who are in treatment range from

16% to 66.8%.** Additionally, post treatment reabuse rates have varied from 18.5% to 33% to 50% to 66.6%, depending on the study.**

Two approaches to measure abuse repetition are recurrence and recidivism. Recurrence is the "occurrence of one or more abuse incidents after an initial incident."** Recurrence can be measured by the frequency count of legal charges of abuse or by the frequency count of verified abuse incidents noted in the case records. Recidivism is a second approach to measure abuse repetition. Recidivism is a "further occurrence of abuse after termination of service to a family following the first citation for abuse."** Recidivism, either frequency count of legal charges of abuse or frequency count of verified abuse incidents may be used as a measure.**

A 1979 study reported findings on a follow up study of 328 families who were provided services for child abuse in two counties of eastern Pennsylvania during the ten year period of 1967-1976.** The study revealed that among the 328 families, 260 had at least one valid charge of child abuse.** However, case records of 286 families revealed verified incidents of abuse.**

Regarding recurrence, of the 260 families with at least one valid charge, there was a total of 349 citations,** and 903 incidents of abuse.

29. Id. "The discrepancy often found between official and unofficial rates of reported reabuse suggests that the true incidence of reabuse is seriously underreported in official statistics." Id. (citing Herrenkohl, Herrenkohl, Egolf & Seech, The Repetition of Child Abuse: How Frequently Does It Occur? 3 Child Abuse and Neglect 57 (1979) (hereinafter "Herrenkohl").


31. Herrenkohl, supra note 29.
32. Id. at 68.
33. Id.
34. Id.
35. Id.
36. Herrenkohl, supra note 29, at 68.
37. Id. at 67.
38. Id. at 68.
39. Id. In case records of the twenty-six families for which there was not a validated charge, there was evidence that abuse had occurred. However, for various reasons, including self-referral of the family, there was not a validated charge. Id.
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in the 286 families with verified incidents were reported. As for recidivism, there were 192 cases which closed among the 260 validly cited families, of the closed cases seventy-three were re-opened. Twenty-one of the families with re-opened cases were found to have further incidents of abuse. Among the 286 families with a verified incident, of which 206 cases had closed, eighty-four were re-opened. Thirty-eight of the families with re-opened cases were found to have further incidents of abuse. This number represents 13.2% of all 286 families or 18.5% of those families who cases had been closed. The degree to which official reports of abuse potentially underestimate the degree of recurrent abuse is significant. For instance, for families with identified abuse, the 25.4% low recurrence percentage for official reports as compared to the much higher percentage for verified incidents 66.8%, means that the magnitude of the problem is underestimated if recurrence is assessed by means of charges. The researchers suggest that "a practical consequence of this underestimation may be that the potential for recurrent abuse may not be given the attention it deserves." Despite the methodological shortcomings of the research on reabuse rates, such rates appear to be high both during and after treatment.

Of significant importance to the issue of prospective abuse, especially where newborns are involved, is the fact that a significant association exists between recurrence and a child's age. Recurrent abuse occurs more frequently in newborn through five year old children than in groups of six through eleven year olds or children over eleven years old.

The terms "abuse" and "neglect" often elicit different meanings from different people. What one parent labels discipline, another will label abuse or neglect. For example, parents are allowed to hit their children; however, it becomes "abuse" when the hitting becomes inappropriate. There is a wide range of variation in the types of situations potentially considered "inappropriate.

Nearly all states have their own set of definitions for abuse and neglect. However, nearly all states' definitions conform to those provided in the Child Abuse and Neglect Prevention and Treatment Act.

Pursuant to a Congressional mandate in the Child Abuse Amendments of 1984, the Study of National Incidence and Prevalence of Child Abuse and Neglect (NIS-2), was commissioned to assess the current national incidence of abuse and neglect and to determine how the severity, frequency and character of maltreatment changed from its earlier 1980 study. The key results of the NIS-2 study estimate that "in 1986, more than one million children nationwide . . . met the stringent requirement of having already experienced demonstrable harm as a result of abuse or neglect." These results represented a sixty-four percent increase in countable cases of abuse and neglect over the estimate of 625,100 provided by the 1980 incidence study. However, the researchers feel that these figures represent an improvement in the pro-

52. Herrenkohl, supra note 29, at 71.
54. Id.
56. Id. at xii. The Child Abuse and Neglect Prevention and Treatment Act is a federal statute which provides basic State Grants. 42 U.S.C. § 5101 (1982).
58. STUDY FINDINGS, supra note 55. This study was commissioned by the National Center on Child Abuse and Neglect, Administration for Children, Youth and Families in the Office of Human Development Services, Department of Health and Human Services.
59. STUDY FINDINGS, supra note 55, at 7-1. Approximately 1,025,900 had already experienced demonstrable harm.
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professionals who deal with mistreated children rather than an increase in actual child abuse. The researchers state that

it seems reasonable to suggest that the findings reported here do not necessarily imply an increase in the actual incidence of child abuse and neglect in the nation, but are consistent with the suggestion that, in the interim since 1980, professionals have become better attuned to the cues of maltreatment . . . .

This particular study is unique since, in addition to reporting on actual abuse, it also used revised definitions which included children who had been endangered, but not yet demonstrably harmed, by abuse or neglect. The endangerment standard included cases where a child's health or safety was endangered through abusive or neglectful treatment. Hence, according to the endangered standard, "all cases were considered to meet the revised harm criterion if maltreatment was officially substantiated by CPS [Child Protective Services] or if non-CPS professionals judged the child's health or well-being to have been seriously endangered by the maltreatment they reported." For example, a two-year old child who was left home alone for several hours may have emerged from the incident unscathed, but the police officer or other community professional who submitted a data form on the case may have judged this treatment as having seriously endangered the child.

When applying the revised standards, more than one and a half million children were abused or neglected in 1986 throughout the United States. These figures translate into an annual incidence rate of 16.3 children per 1,000 children in the nation who experienced demonstrable harm from abuse and neglect and 25.2 children per 1,000 who are endangered or already harmed as a result of abuse or neglect.

61. Id. at 7-4 (emphasis in the original).
62. Id. Another interesting aspect of the NIS-2 study is its section concerning the relation of abuse and neglect to child, family and county characteristics. That section of the NIS-2 study is be further discussed in this article's section "Predicting Prospective Abuse and Neglect", infra at notes 188-234 and accompanying text.
63. STUDY FINDINGS, supra note 55, at 2-7.
64. Id.
65. Id. at 2-7 n.14.
66. Id. 7-1. Approximately 1,584,700 children were abused or neglected. Id.
67. Id.
68. STUDY FINDINGS, supra note 55, at 7-1-7-2.
69. CHILD ABUSE AND NEGLECT REPORTING AND INVESTIGATION - POLICY GUIDELINES FOR DECISION MAKING (D. Besharov, Rapporteur 1988) [hereinafter POLICY GUIDELINES] The report states that "the following statistics concerning reported cases are derived from various reports of the American Humane Association." Id. at 1.
70. DEPARTMENT OF HEALTH AND HUMAN SERVICES OFFICE OF HUMAN DEVELOPMENT SERVICES ADMINISTRATION FOR CHILDREN, YOUTH AND FAMILIES NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, A REPORT TO CONGRESS JOINING TOGETHER TO FIGHT CHILD ABUSE, (January 1986), [hereinafter JOINING TOGETHER] These statistics are based on the American Humane Association's findings.
72. DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, CHILD WELFARE SERVICES IN FLORIDA (August 1985) [hereinafter CHILDO WELFARE]. This document is the State Plan for Child Welfare Services in Florida for the two year period which began in July 1985. Id. at Preface (not paginated). Pursuant to federal regulations IRS must develop a plan describing all child welfare services, regardless of funding source, identifying program deficiencies and indicating major activities planned for strengthening and expanding the range of existing child welfare services. Id. The report also states that "the numbers . . . are not unduplicated due to children who may have been reported two or more times during the year." Id. at 2.
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68. STUDY FINDINGS, supra note 55, at 7-1, 7-2. These findings should not be interpreted as an estimate of the full extent of child abuse and neglect in the U.S. The study design only tapped into cases known to CPS [Child Protective Services] and recognized by professionals in specific categories of investigatory and non-investigatory community agencies. It made no attempt to assess the incidence of cases known to professionals in other agencies and institutions (e.g., private schools, private physicians, mental clinics not affiliated with hospitals or health departments, clinical social workers or mental health professionals in private practice, etc.). Nor did it attempt to identify cases known to neighbors, relatives, or parents and children themselves.

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by HRS during fiscal year 1984-85 revealed credible evidence which would cause a reasonable person to believe that eighteen out of 1,000 children under eighteen years old were abused or neglected.\textsuperscript{76}

During January-June 1984, eighty-six percent of all indicated\textsuperscript{78} allegations involved parents.\textsuperscript{79} Additionally, mothers were most often indicated (48.6\%) while males, including fathers (16.3\%) and stepfathers (4.6\%), accounted for another 20.9\%.\textsuperscript{78} The American Humane Association found that “43 percent of the reported families were headed by a single female caretaker, compared to only 19 percent of all U.S. families”\textsuperscript{79} and that “43 percent were receiving public assistance, compared to about 12 percent of all U.S. families.”\textsuperscript{79} Forty-one percent of all involved children are five years old or younger, and girls were involved in five percent more of the indicated reports of abuse and neglect than boys.\textsuperscript{80}

The Florida HRS report states that “black children, at 28.4%, are overrepresented in relation to their percentage (21.8\%) of the total child population of the state.” However, this “overrepresentation of minority children has been a common characteristic of national child abuse and neglect reporting data since 1976 [when the American Humane Association first began analyzing national data].”\textsuperscript{79} According to the American Humane Association, “possible reasons for this bias are investigative prioritization, biased reporting sources, as well as conditions associated with poverty and unemployment.”\textsuperscript{80}

There are many types of dispositions available in cases where maltreatment of a child by his or her parents has occurred. The range includes the least intrusive, where no further action is taken beyond the investigation, to involuntary, court ordered supervision of the child and family, to the most intrusive which includes removal and placement of the child in foster care.\textsuperscript{82}

Foster care is intended to provide temporary placement of children who are removed from their family due to abuse, neglect or exploitation by the parent or guardian. Its goal is “towards achieving a situation in which a child can return home to his natural parents.”\textsuperscript{84} “If reunification is not possible, then permanency can be effected either through termination of parental rights for those children who could best be served by adoption, through formalization of long-term foster care agreements or by preparing the child for adulthood through an independent living program.”\textsuperscript{85}

According to HRS’s 1984-85 report, four percent of the abused or neglected child population, approximately 2,100 children, were involved in foster care.\textsuperscript{86} However, eleven percent of the children in foster care were permanently committed and available for adoption.\textsuperscript{87} In other words, the parents of these children have had their parental rights terminated.

As noted, child abuse and neglect is a recurring national and local concern. Accordingly, to protect children from injury, many courts have determined that sometimes removing a child from the “potentially dangerous” environment of its parents will help solve this problem.

Parental Rights Termination - Florida

In Florida, the phrases “termination of parental rights” and “permanent commitment” are basically synonymous.\textsuperscript{88} Once parental rights are terminated, HRS or a licensed child-placing agency obtains legal custody of the child and the parents are “legal strangers to that child.”\textsuperscript{88} The Florida legislature’s goal of placing the child in a permanent home can be accomplished since the child is now available for adoption.

The Florida Legislature enacted chapters 39\textsuperscript{89} and 409\textsuperscript{90} of the

\textsuperscript{74} Id. at 9.

\textsuperscript{75} “Indicated” means that credible evidence was gathered which would cause a reasonable person to believe a child was abused or neglected. Id.

\textsuperscript{76} Id. at 18.

\textsuperscript{77} CHILD WELFARE, supra note 72, at 18.

\textsuperscript{78} Id. However, within the reported statistics of child abuse and neglect, 40\% of the cases occur in families headed by single females. JOINING TOGETHER, supra note 70, at 5.

\textsuperscript{79} CHILD WELFARE, supra note 72, at 18 (citing the American Humane Association, 1983 Highlights).

\textsuperscript{80} Id. at 19-20.

\textsuperscript{81} Id. at 19.

\textsuperscript{82} Id. (citing American Humane Association, 1983 Highlights).

\textsuperscript{83} CHILD WELFARE, supra note 72, at 20.

\textsuperscript{84} Id. at 27.

\textsuperscript{85} Id.

\textsuperscript{86} Id. at 20.

\textsuperscript{87} CHILD WELFARE, supra note 72, at 32-33. “Adoption is the permanent plan offering the most stability to the foster child who cannot return to his parents.” Id.

\textsuperscript{88} FLA. BAR, supra note 4, at § 15-5.

\textsuperscript{89} Id.

\textsuperscript{90} FLA. STAT. § 39.001 (1987) stating that:

(2) The purposes of this chapter are: . . . (c) To preserve and strengthen
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by HRS during fiscal year 1984-85 revealed credible evidence which would cause a reasonable person to believe that eighteen out of 1,000 children under eighteen years old were abused or neglected. 74

During January-June 1984, eighty-six percent of all indicated 84 allegations involved parents. 75 Additionally, mothers were most often indicated (48.6%) while males, including fathers (16.3%) and stepfathers (4.6%), accounted for another 20.9%. 76 The American Humane Association found that "43 percent of the reported families were headed by a single female caretaker, compared to only 19 percent of all U.S. families" 77 and that "43 percent were receiving public assistance, compared to about 12 percent of all U.S. families." 78 Forty-one percent of all involved children are five years old or younger, and girls were involved in five percent more of the indicated reports of abuse and neglect than boys. 80

The Florida HRS report states that "black children, at 28.4%, are overrepresented in relation to their percentage (21.8%) of the total child population of the state." However, this "overrepresentation of minority children has been a common characteristic of national child abuse and neglect reporting data since 1976 [when the American Humane Association first began analyzing national data]." 79 According to the American Humane Association, "possible reasons for this bias are investigative prioritization, biased reporting sources, as well as conditions associated with poverty and unemployment." 82

There are many types of dispositions available in cases where maltreatment of a child by his or her parents has occurred. The range includes the least intrusive, where no further action is taken beyond the investigation, to involuntary, court ordered supervision of the child and family, to the most intrusive which includes removal and placement of

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Florida Statutes to govern permanent commitments and to serve the legislative goals of either reuniting the dependent child with his parent(s) or placing the child in a permanent home as quickly as possible. Florida agrees that "the right to the integrity of the family is the child's family ties whenever possible, removing him from the custody of his parents only when his welfare or the safety and protection of the public cannot be adequately safeguarded without such removal; and, when the child is removed from his own family, to secure for him custody, care, and discipline as nearly as possible equivalent to that which should have been given by his parents; and to assure, in all cases in which a child must be permanently removed from the custody of his parents, that the child be placed in an approved family home and be made a member of the family by adoption.

See also Fla. Stat. § 39.002 (1987) entitled "Legislative Intent": It is a goal of the Legislature that the children of this state be provided with the following protections: (1) A permanent and stable home ... (5) Protection from abuse, neglect and exploitation ... (8) An independent, trained advocate, when intervention is necessary and a skilled guardian or caretaker in a safe environment when alternative placement is necessary. 91. Fla. Stat. § 409.166 (1987): (1) Legislative intent - It is the intent of the Legislature to protect and promote every child's right to the security and stability of a permanent family home. The Legislature intends to make available to prospective adoptive parents financial aid which will enable them to adopt a child in foster care, who, because of his special needs, has proven difficult to place in an adoptive home ....

92. A dependent child means a child who, is found by the court: (a) To have been abandoned, abused, or neglected by his parents or other custodians. (b) To have been surrendered to the department [HRS] or a licensed child-placing agency for the purpose of adoption. (c) To have been voluntarily placed with a licensed child-caring agency, a licensed child-placing agency, or the department [HRS], whereupon ... a performance agreement his expired and the parent or parents have failed to substantially comply with the requirements of the agreement.

Fla. Stat. § 39.01(10) (1987). Additionally, the termination of parental rights cannot solely be based on the fact that the child was previously adjudicated dependent. See White v. Department of Health and Rehabilitative Servs., 483 So. 2d 861 (Fla. 3d Dist. Ct. App. 1986). See also infra note 103, for a description of a performance agreement.

93. See In re Baby Boy A., 544 So. 2d 1136 (Fla. 4th Dist. Ct. App. 1989). However, the legislature's goal of reunification was recently questioned as a result of the July 28, 1989, death of two-year-old Bradley McGee. The child died of a brain hemorrhage after repeatedly being pushed headfirst into a toilet bowl for soiling his diapers. Gerald Slaven, inspector general for the Florida Department of Health and Rehabilitative Services stated that "it appears that the safety of the child was not the primary concern." He said that workers put the emphasis on keeping the family to-
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among the most fundamental rights.\textsuperscript{79a} However, an individual's parental rights are subject to the overriding principle that it is the best interest of the child which must prevail.\textsuperscript{89}

Currently, in Florida, parental rights termination may be based on prospective abuse or neglect when the "evidence establishes that the parent will be unable to provide necessary child care and support in the future, and it is otherwise in the best interest of the child to take such action."\textsuperscript{95}

However, the state must comply with specific statutory provisions before terminating parental rights. Initially, a petition for termination of parental rights is filed.\textsuperscript{96} This petition can be filed by "an authorized agent of the [D]epartment of Health and Rehabilitative Services, or by any other person who has knowledge of the facts alleged or is informed of them and believes that they are true . . . ."\textsuperscript{78a}

Thereafter, several hearings follow the original petition. First, an advisory hearing is set and held fourteen days after the original petition is filed.\textsuperscript{99} Here, the date for the adjudicatory hearing is set.\textsuperscript{99a} In an adjudicatory hearing on a petition for termination of parental rights, "clear and convincing evidence shall be required to establish the need for such termination."\textsuperscript{99b} If the court finds clear and convinc-
ing evidence to terminate parental rights, it will "enter an order to that effect and shall thereafter have full authority under this chapter [Chapter 39] to provide for the child who is the subject of the adjudication for termination of parental rights." However, if the requisite standard of proof is not met, the court shall "(a) [e]nter an order placing or continuing the child in foster care under a performance agreement or permanent placement plan; or (b) [e]nter an order returning the child to the natural parent or parents with or without protective supervision and other required services or program participation by the parent." Florida Statute section 39.464 enumerates the procedural elements for parental rights termination.

Florida's present support for termination of parental rights based on prospective abuse or neglect is found in Florida Statute sections 39.01(2) and 39.01(3). In section 39.01(2), abuse is defined as "any willful act that results in any physical, mental, or sexual injury that causes or is likely to cause the child's physical, mental, or emo-

103. A full discussion of performance agreements is beyond the scope of this work. However, a performance agreement is a court ordered plan which is prepared by a social service agency, signed by the parent(s), social service agency, foster parent, guardian ad litem and possibly the child. Essentially, it is a "written plan of action to prevent the recurrence of the facts found in the order which adjudicated the child dependent." See Fla. Stat. §§ 39.01(40) (1987) and 39.451 (1987) for more information on performance agreements. See also Burk v. Department of Health and Rehabilitative Servs., 476 So. 2d 1275 (Fla. 1985), In re C.B., 453 So. 2d 220 (Fla. 5th Dist. Ct. App. 1984). In Burk, the court held that parents must be offered a performance agreement as a prerequisite to permanent commitment proceedings. However, parental rights cannot be terminated solely because of the parents' failure to comply with a performance agreement; the state must still show "clear and convincing evidence of abuse, neglect or abandonment." In re R.W., 495 So. 2d 133 (Fla. 1986). But see Fla. Stat. 39.467(2)(e) (1987) ("[F]ailure to substantially comply is evidence of abuse, abandonment, or neglect, unless the court finds that the failure to comply with the performance agreement is the result of conditions beyond the control of the parent or parents.")

104. A full discussion of permanent placement plans is beyond the scope of this work. However, such plan takes the place of the performance agreement when the parent(s) will not or cannot participate in the preparation of a performance agreement. See Fla. Stat. §§ 39.01(41) (1987) and 39.452 (1987) for further information on permanent placement plans.


Prospective Abuse

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Florida law holds that "prospective abuse or neglect" is a term of art, and is used to denote a situation in which the health of the child is likely to be significantly impaired." Further, neglect occurs when the parent . . . deprives a child of, or allows a child to be deprived of necessary food, clothing, shelter, or medical treatment or permits a child to live in an environment when such deprivation or environment causes the child's physical, mental, or emotional health to be significantly impaired or to be in danger of being significantly impaired. The foregoing circumstances shall not be considered neglect if caused primarily by financial inability unless services for relief have been offered and rejected . . .

Additional support for prospective abuse is found in Florida Statute section 49.464(2)(b)2 entitled "Extraordinary procedures." In pertinent part section 49.464(2)(b)2 states:

(a) Whenever it appears that the manifest best interests of the child demand it, the state may petition for termination of parental rights without offering a performance agreement or permanent placement plan to the parents . . .

(b) The state may petition under this subsection only under the following circumstances:

2. Severe or continuous abuse or neglect of the child or other children by the parent that demonstrates that the parent's conduct threatens the life or well-being of the child . . .

Florida currently allows parental rights termination to be based on "prospective abuse or neglect" when it is in the best interest of the child to take such action." On what basis is this clear-and-convincing evidentiary determination made since no profile exists to accurately identify prospective abusive and neglectful parents?

As mentioned, the courts have been using the definitions of

112. See supra note 103, discussing performance agreements.
113. See supra note 104, discussing the permanent placement plan.
116. See supra notes 118-234, and accompanying text for a discussion on predicting child abuse.
117. See supra notes 107-14 and accompanying text discussing the definitions of abuse and neglect pursuant to the Florida Statutes.
ing evidence to terminate parental rights, it will "enter an order to that effect and shall thereafter have full authority under this chapter [Chapter 39] to provide for the child who is the subject of the adjudication for termination of parental rights."

However, if the requisite standard of proof is not met, the court shall "[a] enter an order placing or continuing the child in foster care under a performance agreement or permanent placement plan; or [b] enter an order returning the child to the natural parent or parents with or without protective supervision and other required services or program participation by the parent." Florida Statute section 39.464 enumerates the procedural elements for parental rights termination.

Florida’s present support for termination of parental rights based on prospective abuse or neglect is found in Florida Statutes sections 39.01(2) and 39.01(37). In section 39.01(2), abuse is defined as "any willful act that results in any physical, mental, or sexual injury that causes or is likely to cause the child’s physical, mental, or emo-

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(b) The state may petition under this subsection only under the following circumstances:

1. Severe or continuous abuse or neglect of the child or OTHER CHILDREN by the parent that demonstrates that the parent’s conduct threatens the life or well-being of the child ...

Florida currently allows parental rights termination to be based on "prospective abuse or neglect" when it is in the best interest of the child to take such action." On what basis is this clear-and-convincing evidentiary determination made since no profile exists to accurately identify prospective abusive and neglectful parents?

As mentioned, the courts have been using the definitions of

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abuse and neglect to support the concept of "prospective abuse and neglect." Therefore, one may wonder why there is an issue pending before the Florida Supreme Court regarding the viability of this concept. It appears that the Fifth District Court of Appeal may have been anxiously awaiting a case like Padgett, since in Manuel v. Department of Health and Rehabilitation Services, Chief Judge Sharp wrote a special concurrence stating that "[w]hether 'prospective neglect' or even 'prospective abandonment' are valid grounds for termination of parental rights pursuant to section 39.01 Florida Statutes, are important legal issues which should be addressed by this court in a proper case [and] had this been such a case, I would have done so." Additionally, Judge Cowart's dissent in Spankie v. Department of Health & Rehabilitative Services, stated that the allegation of such abuse "is not 'prospective'; it is 'speculative.'" Further, Judge Cowart compares terminating parental rights based on "prospective abuse" with "justifying the imprisonment of one who has not committed a crime because 'but for' the fact that he was imprisoned he 'would have' committed a crime."

The Second, Fourth and Third District Courts of Appeal have expressly relied on the future tense elements contained in the definitions of "abuse" and "neglect" in Fla. Stat. sections 39.01(2) and 39.01(26) respectively, to support the concept of prospective abuse. However, in his Florida Supreme Court Brief, Lawrence James Semento, counsel for the Appellant, Thomas Padgett, argues that the Florida courts have erroneously relied on the Florida Statutes to support the concept of prospective abuse. He states that

"The Legislature of the State of Florida, responding to the societal need to protect the rights of both parents and children, has set forth a detailed and specific statute to accomplish termination of parental rights. Prospective abuse, neglect or abandonment, however, are not provided as grounds in that statute."

Further, he states that "the concept of prospective abuse has been grafted onto the statutory scheme through Florida case law." Thus, it appears that in response to Padgett, and the special concurrences and dissent of Justices Sharp and Cowart respectively, the Florida Supreme Court has decided to reevaluate this concept to determine if the concept is "viable."

On August 3, 1989, prior to the Florida Supreme Court's answer to the certified question, the Fifth District Court of Appeal in Palmer v. Department of Health and Rehabilitative Services, terminated a father's parental rights solely on the basis of prospective abuse. The court stated that

"Until recently, our court has not directly passed on whether 'prospective' abuse of a child, however clearly established, is a sufficient legal basis to terminate parental rights. In the prior cases considered by us, there has been an allegation of actual abuse or neglect, and proof of the same, with circumstances indicating that the abuse or neglect will continue if the child is returned to the parent."

The Palmer court recognized that the crucial issue is "whether future behavior, which will adversely affect the child, can be clearly and certainly predicted." However, the court noted that in Palmer it was dealing with pedophilia, a psychological disorder that has been extensively studied. The court further stated that recent "studies show"
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abuse and neglect to support the concept of “prospective abuse and neglect.” Therefore, one may wonder why there is an issue pending before the Florida Supreme Court regarding the viability of this concept. It appears that the Fifth District Court of Appeal may have been anxiously awaiting a case like Padgett, since in Manuel v. Department of Health and Rehabilitation Services, Chief Judge Sharp wrote a special concurrence stating that “[w]hether ‘prospective neglect’ or even ‘prospective abandonment’ are valid grounds for termination of parental rights pursuant to section 39.01 Florida Statutes, are important legal issues which should be addressed by this court in a proper case [and] had this been such a case, I would have done so.” Additionally, Judge Cowart’s dissent in Spankie v. Department of Health & Rehabilitative Services, stated that the allegation of such abuse “is not ‘prospective;’ it is ‘speculative.’” Further, Judge Cowart compares terminating parental rights based on “prospective abuse” with “justifying the imprisonment of one who has not committed a crime because ‘but for’ the fact that he was imprisoned he ‘would have’ committed a crime.”

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[1]be Legislature of the State of Florida, responding to the societal need to protect the rights of both parents and children, has set forth a detailed and specific statute to accomplish termination of

118. 537 So. 2d 1022 (Fla. 5th Dist. Ct. App. 1988).
120. Manuel, 537 So. 2d at 1022-23.
121. Spankie, 505 So. 2d at 1357.
122. Id. at 1359 (emphasis in the original).
123. Id. at 1360.
124. See W.D.N., 443 So. 2d at 495; Yohn v. Department of Health and Rehabilitation Services, 462 So. 2d 1147 (Fla. 3d Dist. Ct. App. 1984); J.L.P., 416 So. 2d at 1252. Also, the First District Court of Appeal may recognize prospective neglect or abuse as a basis to terminate parental rights if such prospective abuse or neglect is sufficiently well-established. See T.D., 537 So. 2d at 175.

parental rights. Prospective abuse, neglect or abandonment, however, are not provided as grounds in that statute.

Further, he states that “the concept of prospective abuse has been grafted onto the statutory scheme through Florida case law.” Thus, it appears that in response to Padgett, and the special concurrences and dissents of Justices Sharp and Cowart respectively, the Florida Supreme Court has decided to reevaluate this concept to determine if the concept is “viable.” On August 3, 1989, prior to the Florida Supreme Court’s answer to the certified question, the Fifth District Court of Appeal in Palmer v. Department of Health and Rehabilitative Services, terminated a father’s parental rights solely on the basis of prospective abuse. The court stated that

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The Palmer court recognized that the crucial issue is “whether future behavior, which will adversely affect the child, can be clearly and certainly predicted.” However, the court noted that in Palmer it was dealing with pedophilia, a psychological disorder that has been extensively studied. The court further stated that recent “studies show
and experts agree . . . that there is no easy 'cure' for this disorder.134 and the rate of recidivism from the medical standpoint is extremely high.135 Consequently, the court affirmed the trial court's finding of prospective sexual abuse.136 The Palmer court compared giving an untreated pedophile, or one who has no prospects for successful treatment, custody of a child as "tantamount to placing matches in a tinderbox."137

As mentioned, other Florida courts have applied the concept of "prospective abuse" to terminate parental rights. In In re J.L.P.,138 the earlier Florida case expressly addressing the issue, the court noted that the definition of "neglect" found in Florida Statutes section 39.01(27)139 supported its holding that "neglect" can be prospective, and the fact that the Appellant never had custody of the child was irrelevant.140 Consequently, in accordance with Santisky,141 the J.L.P. court held that "in order to sustain a final order of permanent commitment because of neglect or abuse, there must be clear and convincing evidence that the child has been or will be abused or neglected."142 Here, there was evidence of the mother's alleged prior abuse, poverty, "squalid" housing arrangements, limited mental capacity, emotional makeup, and promiscuity.143 Additionally, a clinical psychologist's testimony revealed that if the child were left alone with the mother, the child would be subject to a considerable risk of abuse.144

Thus, while noting its sympathy for the mother, the court affirmed the trial court's ruling stating that "[t]he Legislature clearly did not intend to have a child suffer such an experience before a trial court could act."145

Similarly in Yem v State,146 the Third District Court of Appeal utilized the J.L.P. court's proposition that "the fact that the mother never had actual custody of her child does not foreclose a finding of neglect."147 The court found that the mother's act of permitting her child to "live in an environment which caused the child's physical, mental or emotional health to be impaired, or in danger of being significantly impaired," justified permanent commitment of the child.148

Next, in In re W.D.N.,149 the Second District Court of Appeal held that a parent's abuse of some of her children may constitute grounds for the permanent commitment of her other children who also live with the parent . . . . To continue to expose children to abuse by a parent simply because findings of prior abuse by the parent only concerned others of the parent's children would constitute an unacceptable risk to the children where, as here, the mother's propensities in that regard were shown to be beyond reasonable hope of modification.150

As mentioned earlier, in W.D.N., the court relied on "abuse" being defined as "any willful act that results in any physical, mental or sexual injury that causes or is likely to cause the child's physical, mental, or emotional health to be significantly impaired."151 In W.D.N., the father had abandoned the family leaving the mother with five children. One child died in a fire. Another child, S.N., who was adjudicated depen-

134. Id. at 984 n.5. The Palmer court footnote notes the following: See, e.g., State v. Coleman, 490 So. 2d 705, 707 (La. App. 1986).  
135. Id. at 984 n.6. "The recidivism rate for homosexual pedophilia is second only to exhibitionism, and ranges from 13-28% of those apprehended—roughly twice the rate of heterosexual pedophilia." Id. (citing The Merck Manual, Ch. 139, p. 1499 (15th ed. 1987)).  
136. Palmer, 547 So. 2d at 984.  
137. Id.  
138. 416 So. 2d 1250 (Fla. 4th Dist. Ct. App. 1982).  
139.  
140. [W]hen a parent or other legal custodian, though financially able, deprives a child of, or allows a child to be deprived of, necessary food, clothing, shelter, or medical treatment or permits a child to live in an environment when such deprivation or environment causes the child's physical, mental, or emotional health to be significantly impaired or to be in danger of being significantly impaired.  
141. J.L.P., 416 So. 2d at 1252.  
142. Santisky, 455 U.S. at 753.  
143. J.L.P., 416 So. 2d at 1252.  
144. Id. at 1251-53.  
145. Id. at 1253.  
146. 462 So. 2d 1147 (Fla. 3d Dist. Ct. App. 1984).  
147. Id. at 1149 (citing J.L.P., 416 So. 2d 1250).  
148. Yem, 462 So. 2d at 1149. The facts of Yem reveal that the child was born while the mother was imprisoned for the murder of a stepson. The child's grandfather raised her; however, he was found dead in his home and the child was found wandering the streets. The child was filthy and had a severe case of diaper rash. Additionally, the grandfather's house was filthy.  
149. 443 So. 2d 493 (Fla. 2d Dist. Ct. App. 1984).  
150. Id. at 495.  
151. Id. (quoting FLA. STAT. § 39.01(2) (1981)).
and experts agree... that there is no easy ‘cure’ for this disorder, and the rate of recidivism from the medical standpoint is extremely high. Consequently, the court affirmed the trial court's finding of prospective sexual abuse. The Palmer court compared giving an untreated pedophile, or one who has no prospects for successful treatment, custody of a child as "tantamount to placing matches in a tinderbox."  

As mentioned, other Florida courts have applied the concept of "prospective abuse" to terminate parental rights. In In re J.L.P., the earliest Florida case expressly addressing the issue, the court noted that the definition of "neglect" found in Florida Statutes section 39.01(27) supported its holding that "neglect" can be prospective, and the fact that the Appellant never had custody of the child was irrelevant. Consequently, in accordance with Santosky, the J.L.P. court held that "in order to sustain a final order of permanent commitment because of neglect or abuse, there must be clear and convincing evidence that the child has been or will be abused or neglected." Here, there was evidence of the mother's alleged prior abuse, poverty, "squidish" housing arrangements, limited mental capacity, emotional makeup, and promiscuity. Additionally, a clinical psychologist's testimony revealed that if the child were left alone with the mother, the child would be subject to a considerable risk of abuse.

Thus, while noting its sympathy for the mother, the court affirmed the trial court's ruling stating that "[t]he Legislature clearly did not intend to have a child suffer such an experience before a trial court could act."

Similarly in Yem v. State, the Third District Court of Appeal utilized the J.L.P. court's proposition that "the fact that the mother never had actual custody of her child does not foreclose a finding of neglect." The court found that the mother's act of permitting her child to "live in an environment which caused the child's physical, mental or emotional health to be impaired, or in danger of being significantly impaired," justified permanent commitment of the child.

Next, in In re W.D.N., the Second District Court of Appeal held that a parent's abuse of some of her children may constitute grounds for the permanent commitment of her other children who also live with the parent. To continue to expose children to abuse by a parent simply because findings of prior abuse by the parent only concerned others of the parent's children would constitute an unacceptable risk to the children where, as here, the mother's propensities in that regard were shown to be beyond reasonable hope of modification.

As mentioned earlier, in W.D.N., the court relied on "abuse" being defined as "any willful act that results in any physical, mental or sexual injury that causes or is likely to cause the child's physical, mental, or emotional health to be significantly impaired." In W.D.N., the father had abandoned the family leaving the mother with five children. One child died in a fire. Another child, S.N., who was adjudicated depen-
dent on a finding of child abuse, was permanently committed to HRS for adoption.152 Subsequently, W.D.N. was adjudicated dependent on the mother's past abusive behavior toward S.N. and based on the fact that she was unable to provide W.D.N. with necessary medical treatment. Thereafter, the mother had twins, C.N. (male) and C.N. (female). Based on findings that C.N. (male) had been abused (three rib fractures) and the past abuse of S.N., the twins were also adjudicated dependent.153 The mother was provided with all possible helpful programs available, including HRS counseling for parenting problems. However, she did not benefit from the counseling; she did not admit that she had a problem. Since Florida did not have any more programs which could help her, the district court affirmed the trial court's holding that clear and convincing evidence demonstrated that permanent commitment was in the best interests of the children.154

Several other Florida cases have upheld "prospective abuse or neglect." In Spank Pie v. Department of Health and Rehabilitative Services, the Fifth District Court of Appeal based the termination of a mother's parental rights on her "history of physical and emotional abuse with little prospect for improvement."155 In Spank Pie, the mother was unwilling to adjust her lifestyle and consistently denied that abuse had taken place.156 The abuse consisted of

malnourishment, whippings, fractures of the child's leg, black eyes and numerous bruises. The mother raised[d] dogs and travel[ed] frequently to show them. The child often smelled of dog feces, was dressed inappropriately (e.g., sundresses in the winter), was unaware of basic hygienic practices (e.g., daily washing) and was left alone all night on at least one occasion. There was also evidence of unsafe and unsanitary conditions at the mother's home and that she locked the child in her room and nailed boards over the windows.157

The mother was diagnosed as a passive-aggressive personality since she was angry, hostile, and impulsive. Thus, the mother's parental rights were terminated since the court felt that "clear and convincing evi-

152. Id. at 494.
153. Id.
154. W.D.N., 443 So. 2d at 495.
155. 505 So. 2d 1357, 1358 (Fla. 5th Dist. Ct. App. 1987).
156. Id. at 1358.
157. Id. at 1359.
158. Id. at 1357.
159. 544 So. 2d 1136 (Fla. 4th Dist Ct. Ct. 1989).
160. The mother appeared before the court to acknowledge her voluntary placement of the child. Id.
161. Id. at 1137.
162. Id.
163. Id.
164. Baby Boy A., 544 So. 2d at 1137.
165. Id. (quoting J.L.P., 416 So. 2d 1250). There was a strong dissent in this case by Judge Walden. The basis of the dissent was two-fold. First, the father was never offered a performance agreement. Second, the father presented a child caring plan to the trial court. However, the trial court found the plan unworkable. Judge Walden stated that "[w]hile appellant's proposed plan for the caring for the child may not be comparable to that available from better situated adoptive parents, the appellant should not be expected to do more than his best to provide support for his child, given his circumstances." Id. (Walden, J., dissenting).
166. But see In re C.N.G., 531 So. 2d 345 (Fla. 5th Dist. Ct. App. 1988) which offended the permanent commitment of a mother classified as "mildly retarded" or of "low average intelligence." Id. at 345 n.1 (Coward, J. dissenting) The HRS psycholo-
dent on a finding of child abuse, was permanently committed to HRS for adoption.\textsuperscript{154} Subsequently, W.D.N. was adjudicated dependent based on the mother's past abusive behavior toward S.N. and based on the fact that she was unable to provide W.D.N. with necessary medical treatment. Thereafter, the mother had twins, C.N. (male) and C.N. (female). Based on findings that C.N. (male) had been abused (three rib fractures) and the past abuse of S.N., the twins were also adjudicated dependent.\textsuperscript{155} The mother was provided with all possible helpful programs available, including HRS counseling for parenting problems. However, she did not benefit from the counseling; she did not admit that she had a problem. Since Florida did not have any more programs which could help her, the district court affirmed the trial court's holding that clear and convincing evidence demonstrated that permanent commitment was in the best interests of the children.\textsuperscript{156}

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\textsuperscript{152} Id. at 494.

\textsuperscript{153} Id.

\textsuperscript{154} W.D.N., 443 So. 2d at 495.

\textsuperscript{155} 505 So. 2d 1357, 1358 (Fla. 5th Dist. Ct. App. 1987).

\textsuperscript{156} Id. at 1358-59.

\textsuperscript{157} Id. at 1358.
In *I.T. v. Department of Health and Rehabilitative Services*, the court held that the parents’ psychiatric histories, which allegedly showed that they might exercise poor judgment under stress, did not support finding that infant was at risk of prospective neglect. Additionally, in *In re T.D.*, the court held that a parent’s chronic mental illness was a condition beyond her control, and was not shown to be a sufficient basis upon which to predicate the necessary finding of prospective neglect, to warrant termination of parental rights. Further, the parent’s failure to stimulate the child intellectually was an inadequate basis to support a finding of neglect. However, despite its holding, the court noted that under facts which establish that the parent will be unable to provide necessary child care and support in the future, and it is otherwise in the best interest of the child, termination of parental rights may be based on prospective abuse or neglect.

**Prospective Abuse and Neglect In Other States**

Many other states have expressly addressed the concept of prospective abuse and neglect. As in Florida, a state court’s analysis of the issue often revolves around the particular wording and interpretation of that state’s statute.

For example, in *In re Ditrick Infant*, the Ditricks’ parental rights of their first child were terminated due to allegations of physical and sexual abuse. Before these rights were terminated, Carol Ditrick became pregnant with the subject child. "Believing that the birth of this present child was imminent, the plaintiff filed a petition in probate court seeking an order of temporary custody pending further hearings." The Michigan Court of Appeals noted that while the probate

...gist admitted that he had no fear that the mother would ever intentionally neglect or abuse the child. *Id.* at 346 n.9 (Coward, J., dissenting). The dissent suggested that the question of whether mental retardation of a parent is a ground for termination of parental rights, should be certified to the Florida Supreme Court as a question of great public importance. *Id.* at 347 (Coward, J., dissenting).

167. 532 So. 2d 1085 (Fla. 3d Dist. Ct. App. 1988).

168. *Id.* at 1089.


170. *Id.* at 175.

171. *Id.*

172. *Id.*


174. *Id.* at 220, 263 N.W.2d at 38.

175. *Id.*

176. *Id.* at 221, 263 N.W.2d at 39. "The probate court jurisdiction in such matters is defined by M.C.L.A. § 712A.2; M.S.A. § 27.3178(598.2). Subsection (b) of that statute provides that the probate court has [jurisdiction in proceedings concerning any minor under 17 years of age found within the county]. . . . "Id. However, the court noted that the present case concerned the legislature may want to consider amending the probate code. *Id.*


179. *Id.* at 636, 432 N.W.2d at 828.

180. *Id.* at 637, 432 N.W.2d at 829.

181. *Id.* at 639, 432 N.W.2d at 830.

182. *Id.* (citing *In re S.P.*., N.P., and L.P., 221 Neb. 165, 375 N.W.2d 616 (1985)).


184. See *Sanzusky*, 455 U.S. at 1393; *In re Cruz*, 121 A.D.2d 901, 503 N.Y.S.2d 798 (1986) ("a court cannot and should not await broken bone or shattered skull before extending its protective cloak around a child . . . "). *Id.* at 903, 503 N.Y.S.2d 801 (quoting *In re Maria Anthony*, 81 Misc. 2d 342, 345, 356 N.Y.S.2d 333, 339 (1972)).
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In *In re S.L.P.*, evidence supported that the father had a long history of violent behavior and mental illness, and the mother was diagnosed as a paranoid schizophrenic. The Nebraska Supreme Court noted that since neither parent had ever had custody of the child, there was no evidence of actual harm. Nevertheless, the court stated that "a court need not await certain disaster to come into fruition before taking protective steps in the interest of a minor child." Furthermore, it stated that "[i]n termination of parental rights cases, the primary consideration is the best interest of the juvenile."

Based on rationales similar to those discussed above, many other states such as *New York*, *Missouri*, *Illinois*, and *Pennsylvania*...
have upheld the concept of prospective abuse or neglect of children. All the states which have expressly dealt with the issue of terminating parental rights based on prospective abuse or neglect have held that the concept is viable as long as clear and convincing evidence is presented to establish such abuse.

Since many states terminate parental rights based on prospective abuse, the ability to predict child abuse appears crucial to determining whether the concept of “prospective abuse or neglect” is viable enough to interfere with an individual’s fourteenth amendment right to rear children.

Predicting Prospective Abuse and Neglect

Through the use of psychological information, this article will examine the predictors of abusive and neglectful parents to determine if an “abusive or neglectful parent profile” can be objectively formed to support the termination of an individual’s right to rear children.

The previously discussed NIS-2 study compiled and reported the relation of abuse and neglect to child, family, and county characteristics. The report concluded that race/ethnicity and county metastatus were not associated with maltreatment. However, all other characteristics such as the child’s sex, age, family income, and family size did have some impact to the incidence or type of maltreatment. For instance, females were more frequently abused than males.

185. K.S. v. M.N.W., 713 S.W.2d 858 (Mo. Ct. App. 1986) (parental rights were properly terminated upon proof that parents abused child’s siblings, even though the siblings did not incur life threatening or gravely disabling injury or disfigurement nor even serious injury).

186. See In re A.D.R., 186 Ill. App. 3d 386, 542 N.E.2d 487 (1989). The court found that the physical abuse by the father against the wife-mother, which continued for at least seven years, created an environment injurious to the child. The Court further found that when faced with evidence of prior abuse by parents, the juvenile court should not be forced to refrain from taking action until each particular child suffers as injury.

187. In re Black, 273 Pa. Super. 536, 417 A.2d 1178 (1980) (newborn declared deprived even though never in parent’s custody since evidence was sufficient to establish that prior deaths of two of mother’s children were result of improper care and precautions by parents).

188. See STUDY FINDINGS, supra notes 55 to 67 and accompanying text.

189. STUDY FINDINGS, supra note 55, at 7-6.

190. Id.

191. Id. (13.1 per 1,000 females vs. 8.4 per 1,000 males).

192. Id. at 7-7.

193. Id.

194. STUDY FINDINGS, supra note 55, at 7-7.

195. Id.

196. Id.

197. “Large families” includes those families with four or more children.

198. STUDY FINDINGS supra note 55, at 7-7.

199. Los Angeles Times, Feb. 12, 1989, § 1, at 12, col. 1. This article is entitled Child Abuse: Dilemma of Prevention [hereinafter Child Abuse]. The case was neither appealed nor published in the reporter system.

200. Id.

201. Id.

202. Id.
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It was noted that "[t]he Halls are not a terribly winning couple. Joan Hall served time in prison for voluntary manslaughter after she was charged with delivering a blow that killed her daughter in 1982." Doctors and caseworkers say that both Halls have antisocial personality disorders regarded as untreatable and unlikely to change.783

When asked if newborns from all parents who are innately, chronically at high risk would be seized from their parents, Larry Eisenhauer, the Polk County juvenile court judge who ordered M. removed from the Hall's home, stated, "[w]e work under the assumption everything can be remedied. But I know it's coming."784

Of particular importance to the present article is the Iowa authorities' determination that M. faced a forty percent chance of being abused within the next five years.785 This figure was determined by a Consensus Opinion of the Pediatric-Juvenile Court Consultation Committee.786 The report noted that the same social, marital, family, and environmental factors existed as they did when Mrs. Hall abused and killed her daughter.787 "This fact by itself places M. . . . at a twenty percent risk of abuse without any consideration of other factors." Additionally, "it has been reported that in a family in which there has

203. Child Abuse, supra note 199, at 21. M.'s father was not the father of Joan Hall's daughter, Chrsissy. The newspaper article reports that in 1979 Joan, eighteen and unmarried, gave birth to her daughter Christina. Id. Abuse reports accumulated and Chrsissy was placed in a foster home when she was seven months old. Id. After two years of foster care, Chrsissy was returned to her mother's home. Id. At that time, Joan was married (not to M.'s father) and had another daughter. Id. Joan said "she also boozed and did drugs in those days." Id. The article states,

She was speeding on uppers the night Chrsissy died. Chrsissy had thrown up and wet her pants, Joan explained. So she had gotten angry, lost control and pushed Chrsissy against a wall. Chrsissy had fallen. She was just lying on the floor, her body moving funny. Joan had called her name but she hadn't answered. Joan pleaded guilty to voluntary manslaughter. A juvenile court judge terminated her right to keep Jessica, [her second daughter].

Id.

204. Id. The newspaper article continues to discuss the Hall's past in detail.

205. Id.

206. Id. at 12.

207. Consensus Opinion of the Pediatric-Juvenile Court Consultation Committee, at 2 (Unpublished Opinion which was Exhibit Number 11 at the August 4, 1988 "Hall" hearing. [hereinafter Consensus Opinion]).

208. Id.

209. Id. at 1.

been a serious or fatal child abuse case there is a forty percent risk that a second child will be seriously injured."788 To support these percentages, the Committee relied on an article entitled Identifying Correlates of Reabuse in Maltreating Parents.789

The study reported in the above-mentioned article compared twenty-two parent, child and treatment variables which potentially correlated to reabuse by forty-five parents, forty mothers and five fathers, who were in treatment for abuse.790 Results revealed that a single variable alone was not strongly associated with reabuse; however, interactions involving several variables, such as income source, marital status, and the abuser's personal abuse history significantly differentiated between reabusers and nonreabusers.791 Other factors including the child's age, the severity of initial abuse, the parent's age, and the length of the abuser's treatment were also associated with reabuse.792 "For example, while income source did not have a mitigating effect for subjects with a history of having themselves been abused, having some earned income decreased the probability of reabuse for those without a personal abuse history."793 Additionally, "[i]n treatment lasted less than six months, currently unmarried abusers tended to be less likely to reabuse than currently married ones."794 It was noted that the marriage may have created stress in the abusers' environment rather than acting as support.795 An earlier study revealed that family size, family spacing, unplanned conception, parent's age at first birth, and number of children from different fathers are all factors to consider when predicting child abuse and neglect.796

Additionally, when the recidivism rate was calculated, it was reported that forty percent of the parents, eighteen of forty five, had been

210. Id. at 2.

211. Id. (relying on Ferleger, Glenwick, Gaines, Green, Identifying Correlates of Reabuse In Maltreating Parents, 12 CHILD ABUSE AND NEGLECT 41 (1988)).

212. Ferleger, supra note 28, at 41.

213. See id. at 43-46 for a technical explanation of the method of data collection, procedures and the statistical analysis.

214. Id. at 46-47.

215. Id.

216. Id. at 47.

217. Id.

218. Zuravin, Fertility Patterns: Their Relationship to Child Physical Abuse and Child Neglect, 50 J. MARRIAGE AND FAM. 983, 984 (1988). Additionally, this article explores the factor relationships in differentiating abuse from neglect. Such analysis is beyond the scope of this article.
It was noted that "[the] Halls are not a terribly winning couple. Joan Hall served time in prison for voluntary manslaughter after she was charged with delivering a blow that killed her daughter in 1982." Doctors and caseworkers say that both Halls have antisocial personality disorders regarded as untreatable and unlikely to change. When asked if newborns from all parents who are innately, chronically at high risk would be seized from their parents, Larry Eisenhour, the Polk County juvenile court judge who ordered M. removed from the Hall's home, stated, "[w]ork under the assumption everything can be remedied. But I know it's coming." Of particular importance to the present article is the Iowa authorities' determination that M. faced a forty percent chance of being abused within the next five years. This figure was determined by a Consensus Opinion of the Pediatric-Juvenile Court Consultation Committee. The report noted that the same social, marital, family, and environmental factors existed as they did when Mrs. Hall abused and killed her daughter. "This fact by itself places M... at a twenty percent risk of abuse without any consideration of others factor." Additionally, "it has been reported that in a family in which there has been a serious or fatal child abuse case there is a forty percent risk that a second child will be seriously injured." To support these percentages, the Committee relied on an article entitled Identifying Correlates of Reabuse in Maltreating Parents.

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cited for reabuse while they were in treatment. During the follow-up period the rate of reabuse was thirteen percent, sixteen of forty five.

The feasibility and accuracy of identifying parents that are at risk for abusing children is certainly a factor to consider when determining whether the concept of prospective abuse is viable or too speculative. A 1984 study concluded that “prenatal prediction was feasible although the rate of false positive high risk assignment would limit practical application of the interview used.” The “[f]easibility of identifying risk for child abuse prospectively was determined by interviewing 1400 expectant mothers and [through objective rating] predicting that 273 were high risk.”

Thereafter, the interviewers, unaware that their subjective comments were going to be used in the study, recorded additional information which they felt would place a mother at risk. Some of the interviewer comments related to statements that the mothers had made. These statements suggested that the mothers had aggressive impulses towards children. Additionally, “[some mothers] implied they had been investigated by protective services for abuse . . .” In the interviewer’s opinion, some of the mothers “seemed to intentionally fail to protect their children . . . from a dangerous situation that occurred while they were being interviewed.” Of the thirteen mothers receiving these interviewer comments, six had been reported for abuse. Moreover, of the 273 “at risk” mothers, sixty-seven percent reported nonaccidental child injuries; of the 1127 families who were not labeled “at risk,” one percent had such injuries. Additionally, of the 273 “at risk” mothers, fifty were placed there solely on the research assistant’s comments. Of the fifty, four were reported for abuse, illustrating that subjective impressions are important predictors of child abuse. However, the report indicated that prediction was only effective for twenty-four months following the study. Although several reports agree on factors to predict child abuse or reabuse, most note that “the overall approach is unproven and should be limited to investigation” or that “further research on the correlates of reabuse hopefully will lead to additional clinically relevant recommendations for those attempting to prevent the recurrence of abuse.” Moreover, it is virtually undisputed that “despite years of research, there is no psychological profile that accurately identifies parents who, in the future, will abuse or neglect their children.”

Actual Characteristics v. Psychologists’ Predictors

The characteristics of individuals in five of the Florida cases previously discussed—where parental rights have been terminated because of prospective abuse or neglect—will be compared to the psychologists’ reported characteristics of potentially abusive and neglectful parents. The purpose of this comparison is to determine if the medical reports predicting abusive and neglectful parents are accurate despite

219. Ferlenger, supra note 28, at 44.
220. Id. at 44-45. See supra notes 47-50 and accompanying text which discusses the potential for underestimating these rates.
222. Id. The mothers received a thirty five minute interview concerning factors that studies had associated with child maltreatment. Id. at 394. Following are the topics covered: mother’s childhood nurture, her self-image, support available from others, parenting philosophy, attitude about current pregnancy, and general health related problems including alcohol and drug abuse. Id. A modified Life Stress Inventory was used to determine the incidence of twenty one maternal and eleven paternal stressful events during the preceding year. Id. Several questions explored the mother’s knowledge and expectations of child development. Id.
223. Id.
224. Id. at 396.
225. Id. These statements reflect the opinion of the interviewers.
226. Altemeier, supra note 221, at 396.
227. Id.
228. Id. at 395-56.
229. Id. at 396.
230. Id. at 395.
231. Altemeier, supra note 221, at 395, 399.
232. Id. at 400.
233. Ferlenger, supra note 28, at 48. See also I. Sloan, Child Abuse: Governing Law & Legislation 9-13 (Series of Legal Almanacs 781, 1983) These pages list parent character indicators to be used when considering the possibility of child abuse or neglect. However it is noted that the list is not exhaustive and “[n]either does the presence of a single or even several indicators prove that maltreatment exists.” Id. at 9 (emphasis in the original).
234. Policy Guidelines, supra note 69, at 6. See also, Wald, State Intervention on Behalf of “Neglected Children”: A Search for Realistic Standards, in Pursuing Justice for the Child 246, 248 (M. Rosenberg ed. 1976) stating that “the few longitudinal studies that have been done all conclude that prediction of future behavior from observation of child rearing practices is extremely difficult.”
235. Sparkie, 505 So. 2d at 1357; Baby Boy A, 544 So. 2d at 1136; Yem, 462 So. 2d at 1147; W.D.N., 443 So. 2d at 493; and, Palmer, 547 So. 2d at 981.
Weiss: Prospective Abuse and Neglect - The Termination of Parental Right

The feasibility and accuracy of identifying parents that are at risk for abusing children is certainly a factor to consider when determining whether the concept of prospective abuse is viable or too speculative. A 1984 study concluded that "prenatal prediction was feasible although the rate of false positive high risk assignment would limit practical application of the interview used." The "[f]easibility of identifying risk for child abuse prospectively was determined by interviewing 1400 expectant mothers and [through objective rating,] predicting that 273 were high risk." Thereafter, the interviewers, unaware that their subjective comments were going to be used in the study, recorded additional information which they felt would place a mother at risk. Some of the interviewer comments related to statements that the mothers had made. These statements suggested that the mothers had aggressive impulses towards children. Additionally, "[some mothers] implied they had been investigated by protective services for abuse . . . ." In the interviewer's opinion, some of the mothers "seemed to intentionally fail to protect their children . . . from a dangerous situation that occurred while they were being interviewed." Of the thirteen mothers receiving these interviewer comments, six had been reported for abuse. Moreover, of the 273 "at risk" mothers, sixty-seven percent reported nonaccidental child injuries; of the 1127 families who were not labeled "at

219. Ferlenger, supra note 28, at 44.
220. Id. at 44-45. See supra notes 47-50 and accompanying text which discusses the potential for underestimating these rates.
222. Id. The mothers received a thirty five minute interview concerning factors that studies had associated with child maltreatment. Id. at 394. Following are the topics covered: mother's childhood nurture, her self-image, support available from others, parenting philosophy, attitude about current pregnancy, and general health related problems including alcohol and drug abuse. Id. A modified Life Stress Inventory was used to determine the incidence of twenty one maternal and eleven paternal stressors during the preceding year. Id. Several questions explored the mother's knowledge and expectations of child development. Id.
223. Id.
224. Id. at 396.
225. Id. These statements reflect the opinion of the interviewers.
226. Altemeier, supra note 221, at 396.
227. Id.
228. Id. at 395-6.
229. Id. at 396.
230. Id. at 395.
231. Altemeier, supra note 221, at 395, 399.
232. Id. at 400.
233. Ferlenger, supra note 28, at 48. See also L. Sloan, Child Abuse: Governing Law & Legislation 9-13 (Series of Legal Almanacs #79, 1983) These pages list parent character indicators to be used when considering the possibility of child abuse or neglect. However it is noted that the list is not exhaustive and "[n]either does the presence of a single or even several indicators prove that maltreatment exists." Id. at 9 (emphasis in the original).
234. Policy Guidelines, supra note 69, at 6. See also, Wald, State Intervention on Behalf of "Neglected Children": A Search for Realistic Standards, in Pursuing Justice for the Child 246, 248 (M. Rosenheim ed. 1976) stating that "the few longitudinal studies that have been done all conclude that prediction of future behavior from observation of child rearing practices is extremely difficult."
235. Spankie, 505 So. 2d at 1357; Baby Boy A, 544 So. 2d at 1136; Yem, 462 So. 2d at 1147; W.D.N., 443 So. 2d at 493; and, Palmer, 547 So. 2d at 981.

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the noted shortcomings of the studies. This brief analysis is unscientific and is based solely on the limited factual information provided by the cases as reported.

As previously discussed, psychological studies reveal that family income, marital status, family size, and spacing are often indicators of prospective abuse. Unfortunately, the reported cases do not provide enough information to adequately analyze these factors. It should be noted though, that in W.D.N., there would have been a family size of six if one child had not been killed in a fire and if two had not been adjudicated dependent. Other cases cited reflect one or two children in the family.

Additionally, children or their siblings who have already been abused or neglected are in clear danger of further maltreatment. It was reported that "in a family in which there has been a serious or fatal child abuse case there is a [forty] percent risk that a second child will be seriously injured." Moreover, if the parent's same social, marital, family, and environmental factors exist as they did when the child was previously abused or if a sibling was abused, the child is immediately at a twenty percent risk of abuse exclusive of the consideration of other factors. It is then reasonable to assume that unless there is a change in circumstances, a parent who has already engaged in harmful conduct toward any child will do so again. On the other hand, common sense dictates that with actual harm, the chances of an erroneous prediction would greatly increase.

Of the five Florida cases examined, all revealed instances where either a sibling or the child himself was previously abused. In Yem and Baby Boy A., since a parent's prior abuse of a sibling resulted in death and serious injury, respectively, there is automatically a forty percent chance that the subject children would be abused. In Spankie, where the child was fourteen years old at the time of the hearing, there was evidence of a long history of abuse beginning when the subject child was six months old. This evidence clearly demonstrates that the parent is a continuing threat to the child.

Another similarity in three of the five Florida cases was that psychological testimony illustrated that the abusive or neglectful parent has not benefitted or will not benefit from counseling or therapy. The reasons cited for the poor prognosis are usually that the parent does not accept responsibility for his or her past conduct and shows no remorse for such conduct or that the parent exhibits limited intellectual capacity.

Although it has been noted that an accurate profile cannot be determined, it appears that the parents in these actual cases had many of the same characteristics as those indicated in the psychological journals.

How Far Will the Courts Go?

If courts are given the power to terminate an individual's parental rights based on prospective abuse, how far will the courts carry this power? For instance, what will they do about an individual who is labeled a prospective abuser, and then becomes pregnant?

Some states have addressed this problem. As punishment for leaving two infant sons alone in an apartment for three days, an Arizona woman was sentenced to use birth control for the rest of her childbearing years. The American Civil Liberties Union protested that the order violated her reproductive freedom, and the Roman Catholic Church objected that it violated her religious beliefs. This case was not appealed because the judge had to rescind his order since, while on birth control, the woman became pregnant. Hence, if birth control is not the answer, is sterilization?

Ironically, an Indiana Superior Court Judge suggested that he would reduce a possible twenty year prison term for a woman who poisoned her four-year-old son if she were sterilized. Judge Jones

244. See Policy Guidelines, supra note 69, at 6.
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246. Id.
249. supra note 247, at 59.
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246. *Id.*
248. *Id.* at 59. Forster is Catholic.
stated "[s]he has no need for any more children." Nonetheless, the mother became pregnant again. She voluntarily chose to have sterilization surgery after relinquishing custody of the newborn. During sentencing Judge Jones considered the fact that the mother was sterilized and that she relinquished custody of the newborn as mitigating factors when he sentenced her to ten years in prison rather than the maximum sentence of twenty years.

The United States Supreme Court has addressed the issue of involuntary sterilization. In the 1927 case of Buck v. Bell the Court upheld a Virginia statute that permitted involuntary sterilization of the "feeble-minded." However, in 1942, the Supreme Court struck down a sterilization program for prisoners who had been convicted of three felonies. The Court ruled that the statute in question violated the fourteenth amendment's Equal Protection Clause. The Court stated that "[m]arriage and procreation are fundamental to the very existence and survival of the race." However, Buck was never explicitly overruled. Consequently, despite the Skinner decision, courts are presently permitting sterilization of the mentally retarded. Since there may be precedent to support involuntary sterilization, it is not inconceivable that the courts will utilize such sterilization in response to the problem of child abuse.

Conclusion

The concept of "prospective abuse and neglect" appears to create an inherent conflict between an individual's constitutional right to rear children and the states' parens patriae and police powers. Even though no psychological profile exists to accurately identify a prospective abuser or neglectful parent, many states expressly permit parental rights termination to be based on "prospective abuse or neglect" when it is in the best interest of the child.

The Florida Supreme Court will most likely follow the direction of other jurisdictions who recite the rationale that "a court need not await certain disaster to come into fruition before taking protective steps in the interest of a minor child." Alternatively, and less likely, the Florida Supreme Court may comply with the request of Lawrence J. Semento, Counsel for Appellant Thomas Padgett, and defer to the legislature to "provide . . . guidelines and standards by which 'prospective,' as opposed to 'actual,' abuse or neglect would provide a legal basis for termination of parental rights." Since the problem of child abuse and neglect is extremely widespread, this author is persuaded by the rationales expressed by the previously cited jurisdictions. While scientific evidence does not clearly support the concept this is a situation where the emotional appeal is so great that the risk of error is outweighed by the state's interest to protect helpless children. Further, precise guidelines and standards can not be or should not be established since each case is unique. The players and their backgrounds are so very different that precise guidelines would be detrimental to those parents who can benefit from therapy and rehabilitation. However, the inability to determine precise guidelines should not preclude a finding that the concept is viable. It has been accurately stated that "[o]nce the government gets into the business of protecting, there is no alternative but to get involved in the prediction game."

Courts are constantly engaged in the psychological prediction game. The "best interest of the child standard," which Florida courts utilize daily to determine child custody disputes in dissolution proceedings, is based on prediction. For instance, the court considers and evaluates factors including: which parent is more likely to allow the
stated "[s]he has no need for any more children." 883 Nonetheless, the mother became pregnant again. 884 She voluntarily chose to have sterilization surgery after relinquishing custody of the newborn. 885 During sentencing Judge Jones considered the fact that the mother was sterilized and that she relinquished custody of the newborn as mitigating factors when he sentenced her to ten years in prison rather than the maximum sentence of twenty years. 886

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251. Id.
252. Id.
253. Telephone interview with Superior Court Judge Roy F. Jones, Indiana Superior Court. (August 17, 1989).
254. Id.
255. 274 U.S. 200 (1927).
256. Id.
258. Id. at 541.
259. Id.

263. See supra notes 173-187.
child frequent and continuing contact with the nonresidential parent; which parent has the capacity and disposition to provide the child with food, clothing, etc. The court also considers the permanence of the existing or proposed custodial home. Further, the mental and physical health of the parents is evaluated.

Judge Cowart’s unpersuasive dissent states that prospective absences is comparable with “imprisonment of one who has not committed a crime because ‘but for’ the fact he was imprisoned he ‘would have’ committed a crime.” Judge Cowart’s analogy is unfair since the potential victim of child abuse is usually living with the abuser; hence, the victim is extremely accessible. On the other hand, a crime victim rarely lives with the criminal; thus, the criminal must seek out his or her victim. Accordingly, since child abuse is a unique crime in that the victim is brought to the offender’s home, stringent precautions must be utilized. Thorous case by case analysis combined with expert psychological testimony should provide the courts with adequate information to allow it to decide which parents are habitual offenders beyond recovery. As stated, courts continually engage in the prediction game. Since most state court opinions which terminate parental rights lack thorough analysis and rationale, one can only assume that these opinions are supported by the emotional appeal of the issue combined with the realization that both prediction and speculation encompass most areas of law.

Lori Susan Weiss

266. Id.
267. Id.
268. Id. (emphasis added).
269. Spankie, 505 So. 2d at 1360 (Cowart, J., dissenting).