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Family Law - Wyoming's New Termination of Parental Rights Statute

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COMMENTS

FAMILY LAW—WYOMING'S NEW TERMINATION OF PARENTAL RIGHTS STATUTE

Parents have traditionally exercised a great deal of control over their children and their children's lives.[1] Historically, almost anything a parent wished to do with, or concerning, his child was sanctioned by the community at large, and by the legal system, if such sanction were sought. Because a child was considered something akin to a property right,[2] the courts were loathe to interfere in matters concerning the family.

Today, although still given control over numerous aspects of their children's lives,[3] parents are called upon to answer for certain behavior toward their children. Pervasive control over one's children no longer means that a parent may exercise his parental rights unconditionally. Instead, nearly every state has enacted a statute by which a parent's rights to the care and custody of his child may be terminated by the courts.[4] These statutes usually allow for termination under one or more of the following circumstances: 1) in a divorce proceeding; 2) in a guardianship proceeding; 3) in an adoption proceeding; and 4) when the child's natural parent(s) have abused or neglected him.[5]

While Wyoming does not provide for termination in divorce or guardianship proceedings, it does provide for termination under certain circumstances in the state's adoption statute[6] and in a specific statute providing for termination of parental rights.[7] This comment will deal specifically

1. Dobson, *The Juvenile Court and Parental Rights*, 4 FAM. L.Q. 393, 394-95 (1975).
2. *See generally* Brosnan, *The Law of Adoption*, 22 COLUM. L. REV. 332, 335 (1922). *See also* Thomas, *Child Abuse and Neglect Part I: Historical Overview, Legal Matrix, and Social Perspectives*, 50 N.C.L. REV. 293, 299, 300 (1972).
3. Note, *Termination of Parental Rights—Suggested Reforms and Responses*, 16 J. FAM. L. 239, 241 (1977-1978).
4. *See* Chemerinsky, *Defining the "Best Interests": Constitutional Protections in Involuntary Adoptions*, 18 J. FAM. L. 79, 80 n.13 (1979), for a list of state termination statutes.
5. Comment, *Termination of Parental Rights and the Lesser Restrictive Alternative Doctrine*, 12 TULSA L.J. 528, 528-29 (1977).
6. WYO. STAT. § 1-22-110 (1977).
7. WYO. STAT. § 14-2-308 to -318 (Supp. 1981).

with Wyoming's new Termination of Parental Rights Statute, and with what is right and what is wrong with the statute. Also offered will be suggestions for rectifying possible problems inherent in the statute through court interpretation of statutory provisions and predictions as to the position the Wyoming Supreme Court will take when confronted with the new statute.

WYOMING'S NEW TERMINATION STATUTE

The 1981 Wyoming Legislature repealed Wyoming's existing Termination of Parental Rights Statute[8] and replaced it with a statute which differs substantively in several respects from the prior statute. In replacing the prior statute, the court made several improvements, but it may also have created possible constitutional problems. These problems may be ameliorated or cured through court interpretation, however, and satisfactory judicial construction of several provisions should save the statute from a constitutional attack.

The previous Wyoming Termination of Parental Rights Statute[9] allowed for termination of all existing rights of a parent to his or her child, including care custody and control, if that parent abandoned the child, failed without just cause for one year or more to support and maintain a child under the age of eighteen, or abused or neglected the child.[10] The new Termination of Parental Rights Statute,[11] while keeping abandonment, failure to support, and abuse or neglect as statutory grounds for termination of parental rights, significantly changed the language of these provisions. The new statute is more complex and explicit in its approach to termination of parental rights and allows

8. WYO. STAT. § 14-2-301 to -308 (1977) (repealed 1981).
9. *Id.*
10. *Id.* § 14-2-301. The subsection reads:
> Any parent who abandons a child, fails without just cause for one (1) year or more to support and maintain a child under the age of eighteen (18) years or abuses or neglects a child may have his permanent care, control and custody of the child transferred to some other person, agency or institution and may have all his parental rights to the the child terminated. (Laws 1955, ch. 169, § 1; W.S. 1957, § 14-53; Laws 1978, ch. 25, § 1.)

11. WYO. STAT. § 14-2-308 to -318 (Supp. 1981).

termination if circumstances in any of the following subsections are found:

> (i) The child has been left in the care of another person without provisions for the child's support and without communication from the absent parent for a period of at least one (1) year. In making the above determination, the court may disregard occasional contributions or incidental contracts and communications;
>
> (ii) The child has been abandoned with no means of identification for at least three (3) months and efforts to locate the parents have been unsuccessful;
>
> (iii) The child has been abused or neglected by the parent and efforts by an authorized agency or mental health professional have been unsuccessful in rehabilitating the family or the family has refused rehabilitative treatment, and it is shown that the child's health and safety would be seriously jeopardized by remaining with or returning to the parent;
>
> (iv) The parent is incarcerated due to the conviction of a felony and a showing that the parent is unfit to have the custody and control of the child.[12]

D.S. v. Department of Public Assistance and Social Services

The 1981 termination statute was apparently enacted in response to the Wyoming Supreme Court's holding in *DS v. Department of Public Assistance and Social Services*,[13] decided in 1980 under the prior termination statute. The *DS* court pointed out problems with that statute and also articulated an intention to "establish . . . guides and standards"[14] for termination of parental rights cases. These guides and standards have evidently been codified under the new statute.

In *DS*, the court was disturbed by the fact that abuse and neglect were allowed as grounds for termination, but

12. *Id.* § 14-2-309.
13. 607 P.2d 911, 918 (Wyo. 1980).
14. *Id.* at 917.

that they were not defined in the termination statute itself.[15] The court noted, however, that those terms were defined elsewhere in Wyoming statutory law,[16] and apparently accepted those definitions as sufficiently definitive standards for termination.

In the new statute, both terms are expressly cross-referenced in the termination statute itself[17] to another section in Title 14 of the Wyoming Statutes.[18] The cross-references provide definitions of the behavior prohibited by the statute in a proceeding predicated upon "abuse" or "neglect" charges. Thus, no longer need there be any speculation by the court as to the legislature's intended definitions of abuse and neglect.

Another change in the new statute apparently spawned by the *DS* case is the standard of proof required for termination. The prior statute did not articulate the standard to be used in deciding termination cases, and it was left to the court to decide the quantum of proof required. The *DS* court, in analyzing the constitutional issues involved, held that because a "fundamental liberty" was at stake[19] in a termination proceeding,

> termination of parental rights cannot be ordered on the grounds of abuse or neglect unless the showing is *clear and unequivocal* that the child's health—mental or physical—and/or his social or educational well-being has actually been placed in jeopardy through the neglect or abuse by the parent.[20]

This higher standard of proof was deemed necessary by the court because of its conclusion that the right to family integrity is a fundamental right.[21]

The new statute expressly calls for "clear and convincing" evidence of any facts used to terminate a parent's

15. *Id.* at 918.
16. *Id.*
17. WYO. STAT. § 14-2-308(i), (vi) (Supp. 1981).
18. *Id.* § 14-3-202(a) (ii), (vii) (1977).
19. DS v. Department of Public Assistance and Social Services, *supra* note 13, at 918.
20. *Id.* at 919 (emphasis added).
21. *Id.* at 918.

rights.[22] By requiring "clear and convincing" evidence, the legislature was evidently according weight to the particular rights involved (already described as "fundamental" by the *DS* court).[23]

The legislature did not go so far, however, as to require that facts supporting termination be proved "beyond a reasonable doubt."[24] Although it might be argued that such a standard should be required when terminating a parent's rights to his children, it has been suggested that requiring the state to sustain such a burden would make termination a "practical impossibility in those cases where it is appropriate."[25] Therefore, it seems clear that the best and most reasonable standard in termination cases is the "clear and convincing" standard. The parent is adequately protected against unconstitutional termination of his rights because the state is given a high standard of proof; on the other hand, the state is not faced with an insurmountable burden in termination cases.

The *DS* decision has also apparently been statutorily codified under Section 14-2-309(a)(iii) of the 1981 statute.[26] That subsection requires a showing that "the child's health and safety would be seriously jeopardized by remaining with or returning to the parent. . . ."[27] In *DS*, the court stated that if a parent's rights are to be terminated upon a showing of abuse or neglect, there must be a showing that "the child's health—mental or physical—and/or his

22. WYO. STAT. § 14-2-309(a) (Supp. 1981).
23. This standard accords with a recent U. S. Supreme Court decision, Santosky v. Kramer, 50 U.S.L.W. 4333 (U.S. Mar. 23, 1982), where the Court struck down a New York statute requiring only a "fair preponderance of the evidence" to support termination of a parent's rights to his child upon a finding of "permanent neglect." *See* N. Y. FAM. CT. ACT. § 662 (McKinney 1975 & Supp. 1981-1982).
The Court, in a 5-4 decision, held that procedural due process mandates a "clear and convincing" standard of proof in termination cases. Santosky v. Kramer, 50 U.S.L.W. at 4339.
24. *But cf.* LA. REV. STAT. ANN. § 13:1603.A (West Supp. 1982), which requires that certain allegations in Louisiana's termination statute be proven *beyond a reasonable doubt.*
25. Comment, *Proceedings to Terminate Parental Rights: Too Much or Too Little Protection for Parents?* 16 SANTA CLARA L. REV. 337, 349 (1976).
26. WYO. STAT. § 14-2-309(a)(iii) (Supp. 1981).
27. *Id.*

social or educational well-being has actually been placed in jeopardy through the neglect or abuse by the parent."[28] The legislature's adoption of substantially similar language to that found in *DS* indicates that the legislature apparently embraced the court's determination that the best interests of the child is not the determining criterion in termination cases. It is not enough that the child would be better off somewhere else. Instead, the situation must be dangerous enough to jeopardize the child's well-being in order to justify taking the child from its parent or parents.[29]

Other changes in the new statute also appear to be the result of the *DS* holding. In *DS*, the supreme court was faced with conflicting language in the old statute, representing both the "parental rights" doctrine and the theory that termination is appropriate if it is in "the best interests of the child."[30] The court saw the problem as one of statutory construction and the issue as

> "[h]ow . . . [to] harmonize the 'best interest' language of § 14-2-306(a) with the abandonment, abuse or neglect standards of § 14-2-306(b) and § 14-2-301. . . ."[31]

The court apparently reconciled the two theories, but placed the "parental rights" doctrine in the forefront.[32] In fact, it has been suggested that the *DS* court "resolved that establishing 'abuse' or 'neglect' is the threshold question, and the 'best interest' language is pertinent only insofar as it guides the court in its disposition of a case once abuse or neglect is proven."[33] The *DS* court's acceptance of the parental rights doctrine is also reflected in the new statute, apart from the clear and convincing evidence standard, in that

28. DS v. Department of Public Assistance and Social Services, *supra* note 13, at 919.
29. An argument could be made that the child should not be put in the position of having his mental or physical well-being endangered before a court will or can act. Those espousing a "best interests of the child" standard would argue that the child should be afforded more protection than this language allows.
30. DS v. Department of Public Assistance and Social Services, *supra* note 13, at 917.
31. *Id.*
32. *Id. See also* Note, *Termination of Parental Rights: Establishing Standards for the Wyoming Law*, 16 LAND & WATER L. REV. 295, 302 (1981).
33. Note, *supra* note 32, at 308.

all language referring to the "best interests of the child" has been deleted; the standard appears nowhere in the new statute. It seems unlikely that this language was inadvertently omitted from the new statute and the more likely explanation is that the legislature intended to adopt the *DS* court's emphasis on the parent's rights as the first and primary consideration in termination proceedings.

It should be noted that even though the best interests of the child are no longer an express consideration, procedural safeguards designed to protect the child in termination proceedings are still provided. Section 14-2-312 of the 1981 statute[34] provides that a guardian *ad litem* shall be appointed for the child in a termination proceeding. The provision is apparently mandatory and is designed to protect the child's interest in the litigation. The section also allows the "parent, child or interested person to demand a jury trial,"[35] another added protection for the child.

A final provision of the statute designed to protect the child is the requirement that a social study be made when the petition to terminate a parent's rights has been filed.[36] The section, theoretically at least, is designed to protect the child by providing the court with a factual description of the family's situation. Such a study should contain data to help the court decide whether there has been abandonment, abuse or neglect, or parental unfitness, and if so, whether it will be in the child's interests to have the court separate him from his parent or parents. Presumably, then, the court is still to look out for the interests of the child, even if not expressly directed to do so.

THE 1981 WYOMING TERMINATION STATUTE

The 1981 termination statute, while in many respects a response to judicial reasoning set down in *DS*,[37] still presents possible constitutional problems. These problems stem from newly enacted provisions which in several in-

34. WYO. STAT. § 14-2-312 (Supp. 1981).
35. *Id.*
36. *Id.* § 14-2-314.
37. *See supra* text accompanying notes 13-36.

stances are vague and which, therefore, may create due process problems. Each of the new statutory subsections will be discussed and analyzed in terms of the facial constitutionality of the specific provision. Possible judicial construction of several sections will also be suggested as a means of sustaining the constitutional validity of the statute, despite apparent defects. Before these subsections are analyzed, however, a brief overview of cases dealing with termination of parental rights will be provided in an effort to establish the constitutional framework within which Wyoming's new Termination of Parental Rights Statute must fit in order to pass constitutional muster.

Constitutional Analysis

The United States Supreme Court, while never expressly declaring the right to parent to be an absolute and fundamental right,[38] has nonetheless implied that the right to family integrity is indeed "fundamental".[39] The Court has generally found such a right on the basis of one of two interests: 1) a liberty interest or 2) a privacy interest.[40]

The theory that there exists a liberty interest in one's family was early articulated in *Meyer v. Nebraska*,[41] where the Court held that the Fourteenth Amendment includes "the right of the individual . . . to marry, establish a home and bring up children. . . ."[42] Again, in *Pierce v. Society of Sisters*,[43] the Court found that the state may not interfere with the "liberty of parents . . . to direct the upbringing and education of children. . . ."[44] This language suggests that the rights of parents in matters concerning their children is certainly to be highly regarded and not easily interfered with.

38. Comment, *supra* note 5, at 536.
39. *See* Stanley v. Illinois, 405 U.S. 645 (1972); May v. Anderson, 345 U.S. 528 (1953); Prince v. Massachusetts, 321 U.S. 158 (1944); Skinner v. Oklahoma, 316 U.S. 535 (1942).
40. Comment, *Due Process and the Fundamental Right to Family Integrity: A Re-Evaluation of South Dakota's Parental Termination Statute*, 24 S.D.L. REV. 447, 450 (1979).
41. 262 U.S. 390 (1923).
42. *Id.* at 399.
43. 268 U.S. 510 (1925).
44. *Id.* at 534-35.

Under the "privacy" rationale,[45] the Supreme Court has also intimated that the right to family integrity is an important interest. In cases such as *Roe v. Wade*,[46] where the Court recognized an individual's privacy interest in such matters as "marriage . . . procreation . . . contraception . . . family relationships . . . and child rearing and education,"[47] and *Griswold v. Connecticut*,[48] where the Court upheld the "privacy" interest of a couple wishing to use birth control, this privacy interest has been recognized and protected.

As previously noted, the Wyoming Supreme Court has also accepted its role as protector not only of children's rights, but of the rights of parents.[49] In expressly finding that "[t]he right to associate with one's immediate family is a fundamental liberty protected by the state and federal constitutions,"[50] the court determined the standard to be used in determining whether a parent's rights may be terminated in a particular case. The court also determined the standard by which to judge a statute which potentially affects all parents within the state. In other words, the new termination statute must be judged in light of the Wyoming Supreme Court's finding that a fundamental right is involved in taking away a parent's children.[51]

The finding of a fundamental right by a parent to raise his or her family is not dispositive of the question of the appropriate standard of review in termination cases. Instead, the parent's rights must be weighed not only against the interests of the state,[52] but against the rights of the

45. Comment, *supra* note 40, at 450.
46. 410 U.S. 113 (1973).
47. *Id.* at 152-53.
48. 381 U.S. 479 (1965).
49. DS v. Department of Public Assistance and Social Services, *supra* note 13.
50. *Id.* at 918.
51. Because the court found that a "fundamental" right was involved, the "strict scrutiny" standard must be the standard of review. The strict scrutiny standard requires that a compelling state interest be served by the legislation in the proposed statute and that there be no less onerous alternative available to achieve the statutory objective. *See* Washakie County School District Number One v. Herschler, 606 P.2d 310, 333 (Wyo. 1980).
52. The state's authority to interfere in family matters finds a basis in the doctrine of *parens patriae*. The doctrine originated in 18th Century England where the King was held to serve as the pater patriae of those who were in need of protection. The doctrine became part of the common law

child.[53] Because these three interests are not necessarily mutually inclusive, a balance must be struck, and one must not be promoted at the expense and abrogation of another. It is with these considerations in mind that the 1981 statute must be evaluated.

Termination Provisions

As already noted, Wyoming's new statute allows termination under four circumstances.[54] The first, Subsection (i) of the new statute, allows termination if two conditions are satisfied: 1) the parent has not supported the child for at least one year and hasn't made alternative arrangements for support, and 2) the parent has not communicated with the child for at least one year.[55]

It is interesting to note that subsection (i) of the statute does not contain the "just cause" requirement that the prior statute contained. That statute allowed termination when a parent failed without just cause to support and maintain his child for a period of at least one year.[56] The threshold question was whether the parent's failure to support was legally justifiable.

Because the just cause provision is absent from the 1981 statute, an argument could be made that the legislature intended termination of parental rights to be possible regardless of the ability or inability of the parent to pay support and regardless of the reasons for non-support. However, the new statute does allow a parent who cannot support his child to make alternative arrangements for the

in the United States and eventually the duty of protecting children came to rest upon the state. For an excellent historical discussion of the parens patriae doctrine, see Comment, *supra* note 5, at 529-30 n.10.

Another justification for state interference with the family has been upon the theory that it is within the state's police power to interfere because such interference is for the good of society as a whole. *See* Comment, *supra* note 40, at 451.

53. These rights have developed into the "best interests of the child" standard, which places the child's welfare above all other considerations. For a discussion of the "best interests of the child" test, see Comment, *Termination of Parental Rights in Adoption Cases: Focusing on the Child*, 14 J. FAM. L. 547 (1975-1976). *See also* Finlay v. Finlay, 240 N.Y. 429, 148 N.E. 624, 625 (1925).
54. WYO. STAT. § 14-2-309(a) (Supp. 1981).
55. *Id.*
56. WYO. STAT. § 14-2-301 (1977) (repealed 1981).

child's care,[57] avoiding termination of his parental rights on grounds of non-support. This latter provision is necessary to prevent the statute from unconstitutionally discriminating against the indigent by terminating a parent's rights on the grounds that he is unable to support his child. By allowing a parent to make other provisions for his child's support, the due process and equal protection clauses are not contravened.[58]

The statute also adds a non-communication clause to the non-support provision.[59] A parent must not have communicated with the child for a period of at least one year if his or her rights are to be terminated. Thus, even if a parent is unable to support his or her child and has not made alternative arrangements for the child's care and support, termination will not be possible if the parent has maintained contact with the child. This provision safeguards the rights of parents who for whatever reason do not support their children, but who still maintain a relationship with them.[60] It appears, then, that the initial provisions of Subsection (i) of the Statute are constitutional.

More problematic, however, is the language in Subsection (i) allowing the court to "disregard occasional contributions, or incidental contacts and communications."[61] This allowance for judicial discretion poses constitutional problems in the the delegation is couched in vague terms. In a void for vagenuess challenge to a statute, the primary contention is that the statute in question is unconstitutional because its language affords insufficient due process protections to

57. WYO. STAT. § 14-2-309(a)(i) (Supp. 1981).
58. In Washakie County School District Number One v. Herschler, *supra note* 51, at 334, the Wyoming Supreme Court indicated that "[a] classification on the basis of wealth is considered suspect, especially when applied to fundamental interests." *See also* Zablocki v. Redhail, 434 U.S. 374 (1978) (statute denying individual the right to marry if he had defaulted on support obligations struck down); Boddie v. Connecticut, 401 U.S. 371 (1971) (statute requiring filing fee for divorce in the case of indigents held unlawful).
59. WYO. STAT. § 14-2-309(a)(i) (Supp. 1981).
60. This provision, coupled with the provision allowing a parent to make arrangements for the child's care if he is not supporting the child, prevents a possible equal protection challenge. The statute does not terminate the parental rights of indigents solely because they are unable to support their children.
61. WYO. STAT. § 14-2-309(a)(i) (Supp. 1981).

persons possibly affected by the statute.[62] Three basic dangers are posed by unconstitutionally vague statutes: "the absence of fair warning, the impermissible delegation of discretion, and the undue inhibition of the legitimate exercise of a constitutional right."[63] It is these dangers which courts hope to avoid by either striking down or narrowly construing offending statutory language.

In a recent federal case, *Alsager v. District Court of Polk City, Iowa*,[64] the court was faced with Iowa's termination statute, which allowed termination when facts showed

> b. [t]hat the parents have substantially and continuously or repeatedly refused to give the child necessary parental care and protection.
>
> c. [t]hat although financially able, the parents have substantially and continuously neglected to provide the child with necessary subsistence, education, or other care necessary for physical or mental health or morals of the child or have neglected to pay for subsistence, education, or other care of the child when the legal custody is lodged with others.
>
> d. [t]hat the parents are unfit by reason of debauchery, intoxication, habitual use of narcotic drugs, repeated lewd or lascivious behavior, or other conduct found by the court likely to be detrimental to the physical or mental health or morals of the child.[65]

The court took note of the three potential dangers of vague statutes[66] and determined that all three dangers were present in Iowa's termination statute.[67] Specifically, the *Alsager* court rejected the standards of "necessary parental care and protection" and of "[parental] conduct . . . detrimental to the physical or mental health or morals of the child" as providing no guidance or warning, in that the offending words were subject to "multifarious interpretations"[68] and

62. *See* Connally v. General Construction Construction Co., 269 U.S. 385, 392-94 (1926).
63. Alsager v. District Court of Polk City, Iowa, 406 F. Supp. 10, 18 (S.D. Iowa 1975).
64. 406 F. Supp. 10 (S.D. Iowa 1975).
65. *Id.* at 14 (Quoting IOWA CODE § 232.41 (1969)).
66. *Id.* at 18-19.
67. *Id.* at 20.
68. *Id.* at 18.

which therefore afforded parents no "reasonable opportunity to know what is prohibited."[69] Parents also might be inhibited in exercising their right to family integrity by a statute which is subject to ambiguous interpretation. Finally, the *Alsager* court felt that allowing state officials to decide on an *ad hoc* basis what parental conduct offended the statute provided too great an opportunity for arbitrary and subjective decisions.[70]

In *Roe v. Conn.*[71] which adopted the reasoning of *Alsager*, the federal district court was faced with Alabama's termination statute, which allowed removal of the child from its home upon a finding that the child was "neglected."[72] A "neglected" child was one without

> proper parental care or guardianship or whose home, by reason of neglect, cruelty or depravity . . . *is an unfit and improper place for such child*. . . .[73]

The court declared that whether a home is "unfit" or "improper" is "[o]bviously . . . a question about which men and women of ordinary intelligence would greatly disagree."[74] With such potential for disagreement and dissension, the statute was held to be unconstitutionally vague.[75]

Because Wyoming's statute directs courts to disregard "occasional" or "incidental" contributions, contacts, and communications, under an *Alsager* or *Roe* analysis, the statute might be held to afford inadequate notice to a parent as to which of his contacts, communications, and contributions a court may decide to ignore in determining whether to terminate his rights. Likewise, it could be argued that the provision gives no guiding standards to the court itself and that the discretionary delegation of power therefore becomes an impermissible delegation.

69. *Id.*
70. *Id.*
71. 417 F. Supp. 769 (M.D. Ala. 1976).
72. *Id.* at 773 n.1.
73. *Id.* at 779 (emphasis added).
74. *Id.* at 780.
75. *Id.*

Subsection (ii) of Wyoming's termination statute apparently poses no constitutional problems. The provision allows termination when a child has been abandoned with no means of identification for at least three months and when efforts to locate the parents have been unsuccessful. This subsection is specific in its description of the type of behavior which will precipitate termination proceedings[76] and a parent knows, or is held to know, exactly the sort of conduct which is proscribed. Likewise, a court need only inquire whether there has been an abandonment for three months and whether efforts to locate the parent or parents have been successful. The subsection is sufficiently definite to avoid a challenge on grounds that the statute is void for vagueness.

Subsection (iii) of the termination statute is the most detailed of the subsections allowing for termination. As previously noted, that subsection permits a court to terminate the parent-child relationship if the child has been abused or neglected; if attempts at parental rehabilitation have failed or have been refused; and if it can be shown that the child's well-being would be seriously jeopardized by remaining with or returning to the parent(s). As was noted, "abuse" and "neglect" are defined in cross references to Wyo. Stat. § 14-3-202(a)(ii) and § 14-3-202(a)(vii), respectively.[77] "Abuse", especially, is substantially defined and appears to afford adequate notice to parents, and guidance to courts. Likewise, the requirement of a rehabilitative effort or refusal of such an effort affords a parent sufficient notice that a court is considering termination of a parent's rights. Finally, the conjuctive requirement of a finding that the child's health and safety will be seriously jeopardized by remaining with or returning to the parent is an added constitutional safeguard of the parent's rights.[78]

The definition of neglect, on the other hand, could be subject to constitutional attack, although the *DS* court did

76. WYO. STAT. § 14-2-309(a)(ii) (Supp. 1981).
77. *Id.* § 14-2-309(a)(iii).
78. DS v. Department of Public Assistance and Social Services, *supra* note 13, at 919.

not indicate any constitutional infirmities in the definition and seemed to accept it as legitimate.[79] As earlier mentioned, the *Alsager* court struck down Iowa's termination statute where the standards of "necessary parental care and protection . . . [and of parental] conduct . . . detrimental to the physical or mental health or morals of the child"[80] were held to be too vague. The neglect provision, as defined by Wyoming Statute § 14-3-202(a)(ii) (1977),[81] seems hardly more definitive. Parents are cautioned only to provide "adequate" care, maintenance, supervision, education or other care "necessary" for the child's "well-being".[82] It could certainly be argued under *Alsager* and *Roe* that the terms "adequate", "necessary" and "well being" have no common meaning within this context and that they therefore offer no warning or guidance and should be held to be unconstitutionally vague.

The final circumstance in which a parent's rights may be terminated under the new statute is found in subsection (iv) of Wyoming Statute § 14-2-309. This subsection allows for termination if two circumstances are met: 1) the parent is incarcerated upon the conviction of a felony and 2) he or she is found unfit to have custody and control of the child.[83] While the requirement that a parent be incarcerated upon conviction of a felony is sufficiently definitive, the requirement that the parent be found "unfit" is not. The term "unfit" is not defined in the statute, nor is it cross-referenced to another statutory section. Therefore, it is left to the court and to the parent to speculate as to the meaning of the term in the context of the statute. Because the focus is on "unfitness" rather than on whether the parent has abused, neglected, or abandoned the child, it appears that the legislature intended the term to mean something other than abuse, neglect or abandonment, but we are left to speculate as to that intent.

79. *Id.*
80. Alsager v. District Court of Polk City, Iowa, *supra* note 63, at 18.
81. WYO. STAT. § 14-3-202(a)(ii) (1977).
82. *Id.*
83. WYO. STAT. § 14-2-309(a)(iv) (Supp. 1981).

The offending statutory provision in *Roe*, defining "neglected child", and allowing for termination when the home was found to be "unfit",[84] is clearly similar to the provision of Subsection (iv) of Wyoming's statute. And as men and women of ordinary intelligence may disagree as to what constitutes an "unfit" home, so may they disagree as to what constitutes an "unfit" parent. The lack of attendant language defining the term suggests that this subsection is subject to the same attack on vagueness grounds which felled the statutes in *Alsager* and *Roe*.

It appears, then, that at least some of the vagueness problems found in *Alsager* and *Roe* are present in Wyoming's new statute. Not only might the statute inhibit a parent's right to exercise his parental rights, but a statutory section such as that in the Wyoming law which permits termination of parental rights when a parent is found to be "unfit" allows decisions to be made on arbitrary and discriminatory grounds. A more carefully drawn statute, or a carefully narrowed construction would eliminate the harm caused by directionless terms and would provide for more uniform adjudication.

Other Decisions And Statutory Constructions

Not all state courts have been willing to follow the rationales of *Roe* and *Alsager*. Instead, several courts have upheld termination statutes subjected to vagueness challenges. These cases, too, may impact on a Wyoming court's willingness or reluctance to strike down the state's termination statute on vagueness grounds and are therefore helpful in considering the fate of Wyoming's statute.

In *In re Keyes*,[85] the Oklahoma Supreme Court specifically rejected the reasoning of *Alsager* and *Roe*.[86] The court agreed that the terms "care and protection necessary for the child's physical or mental health" are terms "about which men and women of ordinary intelligence may dis-

84. ALA. CODE tit. 13, § 350 (2) (1958).
85. 574 P.2d 1026 (Okla. 1977).
86. *Id.* at 1029.

agree".[87] However, the court was not bothered by such vagueness and not persuaded that the statute was so vague as to be unconstitutional.

The court further noted that, although Oklahoma's statute was similar to the Iowa statute struck down in *Alsager*, Oklahoma's statute requires parents to be given six months to correct conditions of neglect. This apparently reassured the court that such warning would afford parents sufficient due process protections. The court did not address the problem of vague provisions and the potential for arbitrary decisions.

Again, in *In re David*,[88] the *Alsager* rationale was denounced.[89] The court noted that Rhode Island's statute differed from the Iowa statute,[90] but went further by rejecting the *Alsager* court's use of the strict scrutiny standard in termination proceedings.[91]

In *In re Aschauer*,[92] the phrases "proper parental control" and "proper maintenance, training and education" were under attack as being unconstitutionally vague.[93] *Alsager* and *Roe* were cited in support of the contention that the terms were unconstitutional. Again, the reasoning of *Alsager* and *Roe* was rejected. Instead, the court held that the phrases read in the context of the statute as a whole provided sufficient specificity to withstand a vagueness challenge. Further, the court noted that indefinite terms such as "proper" were necessary to provide needed flexibility in determining cases such as the one before the court.[94]

The court in *In re Brooks*[95] was faced with a statute which allowed for termination upon a showing of unfitness. The court differentiated between the Iowa statute, which was the subject of *Alsager*, and the Kansas statute before

87. *Id.*
88. 427 A.2d 795 (R.I. 1981).
89. *Id.* at 801.
90. *Id.*
91. *Id.*
92. 92 Wash. 2d 689, 611 P.2d 1245 (1980).
93. *Id.* at 611 P.2d at 1249.
94. *Id.* at 611 P.2d at 1250 n.5.
95. 228 Kan. 541, 618 P.2d 814 (1980).

the court by noting that "[t]he [Iowa] action was brought to sever the parental rights",[96] while under the Kansas statute in question "the court must find the children to be deprived before the issue of termination is reached. The termination of parental rights is rather dispositional in nature."[97] The court further noted that the *Alsager* court had applied the criminal statute test for vagueness, which the Kansas court felt was inappropriate.[98]

A more important consideration for the *Brooks* court, however, may have been that the Kansas court had several times construed the term "unfitness." Therefore, judicial construction was held to have cured whatever vagueness problems may have been embodied in the term "unfit."[99]

Other state courts have also rejected vagueness challenges to termination statutes, while not expressly denouncing *Alsager* and *Roe*. The Supreme Court of Colorado was faced with seemingly vague language in *People v. D.A.K.*,[100] when called upon to determine the constitutionality of a termination provision which defined an abused or dependent child as one whose parent had subjected him or her to "mistreatment or abuse."[101] The court noted the importance of the parental rights involved, but held that the statute was sufficiently definitive to warn parents as to what conduct is prohibited.[102] The court also recognized the importance of indefinite language in an effort to afford flexibility in enforcement.

Another subsection of Colorado's termination statute was challenged in *People in the Interest of V.A.E.Y.H.D.*[103] The statutory section in question defined a neglected or dependent child as one "whose environment is injurious to his welfare."[104] This subsection was challenged on void for vagueness grounds, and again, the Colorado court rejected

96. *Id.* at 618 P.2d at 819.
97. *Id.* at 618 P.2d at 820.
98. *Id.* at 618 P.2d at 818-19.
99. *Id.* at 618 P.2d at 819.
100. 198 Colo. 11, 596 P.2d 747 (1979).
101. *Id.* at 596 P.2d at 750.
102. *Id.* at 596 P.2d at 751.
103. 605 P.2d 916 (Colo. 1980).
104. COLO. REV. STAT. § 19-1-103 (20) (c) (1973).

the challenge. The court seemed satisfied with the Illinois and South Dakota Supreme Courts' treatment of substantially similar language in a challenge to its termination statute.[105] The Colorado court had held that its statutory standards were a sufficient warning to the average intelligent person and that, therefore, the statute did not violate the constitutional right of due process.[106] The Illinois court had also earlier noted that "[c]hild neglect is by its very nature incapable of a precise and detailed definition. . . ."[107] The Colorado court accepted this reasoning and upheld Colorado's statute..

The Current Trend

It appears that the general trend of state courts is to reject the reasoning of *Alsager* and *Roe* and to uphold termination statutes, even if the language is admittedly vague. This difference of opinion as to the constitutionality of similar provisions seems to stem from opposing concerns. The basic tenet of *Alsager* and *Roe* was that any statutory provision must "clearly identify and define the evil from which the child needs protection and . . . specify what parental conduct so contributes to that evil that the state is justified in terminating the parent-child relationship."[108] Several state courts, however, expressed the concern that termination provisions must be kept indefinite in order to encompass all offending behavior. Those courts were perhaps more interested in protecting the child from possible harmful behavior than in protecting the parent from possible unconstitutional language. The different outcomes in these termination cases might very well be indicative of those differences which exist between those advocating the "parental rights" doctrine and those concerned primarily with the best interests of the child.

Amelioration

Should the Wyoming Supreme Court follow an *Alsager* and *Roe* analysis, and find that there are vagueness prob-

105. People in the Interest of V.A.E.Y.H.D., *supra* note 103, at 918-19.
106. *Id.*
107. *Id.*
108. Alsager v. District Court of Polk City, Iowa, *supra* note 63, at 21.

lems with the new statute, the next step will be for the court to try to eliminate those problems by statutory construction. Facial defects in statutory provisions may be cured by judicial interpretation.[109] The United States Supreme Court in *Grayned v. City of Rockford*[110] addressed the challenge to a statute on void for vagueness grounds by indicating that vagueness problems can be cured by a state court construction delimiting vague standards to constitutionally permissible bounds.[111]

In other words, language in the Wyoming statute which is vague may still be held constitutional if the court is willing to construe offending language with the degree of specificity needed to warn parents and to guide courts. Although the Wyoming Supreme Court was not called upon to cure defective provisions in its prior termination statute, other courts have taken this approach in order to avoid the necessity of invalidating the termination statute.[112]

Suggestions

In subsection (i) of the Wyoming termination statute, courts should probably define "incidental contacts and communications" and "occasional contributions" more specifically in order to alert parents and judges as to the quantum of contact required to avoid termination. If the intent of the legislature is to require that the parent make a good faith effort to support and communicate with his child, then such a standard should be embodied in a judicial interpretation.

The neglect provision of the new statute may also need judicial interpretation to give meaning to the offending terms. The requirement that the child's safety or health must be seriously jeopardized by remaining with the parents should at least narrow the range of activities and situations which a court can consider as constituting neglect.

109. Grayned v. City of Rockford, 408 U.S. 104, 111-113 (1972).
110. *Id.*
111. *See* Alsager v. District Court of Polk City, Iowa, *supra* note 63, at 19.
112. *See* In re Vallimont, 182 Kan. 334, 340, 321 P.2d 190 (1958); Finney v. Finney, 201 Kan. 263, 440 P.2d 608 (1968); *In re* Penn, 2 Kan. App. 2d 623, 625, 585 P.2d 1072 (1978).

The term "unfit", probably more than any other provision, should be defined by the courts. One approach would be to incorporate the definitions of subsections (i), (ii), and (iii) of the statute to define "unfit". In other words, unfitness would embrace a finding of non-support and non-communication for a period of one year; a finding of explicit or express abandonment for a period of three months; or a finding of abuse or neglect on the part of the parent whose rights are in danger of being terminated. The requirement of a finding of at least one of these factors would narrow the definition of unfitness enough to sustain the validity of the statute in a vagueness challenge. It would also afford sufficient notice to incarcerated parents, notwithstanding the vagueness problems already discussed as to subsection (i).[113] Another approach might be to simply set down the specific factors the court will consider as constituting "unfitness". Again, a more definitive list of offending conduct would provide the needed notice and guidance. It appears, then, the Wyoming courts have several options in interpreting the statute and it is up to these courts to tailor definitions and provisions so that they conform with constitutional requirements.

CONCLUSION

Wyoming's new Termination of Parental Rights Statute is in many respects a valid attempt to protect both the rights of parents facing termination and the rights of children whom the state seeks to protect. Provisions designed to safeguard constitutional rights have been included in several subsections. The statute may not go far enough, however, in safeguarding the rights of those parents subjected to vague statutory provisions.

If the statute is challenged on void for vagueness grounds, the court will be called upon to determine whether the statute is facially defective, and if so, whether this defect can be cured through court interpretation. The court's decision will depend on whether the court accepts the *Alsager*

113. *See supra* text accompanying notes 60-74.

and *Roe* courts' insistence upon specific terms and definitions in statutory termination provisions or whether it is willing to accept less definitive language as a means of preserving flexibility in enforcement and interpretation.

Although the vagueness issue was not before the court in *DS*, the court's lack of concern over several seemingly vague provisions in the prior statute might indicate that the court may be less than responsive to a void for vagueness challenge to the new statute. On the other hand, if the court's primary concern is protecting the parent in termination cases, a void for vagueness challenge might indeed be successful.

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