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Too Stupid: Intellectual Disability as a Statutory Ground for Termination of Parental Rights

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Too Stupid: Intellectual Disability as a Statutory Ground for Termination of Parental Rights

Too Stupid: Intellectual Disability as a
Statutory Ground for Termination of Parental
Rights

Charlotte Jayne Cooper*

ABSTRACT

Smarter people do not inherently make for better parents. Absent abuse or neglect, a parent with a low intellectual quotient runs the risk of losing their children to the state. This Article addresses intellectual disability as a ground for termination of parental rights, and illustrates a general understanding on what intellectual disability is. More notably, this Article is the first to provide a complete state survey on intellectual disability as a ground in termination of parental right statutes, and specifically addresses state's termination statutes that epitomize overboard intellectual disability language and narrow intellectual disability language. With the disability described and the statutory language flushed out in the body of the Article, an argument is subsequently made on the type of language states should consider employing to afford more protections for the average intellectually disabled parent from state action. These parents should not rely on being dealt an enlightened judge who can balance the scales of justice imperially; in other words, a judge who does not adhere to the arbitrary presumption that all intellectually disabled parents are unfit to care for their children. This Article concludes by articulating a straightforward notion: in order to preserve the family nucleus for non-severe intellectually disabled parents, states must cease employing overbroad statutory language.

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INTRODUCTION

“I’m not a smart man, but I know what love is.”¹

In 2013 an Oregonian couple had their first son removed from their home following a family member reporting neglect to the state’s child welfare agency. Pursuant to the report of alleged neglect, the Department of Human Services began investigating the parents. The department found no signs of abuse, but reported in their findings that the parents both have below-average IQs. The state agency also found representations of the struggles and frustrations people with learning disabilities face when attempting to be parents. In reports of concerns about the couple’s parenting skills, a Mountain Star² case worker recalled having to prompt the two parents to have Christopher wash his hands after using the toilet and to apply sunscreen to all of his skin rather than just his face. Upon this information, the state removed Christopher and placed him in foster care.

Then in 2017, the couple had a second son, Hunter. The state took custody of Hunter as well. However, this time the state removed the couple’s second son directly from the hospital following his

birth.³ The state’s justification for taking Christopher and Hunter away from their parents is grounded in the parent’s limited cognitive abilities that interfere with their aptness to safely parent the children.⁴ Reunification is being sought but has yet to be achieved. The children remain sequestered from their parents by residing in the state’s foster system. In light of this story, and many others, one question surfaces in the mind: are individuals with average to high IQs inherently better parents because of their ample cognitive ability?

For many, the ability to be a parent and raise children is taken for granted. Good parents should not have their parental rights terminated. Absent true abuse or neglect, like in the case outlined above, parents with limited cognitive ability⁵ can have a basic, fundamental right terminated: the right to make decisions concerning the care, custody⁶, and control of their children⁷. The Supreme Court of the United States has long recognized this fundamental right of parents.⁸ Nevertheless, parents with below average IQs have been and continue to be denied full enjoyment of their rights with respect to care, custody, and control of their children because of a condition they have, not a behavior they exhibit.⁹

This article will discuss what intellectual disability is, explore the current landscape of state statutes addressing intellectual disability in termination of parental rights, and finally propose that states should eliminate overbroad intellectual disability language in their termination of parental rights statutes. Part I of this Article will provide an in-depth definition of intellectual disability and its sub-classifications. Following this definition section, Part I will then provide brief background information on the description and definitions of intellectual disability. This Article disallows any in-depth historical discussion on the background of intellectual disability, mental retardation, and mentally disability. Thus, an in-depth historical, socio-economic, and social-psychological background of the aforementioned classifications will not be discussed in this article. Part II will discuss the current landscape of state statutes addressing intellectual disability as a ground for termination of parental rights. Additionally, this section will analyze the narrow and broad language present in state's termination statutes. Finally, Part III will offer a proposal to states to recognize and be cognizant of the varying classes of intellectual disability and, thus, protect mild

and moderate intellectually disabled parents by using specific, narrow language in their termination of parental rights statutes.

I. DESCRIPTION AND DEFINITION OF INTELLECTUAL DISABILITY

In order to understand the anatomy of a problem, one must first have a skeletal framework. To begin piecing this framework together, a minor description of intellectual disability will be provided. The description provided in the subsequent paragraph is essential for the reader to cognize this form of disability, and for the development of this article's analysis.

It has been estimated that in the United States there are at least 4.1 million parents with disabilities who have minor children.¹⁰ This group represents 6.2 percent of the parenting population.¹¹ No national study has been conducted to identify the total number of parents with disabilities who have been involved in the child welfare system.¹² However, the National Center on Parents with Disabilities and their Families analyzed data from 19 states and found that 12.9 percent of children removed by child welfare services had a caregiver with a disability.¹³ Multiple studies have revealed that 30 to 50 percent of parents with

intellectual disabilities lose custody of their biological children.¹⁴

The definition of intellectual disability will be defined in accordance with the current understanding of this form of disability. For clear comprehension, the definition of intellectual disability will be delineated below.

A. General Definition of Intellectual Disability

Intelligence has systematically been defined using the Intelligent Quotient (IQ) test.¹⁵ Some scholars have asserted that Intellectual Disability “is not a disease, disorder or disability.”¹⁶ Instead, it is a label for a diverse group of people.¹⁷ Individuals labeled as intellectually disabled share characteristics: limitations in intelligence and deficits in adaptive skills.¹⁸ The American Association on Mental Retardation lists these specific examples of adaptive behavior skills: receptive and expressive language, gullibility, money concepts, using transportation and doing house-keeping activities.¹⁹ These characteristics suggest that this group of individuals are homogenous. In fact, they are not homogenous or monolithic. These individuals are a heterogeneous, non-

monolithic group who are categorically subdivided into mild, moderate, and severe forms of intellectual disability.²⁰

1. Severe Intellectual Disability

Severe intellectual disability is relatively marked by an IQ of thirty-five or lower.²¹ It is often characterized by “organically based retardation.”²² Organically based retardation denotes genetic, chromosomal, and other biological etiologies.²³ This group constitutes a large portion of individuals with serious birth defects and physical impairments.²⁴ Those with severe intellectual disabilities usually need lifelong support.²⁵ Moreover, individuals with severe intellectual disability are able to learn simple daily routines and to engage in simple self-care. However, these individuals need supervision in social settings and often need family care to live in a supervised setting such as a group home.²⁶ For example, an Iowan mother had her parental rights terminated because her behavior mimicked behaviors of individuals who are severely disabled:

[she had] difficulty overcoming her intellectual impairment to adequately provide a safe and reliable

home for [the child]. Furthermore, [the mother] was unable to care for [the child] without relying heavily on service providers and her mother. She frequently became angry while attempting to provide for [the child] needs and developing mobility. [The mother] demonstrated a sustained inability to understand [the child's] developmental stages with age appropriate expectations.²⁷

The categorical subdivision, severe, will not be discussed further in detail, for it is not the sole focus of this Article. This class of intellectually disabled individuals needs daily assistance for the most pedestrian of tasks, let alone has the requisite skill set to care for a child. However, to entirely omit this subdivision would be improper, and hinder the reader from grasping the limited scope of background provided in this Article. The extent this class will be discussed hinges on state statutory language in later sections of this article.

2. Moderate Intellectual Disability

Moderate intellectually disabled individuals have a relative IQ range of thirty-five to forty-nine.²⁸ This group roughly comprises ten percent of the total population.²⁹ With support and training, this group can live and, or develop the requisite skill set to successfully live on their own.³⁰ Similar to severe, moderate intellectual disability stems from organic causes, such as chromosomal abnormalities, birth defects, or brain injury.³¹ Dissimilar to severe, individuals with moderate intellectual disability can take care of themselves and others, travel to familiar places in their community, and learn basic skills related to safety and health. Their self-care requires little to no support. Unlike the classification of severe, this class of moderate intellectually disabled individuals will be discussed further in this Article.³²

3. Mild Intellectual Disability

The majority³³ of individuals with intellectual disabilities are classified as mild.³⁴ This category of individuals has an IQ range of fifty to seventy.³⁵ These individuals can learn practical life skills, which allows them to function in ordinary

life with nominal levels of support, or no support at all.³⁶ For example, when a father sought support from social services during a period of impoverishment, rendering the fathers home without food or electricity, social services did not later release the child back into the fathers care.³⁷ Subsequently, a social services agent filed a petition to terminate parental rights of the father.³⁸ There was no evidence bearing on the issue of abuse or neglect of the child, and the child was never returned to the father from social services.³⁹ A psychiatrist evaluated the father and conjecturally declared the father intellectually disabled due to his illiteracy.⁴⁰ The father's intelligent quotient was never measured.⁴¹ During trial, the lower court relied on the psychiatrist's speculative report and testimony, and rendered their decision against the father.⁴² The case outlined above is merely one of the many examples of the problems and prejudices parents with or perceived as having intellectual disability face in American jurisprudence.

Unlike the fact pattern provided above, individuals in this subdivision are almost always diagnosed when they are in an environment of curricular development, such as a school.⁴³ When individuals are not in such environments, they become so

integrated into society, they cannot be distinguished from non-intellectually disabled persons.⁴⁴ Aside from obtaining social benefits and support and assistance from family and friends, individuals in this group can live independently and enter the job market.⁴⁵ From this point forward, the discussion of intellectual disability will refer strictly to parents who fall within the classifications of moderate and mild.

II. THE CURRENT STATUTORY LANDSCAPE: LAW SURROUNDING TERMINATION OF PARENTAL RIGHTS WITH RESPECT TO INTELLECTUAL DISABILITY

Disability is one of the only grounds for termination based on a parent's condition, rather than a parent's behavior.⁴⁶ While no state says that disability can be grounds by itself for termination of parental rights, if disability is included as grounds for termination, it can become the main focus of a child protection case.⁴⁷

A. *State Responsibility and Action in the Child Welfare System*

Child welfare agencies are laudable systems of "service designed to promote the well-being of children by ensuring safety, achieving permanency, and strengthening families to care for their children

successfully.”⁴⁸ States are primarily responsible for the child welfare systems. State law governs cases in these systems; despite the fact states receive federal aid and funding.⁴⁹ State statutes govern every aspect of a child welfare proceeding. For example, statutes govern who may determine when an investigation must be made into allegations of child abuse or neglect, what types of services the family may receive to promote reunification, and when termination of parental rights are appropriate, thus rendering the family nucleus obsolete.⁵⁰ Aptly stated by Justice Ginsburg, the later type of state action outlined above is “among the most severe forms.”⁵¹

B. *Termination of Parental Right Statutes*

Like most state statutes, child welfare statutes are verbose. Yet these statutes are purposely vague. Vagueness creates flexibility with regard to judicial discretion. Vague language in these statutes permits judges to exercise broad discretion in deciding child welfare cases.⁵² In everyday cases, this type of discretion and flexibility is of course desired, if not appropriate.⁵³ Nevertheless, when termination proceedings are based on

grounds of intellectual disability, this judicial discretion opens a conduit for legal bodies⁵⁴ to give way to bias and presumptions when determining the outcome of a proceeding, hearing, or case.⁵⁵

States walk a tight rope when balancing the rights of the parent and the rights of the child. Naturally, states take diverse approaches in their statutes in order to balance the state’s interest in the child and the parent’s interest in the child.⁵⁶ State statutes vary in terms of grounds included for termination of parental rights and in the level of specificity with which those grounds are defined.⁵⁷ The more favorable state statutes do not deem intellectually disabled parents unfit to raise their child. The more problematic statutes embrace and seamlessly correlate⁵⁸ intellectual disability with parental unfitness and ineptitude.

Now, when a state child welfare agency believes a child is abused or neglected, it may seek to take remove the child when the state judiciary grants such action, and termination of parental rights is on the table.⁵⁹ In termination of parental rights proceedings, most states require the court to determine: (1) by a preponderance of the evidence, that reunification efforts were reasonable; (2) by clear and convincing evidence, that a parent is unfit; and (3) that

severing the parent-child relationship is in the child's best interest.⁶⁰ Every state is responsible for establishing their statutory grounds for termination.

C. *State Statutes Addressing Intellectual Disability*

Approximately two-thirds of states have statutes that include intellectual disability as a factor for terminating parental rights if the state perceives the disable parent unable, or unfit to care for the child.⁶¹ The remaining 15 states do not include intellectual disability in their termination of parental right statutes. The 35 states that do are: Alabama⁶², Alaska⁶³, Arkansas⁶⁴, Arizona⁶⁵, California⁶⁶, Colorado⁶⁷, Delaware⁶⁸, District of Columbia⁶⁹, Georgia⁷⁰, Hawaii⁷¹, Illinois⁷², Iowa⁷³, Kansas⁷⁴, Kentucky⁷⁵, Maryland⁷⁶, Massachusetts⁷⁷, Mississippi⁷⁸, Missouri⁷⁹, Montana⁸⁰, Nebraska⁸¹, Nevada⁸², New Hampshire⁸³, New Jersey⁸⁴, New Mexico⁸⁵, New York⁸⁶, North Carolina⁸⁷, North Dakota⁸⁸, Ohio⁸⁹, Oklahoma⁹⁰, Oregon⁹¹, South Carolina⁹², Tennessee⁹³, Texas⁹⁴, Virginia⁹⁵, Washington⁹⁶ and Wisconsin⁹⁷.⁹⁸ No one statute is a mirror-image of the another statute. The language varies. This variance is discussed below.

1. A Minority of States Employ Narrow Statutory Language

Within the two-thirds of states that include intellectual disability as a factor for terminating parental rights, there are only a handful of states that do not use overly broad, vague verbiage. These states are Kentucky, Mississippi, Virginia, Washington, and Wisconsin. Their termination of parental rights statutes specifically include narrow language on the type of intellectual disability being targeting by the state.⁹⁹

The state of Mississippi is one such state to accomplish a narrowly tailored statute addressing the matter of intellectual disability as grounds for parental rights termination. Mississippi's statute reads: "If established by clear and convincing evidence,"¹⁰⁰ grounds for termination of the parent's parental rights is appropriate, if reunification between the parent and child is not desirable toward obtaining a satisfactory permanency outcome:

The parent has been medically diagnosed by a qualified mental health professional with a *severe mental* illness or *deficiency* that is unlikely to change in a reasonable period of time and which, based upon expert testimony or an established pattern of behavior, makes

the parent unable or unwilling to provide an adequate permanent home for the child.¹⁰¹

Mississippi uses the term “severe”¹⁰² in its language when addressing a parent’s intellectual disability.¹⁰³ It is clear the state of Mississippi requires a history of behavior connected to a “severe”¹⁰⁴ disability by mandating a pattern of behavior be established to empirically prove the parent is truly unfit to provide for the child.

Another state that narrows its language when addressing intellectual disability as a ground for termination of parental rights is the state of Washington. Washington’s termination of parental right statute allows for the court to consider:

Psychological incapacity or *mental deficiency* of the parent that is so *severe and chronic* as to render the parent incapable of providing proper care for the child for extended periods of time or for periods of time that present a risk of imminent harm to the child, and documented unwillingness of the parent to receive and complete treatment or documentation that there is no treatment that can render the parent capable of providing proper care for the child in the near future.¹⁰⁵

Per the language of Washington’s statute, the state requires a parent’s intellectual disability be “so severe and chronic”¹⁰⁶ that it places the child in imminent harm.¹⁰⁷ Like Mississippi, Washington narrows the overbroad and rather ambiguous definition of intellectual disability.¹⁰⁸ Interestingly, unlike Mississippi, Washington provides a second prong to this ground for termination by requiring documentation of the parent’s “unwillingness”¹⁰⁹ to receive and complete treatment, or that no such treatment would render proper, future care of the child.¹¹⁰ In effect, Washington seems to be combatting bias and presumption by placing a higher burden on the state to convey an unfit intellectually disabled parent or parents.

The state of Virginia parallels the narrow language employed by Mississippi and Washington. In Virginia’s termination of parental rights statute, the language reads as follows:

The parent or parents have a mental or emotional illness or intellectual disability of such *severity* that there is no reasonable expectation that such parent will be able to undertake responsibility for the care needed by the child in accordance with his age and stage of development.¹¹¹

Dissimilar to Mississippi and Washington, Virginia uses the phrase “intellectual disability”¹¹² in its statute. Virginia categorizes intellectual disability by the ‘severity’ of one’s mental state¹¹³ Thus, Virginia conscientiously disallows state actors from terminating parental rights on a basis other than a parent’s severe intellectual disability.¹¹⁴

Termination of parental rights in other states share similar goals to the aforementioned states. However, these states do not use “severe” or “severity” to classify intellectual disability. Instead, these states use alternative terms or restrictive language to classify the different intellectual disabilities. For example, the statutory section regarding a parent’s intellectual disability as a ground for termination in the state of Wisconsin’s says:

Continuing parental disability, which shall be established by proving that: The parent is presently, and for a cumulative total period of at least 2 years within the 5 years immediately prior to the filing of the petition has been, an inpatient at one or more hospitals. . . licensed treatment facilities. . . or state treatment facilities. . . on account of. . . *developmental disability*.¹¹⁵

The phrase “developmental disability”¹¹⁶ is defined by Wisconsin as:

a disability attributable to intellectual disability. . . or another neurological condition closely related to an intellectual disability or requiring treatment similar to that required for individuals with an intellectual disability, which has continued or can be expected to continue indefinitely, *substantially impairs* an individual from adequately providing for his or her own care or custody, and constitutes a substantial handicap to the afflicted individual.¹¹⁷

Wisconsin’s definition of developmental disability does not contain any reference to the severity of one’s mental state.¹¹⁸ Instead the definition utilizes the phrase “substantially impairs an individual”¹¹⁹ with an intellectual disability.¹²⁰ Consequently, when Wisconsin’s termination of parental rights statute is read in conjunction with the definition section, it is clear the state’s approach to termination is narrowly confined to situations involving a period of recent institutionalization for an intellectual disability that impairs the parent to a substantial degree.

Mississippi, Washington, Virginia and Wisconsin are not the only states narrowing their statutory language

surrounding intellectual disability as a ground for termination. The states of Delaware, Illinois, Kentucky, and New Hampshire implement language most similar to that of Wisconsin.¹²¹ But, there is a key difference between Wisconsin’s language and three of these four states mentioned above. As previously stated, Wisconsin uses “substantially impairs an individual,”¹²² when defining the severity of intellectual disability. Delaware, Illinois and Kentucky use language like, “significantly sub-average general intellectual functioning”¹²³ when defining intellectual disability. Refer back to the general definition of intellectual disability in this article and the problem is clear; the latter language used defines the intellectual disability monolithically. Intellectual disability is a sub-average intellect of an individual, so this definition offers nothing more than simply defining the disability in its most general form.

2. A Majority of States Employ Overbroad Statutory Language

The remaining states and the District of Columbia use overbroad language in their statutes addressing intellectual disability as a ground for termination of parental rights of a child. These states are the antithesis to states

like Kentucky, Mississippi, Virginia, Washington and Wisconsin.

For example, the state of New York has overbroad statutory language when addressing intellectual disability as a ground for termination. New York’s statute reads:

The parent or parents... are presently and for the foreseeable future unable, by reason. . . . *intellectual disability*, to provide proper and adequate care for a child who has been in the care of an authorized agency for the period of one year immediately prior to the date on which the petition is filed in the court.¹²⁴

New York’s termination statute attempts to connect a parent’s intellectual disability to the capacity of the parent to provide care to child, yet it offers no language that narrows the class of intellectually disabled parents.¹²⁵ New York’s use of “intellectual disability”¹²⁶ is overly broad and states in this majority employ comparable, overly broad language.¹²⁷ Due to New York’s broad language, the statute doesn’t account for how stratified the class of intellectually disabled parents are, and thus harms those parents who are fit to provide care.

III. INTELLECTUAL DISABILITY SHOULD NOT BE ENTIRELY ELIMINATED FROM STATUTORY LANGUAGE, BUT SHOULD NARROWLY ADDRESS THE CLASS OF INTELLECTUAL DISABILITY

While no state says that intellectual disability can be the sole ground for termination of parental rights, it can become the focus of child protection cases.¹²⁸ Accordingly, states should crystalize their statutes to reflect the heterogeneous group of individuals that are intellectually disabled parents. Most states, if not all, should parallel Mississippi, Washington, Virginia's statutory language because the language preempts non-severe intellectually disabled parents being swept into the scope of foreseeable child abuse and neglect, or general unfitness to provide for the child.

The rights of an intellectually disabled parent should not hinge on a "compassionate judge that understands the issues faced by [these] individuals."¹²⁹ More importantly, parental rights should not hinge on unjustifiable, overly broad language in state statutes addressing termination of parental rights. Disability is the only instance in which it is acceptable and legal to terminate parental rights of a group of individuals based on a condition rather than a behavior.¹³⁰ As previously stated in this

article, intellectual disability is not a homogenous group of people.

While, currently, parents with disabilities in many states may face discrimination in child custody and termination of parental rights proceedings, this can be changed. States need to reconsider the inclusion of disability in child custody codes. Highlighted in the discussion surrounding New York's termination statute, overly broad language doesn't account for the three immensely different classifications of intellectually disabled parents. Overly broad language and non-specific definitions of intellectual disability sweeps non-severe parents who are perfectly able to provide adequate, reasonable care for their child, under the deleterious rug of court ordered termination. States must evaluate their current language of termination of parental rights statutes and consider altering the language used to define intellectual disability as a ground for termination to reflect severe forms intellectual disability, like Mississippi, Virginia and Washington. States must be pressed upon to eliminate overly broad statutes and alternatively modify their statutes with terminology that is indicative of the varying classes of the intellectual disabled community.

A. Addressing Environmental Risks Posed to Children Whose Parent Is Intellectually Disabled

As addressed throughout this Article, individuals with intellectual disability are a diverse group, with a substantial, varying degree of “attitudes... aptitudes” and adaptability.¹³¹ Understandably so, some concern may be raised when one thinks about the environment a child is subject to with a parent who falls within the mild or moderate class of intellectual disability. This level of concern and risk escapes few; even those advocating for stricter, narrow statutory language in termination of parental rights statutes.

Notwithstanding this genuine concern, researchers have often come to find that intellectually disabled parents exhibit “unexpected strengths” in parenting tests while providing their children with a growing intellectually stimulating environment.¹³² Parents with intellectual disability often have limited effect on a child’s behavior and development.¹³³ Ultimately, this class of parents are more likely to be successful parents and members of society when they “enjoy the virtues of interdependence and communality,”¹³⁴ not hindered by stereotypes and marginalization.

Now, a child can have “genetic and environmental vulnerability”¹³⁵ if that child has an intellectually disabled parent or parents. This vulnerability can make them susceptible to extensive responsibilities at home, sub-par school performance, guilt and isolation, anti-social behaviors and various mental disorders.¹³⁶ However, it should be noted, children of substance abusers are almost three times more likely to be physically or sexually assaulted than other children, more than four times more likely to be neglected, and more likely to be substance abusers themselves.¹³⁷

Ultimately, the classification of the intellectual disability may be “the most important predictors of parenting success” in fostering a safe, loving, enriching environment for their child.¹³⁸ Yet, evidence overwhelmingly displays that non-severe intellectually disabled parents can adequately and positively care for their children with, if needed, certain levels treatment and support.¹³⁹

CONCLUSION

Nothing stated above is saying every single actor in the legal system, and its agents across this nation routinely, systematically and purposely discriminates against intellectually disabled parents. To the contrary, there are a number of judges

who are enlightened on this particular disability and consequently deny termination for parents who have limited cognitive ability.¹⁴⁰ However, preservation of the family nucleus for these individuals cannot rely on the hope that their case gets assigned to an enlightened judge.

Plenty of parents' rights are terminated because their intellectual disability does, or can, render them unfit to provide care for their child. In matters, similar to the Oregonian couple,¹⁴¹ the state should not come running at the ring of the intellectual disability bell and remove a child from their mild or moderate intellectually disabled parent; especially when there is no finding of prima facie abuse or neglect.

In conclusion, states must evaluate their current language of termination of parental rights statutes. States should consider altering their language to parallel 'severe' language used by states like Mississippi, Virginia and Washington. In addition, states must be pressed upon to eliminate overly broad statutes and alternatively modify their statutes with terminology that is indicative of the varying classes of the intellectually disabled community.

Thus, overly broad intellectual disability language in termination of parental rights statutes must cease because smarter people do not inherently make for better parents, so why penalize those parents with non-severe cognitive inability. When more states begin to follow Mississippi's and Washington's example of narrow statutory language, these states will be practicing more effective, more equitable family law. Justice is needed for this community. The family nucleus must be protected and preserved for all.

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¹ Forrest Gump tells Jenny Curran this after he proposes marriage to her. FORREST GUMP. (Paramount Pictures 2001).

² A nonprofit organization in Oregon devoted to combating child abuse and strengthening families. For more information regarding this organization, please visit <http://perma.cc/TUC3-QDLG>.

³ This action is routine. Removal of children born to parents with intellectual disabilities shortly after birth is based on a presumption the parents will be unfit; See, Chris Watkins,

Beyond Status: The American with Disabilities Act and the Parental Rights of People Labeled Developmentally Disabled or Mentally Retarded, 83 CALIF. L. REV. 1415, 1438 (1995) (“[P]resumptions of unfitness are most apparent in cases where the parent has never actually had custody of the child. Intervention in these cases often take place before birth, even though the parent has not done anything to harm or threaten the child.”) [hereinafter Watkins].

⁴ This narration is adapted from various media outlets.

See, <https://perma.cc/FQ99-7F3G>; <https://perma.cc/V6ZH-7UNN>; and <https://perma.cc/GS8N-TVVZ>.

⁵ In re D.A., 862 N.E.2d 829, 832 (Ohio 2007) (holding that a trial court may not base its decision *solely* on the limited cognitive ability of the parents when determining the best interest of a child at a permanent-custody hearing (emphasis added)). The phrase “limited cognitive ability” refers to a parents’ Intellectual Quotient (IQ).

⁶ Some state statutes use the term “parental responsibility” or “parental decision-making responsibility” in place of “custody.” This Article will use the term “custody.”

⁷ Throughout this Article, the term ‘children’ will be used interchangeably with the term ‘child.’

⁸ See *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923) (the rights to conceive and to raise one’s children have been deemed essential, thus emphasizing the importance of the family unit); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (basic rights of man); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (the court stated, it is cardinal that the custody, care and nurture of the child reside first in parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.); *May v. Anderson*, 345 U.S. 528 (1953) (rights far more precious...than property rights) *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (where the family unit has long been a paramount concern of the courts); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (Parents’ interest in the care, custody, and control of their children is

perhaps the oldest of the fundamental liberty interests recognized by the Supreme Court of the United States.).

⁹ Robyn M. Powell, *Safeguarding the Rights of Parents with Intellectual Disabilities in Child Welfare Cases: The Convergence of Social Science and Law*, 20 CUNY L. REV. 127, 148 (2016) [hereinafter Powell].

¹⁰ Stephen H. Kaye, *Population Estimates and Demographics of Parents with Disabilities in the United States*, (Berkeley, CA: Through the Looking Glass, 2011) [hereinafter Kaye].

¹¹ *Id.*

¹² See Alison Gemmill, *Summary of the 2008 National Child Abuse and Neglect Data System Child File: Victims of Maltreatment and Their Caregivers’ Disabilities*, (Berkeley, CA: Through the Looking Glass, 2011) [hereinafter Gemmill].

¹³ *Id.*

¹⁴ David McConnell et al., *Parental Cognitive Impairment and Child Maltreatment in Canada*, 35 CHILD ABUSE & NEGLECT 600, 621-32 (Aug. 2011) [hereinafter David McConnell]; Tim Booth, Wendy Booth, and David McConnell, *Care Proceedings and Parents with Learning Difficulties: Comparative Prevalence and Outcomes in an English and Australian Court Sample*, 10 CHILD FAM. SOC. WORK 353-60 (Nov. 2005) [hereinafter McConnell]; See generally National Council on Disability, *Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children*, 14 (Sep. 27, 2012), https://ncd.gov/rawmedia_repository/89591c1f_384e_4003_a7ee_0a14ed3e11aa.pdf [hereinafter *Rocking the Cradle*].

¹⁵ Currently, the average adult IQ score falls between 85-115. This range is the so-called ‘normal’ range. <https://perma.cc/2YKY-BYBV>. A number of questions are raised in reference to both the validity and use of IQ tests. Individuals who are in the lower ranges of the intelligence scale test inconsistently; often times meeting the threshold for mild to moderate mental deficiency and other times not meeting the threshold. See Donald L. Macmillan et al., *A Challenge to the Viability of Mild Mental Retardation as a Diagnostic Category*, 62 EXCEPTIONAL CHILD. 356, 360 (1996) [hereinafter MacMillan]. The score may

change depending upon who administers the test, when, and under what conditions. This is especially troubling because an upward trajectory of only a few points from seventy to a seventy-three can mean the difference between which classification of intellectual disability, and no diagnosis. *See infra* note 19, at 538. Furthermore, the IQ test problematic because it has been used to support social injustices; historical and current. *Id.* During the 1900s the eugenics movement used IQ tests to support sterilization of individuals labeled stupid, “moron,” or “idiot.” *See generally* Martha A. Field & Valerie A. Sanchez, *Equal Treatment for People with Mental Retardation: Having and Raising Children* (1999). IQ tests continue to be used to track minority children into special education classes, which some scholars have argued is a subversive mode of maintaining segregated schools. Beth A Ferri & David J. Connor, *Special Education and the Subverting of Brown*, 8 J. GENDER RACE & JUST. 57, 59-61 (2004).

¹⁶ *See* Robert L. Hayman Jr., *Presumptions of Justice: Law, Justice, Politics and the Mentally Retarded Parent*, 103 HAR. L. REV. 1201, 1213 (1990) (*cited in* Charisa Smith, *Finding Solutions to the Termination of Parental Rights in Parents with Mental Challenges*, 39 LAW & PSCHOL. REV. 205, 211 (2014-2015) [hereinafter Smith].).

¹⁷ *Id.*

¹⁸ *See* Anthony M. Graziano, *Developmental Disabilities: Introduction to a Diverse Field*, 200-01(2002) [hereinafter Graziano].

¹⁹ Am. Ass’n on Mental Retardation, Fact Sheet: Frequently Asked Questions About Mental Retardation (July 9, 2002) (*cited in* Alexis Collentine, *Respecting Intellectually Disabled Parents: A call for Change in State Termination of Parental Right Statutes*, 34 HOFSTRA L. REV. 535, 538 (Winter 2005) [hereinafter Collentine].).

²⁰ *See* Graziano, *supra* note 22.

²¹ Collentine, *supra* note 19, at 538.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Graziano, *supra* note 18.

²⁶ *See generally* American Psychiatric Assistance, *Diagnostic and Statistical Manual*

of Mental Disorders (5th ed. 2013) [hereinafter American Psychiatric]; *See also* Barry J. Ackerson, Parents with Serious and Persistent Mental Illness: Issues in Assessment and Services, 48 SOC. WORK 187, 190 (2003); Collentine, *supra* note 19 at 537-39.

²⁷ *In re D.W.*, 791 N.W.2d 703, 708 (Iowa 2010).

²⁸ *See* Graziano, *supra* note 18; Collentine, *supra* note 19 at 539.

²⁹ Graziano, *supra* note 18 at 212.

³⁰ *Id.*

³¹ Edward Ziglar & Robert M. Hodapp, *Understanding Mental Retardation*, 51 (1986).

³² *See* American Psychiatric, *supra* note 26.

³³ Approximately 75-80%. *See* Graziano, *supra* note 18, at 200-02.

³⁴ *See* American Psychiatric, *supra* note 26.

³⁵ *See*, Samantha Gluck, *Mild, Moderate, Severe Intellectual Disability Differences*, Healthy Place For Your Mental Health (Aug. 08, 2016)

<https://www.healthyplace.com/neurodevelopmental-disorders/intellectual-disability/mild-moderate-severe-intellectual-disability-differences/>; Graziano, *supra* note 18 at 200-01.

³⁶ American Psychiatric, *supra* note 26.

³⁷ *In re Adoption/Guardianship*, 796 A.2d 778, 788 (Md. 2002).

³⁸ *Id.* at 785-86.

³⁹ *Id.* at 789.

⁴⁰ *Id.* 789-790.

⁴¹ *Id.*

⁴² *Id.* at 789. (The psychiatrist testified in court the father would “*probably* categorize [the father’s] intellectually impairment as a disability” because the father “cannot read and his judgment is very limited.” (emphasis added)).

⁴³ Graziano, *supra* note 18, at 209-10.

⁴⁴ Macmillan, *supra* note 15 at 360-362.

⁴⁵ Graziano, *supra* note 18, at 210.

⁴⁶ *See generally* E. Lightfoot, T. LaLiberte & K. Hill, *Guide for Creative Legislative Change: Disability in the Termination of Parental Rights and Other Child Custody Statutes* (July 2007) [hereinafter *Legislative Change*]. *See* Powell, *supra* note 9, at 148.

⁴⁷ *Legislative Change*, *supra* note 46.

⁴⁸ Child Welfare Information Gateway, *Fact Sheet: How Child Welfare System Works*, U.S. Department of Health and Human Services (D.C. 2013), available at <http://www.childwelfare.gov/pubs/factsheets/cpswork.cfm>.

⁴⁹ Comm'n on Disability Rights, Am. Bar Ass'n, Report to the House of Delegates (Feb. 2017), available at https://www.americanbar.org/content/dam/aba/administrative/mental_physical_disability/114.authcheckdam.pdf. [hereinafter Disability Rights].

⁵⁰ See Collentine, *supra* note 19, at 547.

⁵¹ M.L.B. v. S.L.J., 519 U.S. 102, 128 (1996).

⁵² Brandon R. White, *Termination of Parental Rights of Mentally Disabled Parents in New York: Suggestions for Fixing An Overbroad, Outdated Statute*, 34 BUFF. PUB. INTEREST L. J. 1, 31 (2015) [hereinafter White].

⁵³ Shawndra Jones, *Working Group Report: State Intervention in the Family: Child Protective Proceedings and Termination of Parental Rights: Working Group Three*, 40 COLUM. J. L. & SOC. PROBS. 485, 489-90 (2007).

⁵⁴ Judges or other participants in court proceedings.

⁵⁵ White, *supra* note 52, 32 (“Legal players in child welfare proceedings are usually not experienced or trained to work with individuals with intellectual disability... and judges often hold biases against those who present an intellectual disability.” *Id.* at 32-33).

⁵⁶ Catherine Ross, *The Tyranny of Time: Vulnerable Children, “Bad” Mothers, and Statutory Deadlines in Parental Termination Proceedings*, 11 VA. J. SOC. POL’Y & L. 176, 177 (2004) [hereinafter Ross].

⁵⁷ See Collentine, *supra* note 19, at 549.

⁵⁸ There is no clear correlative link between a low IQ and the inability to parent. See David McConnell et al., *Development Profiles of Children Born to Mothers with Intellectual Disability*, 28 J. INTELL. & DEV. DISABILITY 122, 125 (2003) [hereinafter David McConnell].

⁵⁹ Disability Rights, *supra* note 49, at 2.

⁶⁰ *Id.*

⁶¹ *Id.* See White, *supra* note 52, at 31-32; See also Powell, *supra* note 9, at 138.

⁶² ALA. CODE § 12-15-319(a)(2) (2016) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability).

⁶³ ALASKA STAT. ANN. § 47.10.011(11) (West 2016) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability).

⁶⁴ ARK. CODE ANN. § 9-27-341(b)(3)(B)(vii)(c) (West 2015) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability).

⁶⁵ ARIZ. REV. STAT. §8-533 (b)(3) (2014).

⁶⁶ CAL. WELF. & INST. CODE § 300(b)(1) (West 2016) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability).

⁶⁷ COLO. REV. STAT. ANN. § 19-3-604(b)(I) (West 2012) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability).

⁶⁸ 13 DEL. CODE. ANN. § 1103(a)(3) (West 2009) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability).

⁶⁹ The District of Columbia is not one of the 50 states, but a federal district established by Congress; D.C. CODE ANN. §§ 16-2353(b)(2), 16-2301(9)(A)(iii) (West 2016) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability & Physical Disability).

⁷⁰ GA. CODE ANN. §§ 15-11-310, 15-11-26(9) (West 2014) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability & Physical Disability).

⁷¹ HAW. REV. STAT. ANN. § 571- 61(b)(1)(F) (West 2017) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability).

⁷² 750 ILL. COMP. STAT. ANN. 50/1(D)(p) (West 2017) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability).

⁷³ IOWA CODE ANN. §§ 232.116(1)(k)(2), (2)(a) (West 2016) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability).

⁷⁴ KAN. STAT. ANN. § 38-2269(b)(1) (West 2016) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability & Physical Disability).

⁷⁵ KY. REV. STAT. ANN. § 625.090(3)(A) (West 2012) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability).

⁷⁶ MD. CODE ANN. § 5-323(d)(2)(iii) (West 2009) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability & Physical Disability).

⁷⁷ MASS. GEN. LAWS ANN. 210 § 3(c)(xii) (West 2012) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability).

⁷⁸ MISS. CODE ANN. § 93-15-121(a), (b) (West 2016) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability & Physical Disability).

⁷⁹ MO. REV. STAT. ANN. §§ 211.447(5)(2)(A), (10) (West 2014) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability).

⁸⁰ MONT. CODE ANN. § 41-3-609(2)(a) (West 2015) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability).

⁸¹ NEB. REV. STAT. ANN. § 43-292(5) (West 2016) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability).

⁸² NEV. REV. STAT. ANN. § 128.106(1)(a) (West 2015) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability).

⁸³ N.H. REV. STAT. ANN. § 170-C:5(IV) (West 2016) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability).

⁸⁴ N.J. STAT. ANN. §§ 9:2-19, 9:2-13(e) (West 2013) (Intellectual/Developmental Disability).

⁸⁵ N.M. STAT. ANN. §§ 32A-4-28(B)(2), 32A-4-2(F)(4) (West 2016) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability & Physical Disability).

⁸⁶ N.Y. SOC. SERV. ANN. § 384-b 4(c) (West 2016) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability).

⁸⁷ N.C. GEN. STAT. ANN. § 7B-1111(A)(6) (West 2013) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability).

⁸⁸ N.D. CENT. CODE ANN. § 27-20-44(1)(b) (West 2016) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability & Physical Disability).

⁸⁹ OHIO. REV. STAT. ANN. § 2151.414(E)(2) (West 2016) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability & Physical Disability).

⁹⁰ OKLA. STAT. ANN. § 1-4-904(B)(13) (West 2016) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability & Physical Disability).

⁹¹ OR. REV. STAT. ANN. § 419B.504(1) (West 2016) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability).

⁹² S.C. CODE ANN. § 63-7-2570(6) (West 2014) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability & Physical Disability).

⁹³ TENN. CODE ANN. § 36-1-113(g)(8)(A) (West 2016) (Intellectual/Developmental Disability).

⁹⁴ TEX. FAM. CODE ANN. § 161.003(a)(1) (West 2015) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability).

⁹⁵ VA. ANN. CODE ANN. § 16.1-283(B)(2)(a) (West 2012) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability).

⁹⁶ WASH. REV. CODE ANN. § 13.34.180(1)(e)(ii) (West 2013) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability).

⁹⁷ WIS. STAT. ANN. § 48.415(3) (West 2016) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability).

⁹⁸ The remaining 15 states do not have child welfare statutes that include intellectual disability as a ground for termination of parental rights. These states include Connecticut, Florida, Idaho, Indiana, Louisiana, Maine, Michigan, Minnesota, Pennsylvania, Rhode Island, South Dakota, Utah, Vermont, West Virginia and Wyoming. Most of these states have recently removed the disability language from their state termination of parental rights laws. See *generally* Disability Rights, *supra* note 49, at 8-10.

⁹⁹ KY. REV. STAT. ANN. § 625.090(3)(A) (West 2012); MISS. CODE ANN. § 93-15-121(a), (b) (West 2016); VA. ANN. CODE § 16.1-283(B)(2)(a) (West 2012); WASH. REV. CODE ANN. § 13.34.180(1)(e)(ii) (West 2013); WIS. STAT. ANN. § 48.415(3) (West 2016)

¹⁰⁰ *Id.* at § 93-15-121 (a) (West).

¹⁰¹ *Id.* (emphasis added).

¹⁰² *Id.*

¹⁰³ Not to be concerned, like most states, the state of Mississippi refers to intellectual disability as mental deficiency in their statute. *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ REV. CODE § 13.34.180(1)(e)(ii) (West).

¹⁰⁶ *Id.*

¹⁰⁷ MISS. CODE ANN. § 93-15-121(a); REV. CODE § 13.34.180.

¹⁰⁸ *Id.* at §13.34.180.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ VA. ANN. CODE § 16.1- 283(B)(2)(a) (West 2012).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ WIS. STAT. ANN. § 48.415(3)(a) (West 2016) (emphasis added).

¹¹⁶ *Id.*

¹¹⁷ WIS. STAT. ANN. § 55.01(2) (West 2012) (emphasis added).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ See 13 DEL. CODE ANN. § 1103(a)(3) (West 2009); See 750 ILL. COMP. STAT. ANN. 50/1(D)(p) (West 2016); See KY. REV. STAT. § 625.090(3)(A) (West 2012); See N.H. REV. STAT. ANN. § 170-C:5(IV) (West 2016).

¹²² STAT. ANN. § 55.01(2).

¹²³ See CODE § 1103(a)(3); See STAT. ANN. 50/1(D)(p); See REV. STAT. § 625.090(3)(A).

¹²⁴ N.Y. SOC. SERV. ANN. § 384-b 4(c) (West 2016)(emphasis added).

¹²⁵ *Id.*; White, *supra* note 52, at 31.

¹²⁶ SOC. SERV. § 384-b (4)(c).

¹²⁷ Similar overbroad language is used by states. See, STAT. ANN. § 1-4-904(B)(13) (“diagnosable cognitive condition”); STAT. ANN. §§ 32A-4-28(B)(2), 32A-4-2(F)(4) (“mental disorder or incapacity”); REV. § 211.447(5)(2)(A) (“mental condition”).

¹²⁸ *Legislative Change, supra* note 46.

¹²⁹ White, *supra* note 52, at 40; See *In re W.W. Children*, 736 N.Y.S.2d 567 (Fam. Ct. 2001) (The respondent mother, an intellectually disabled woman, had her children removed and placed in foster, but the judge held the petitioner did not prove the mother would be unable to provide adequate care for her children in the foreseeable future.).

¹³⁰ Powell, *supra* note 9.

¹³¹ Smith, *supra* note 16, at 216; See Jung Min Park et al., *Involvement in the Child Welfare System Among Mothers with Serious Mental Illness*, 57 PSYCHIATRIC SERVS. 493, 493-95 (2006).

¹³² Hayman, *supra* note 16, at 1222.

¹³³ Smith, *supra* note 16, at 216.

¹³⁴ Hayman, *supra* note 16, at 1255.

¹³⁵ Smith, *supra* note 16, at 216 (citing *When a Parent Has a Mental Illness: Issues and Challenges*, MENTAL HEALTH AM. WIS. 1, 2, [http://mhawisconsin.org/Data/Sites/1/media/facts-sheets/sf_issues\[1\].pdf](http://mhawisconsin.org/Data/Sites/1/media/facts-sheets/sf_issues[1].pdf)).

¹³⁶ Smith, *supra* note 16, at 216.

¹³⁷ *Facts of Families: Children of Mental Illness*, AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY 1 (Dec. 2008), available at http://www.aacap.org/App_Themes/AACAP/docs/facts_for_families/39_children_of_parents_with_mental_illness.pdf; See generally

Barbara A. Babb & Judith Moran, *Substance Abuse, Families and Unified Family Courts: The Creation of a Caring Justice System*, 3 J. HEALTH CARE L. & POL'Y 1, 9 (1999).

¹³⁸ Smith, *supra* note 16, at 217.

¹³⁹ Smith *supra* 16, at 217-218.

¹⁴⁰ See, e.g., *In re Loraida G.*, 701 N.Y.S.2d 822 (Fam. Ct. 1999); *In re W.W. Children*, 736 N.Y.S.2d 567 (Fam. Ct. 2001).

¹⁴¹ This couples story is stated in the Introduction section of this Article.