TERMINATION OF PARENTAL RIGHTS

Written By

JUDGE HOWARD SMYSER

Magistrate Judge, Twin Falls County, Fifth Judicial District
2011

Revised by

JUDGE BRYAN MURRAY

Magistrate Judge, Bannock County, Sixth Judicial District
2015

Revised by

JUDGE VICTORIA OLDS

Magistrate Judge, Lewis County, Second Judicial District

Revised May 29, 2022

TERMINATION OF PARENTAL RIGHTS

The following research addresses various issues common to cases involving the termination of parental rights. The brief synopsis on each issue in this outline is simply a compilation, and is meant to familiarize the reader with case law and/or statutes on each topic. **However, the discussion contained herein is minimal compared with the totality of the law addressing these issues. Consequently, these notes should be the start rather than the completion of any research by the reader. Statutory language and court rules change annually, so the reader should always check for updated statutes and court rules.**

The Child Protection Committee extends its appreciation to the Committee members listed above who have worked over many years to maintain this resource.

HOLD THE CTRL BUTTON DOWN WHILE CLICKING ON

A TABLE OF CONTENTS TOPIC TO JUMP

TO THAT SECTION OF THE OUTLINE.

TABLE OF CONTENTS

I. IS THE PARTY A PARENT? 12

A. A PARTY MUST FIT A STATUTORY DEFINITION OF PARENT 12

1. The Court First Determines If A Parental Right Exists 12

B. RECOGNIZED PARENTS 12

1. Definition Of A Parent Under I.C. §16-2002(11) 12
2. Definition Of A Presumptive Father 12
3. Unmarried Biological Father 12

C. ANALYZING THE UNMARRIED BIOLOGICAL FATHER/CONSENT TO ADOPTION 13

1. Idaho Code § 16-1504(2)(a) 13
2. Effect Of Court Adjudication Recognizing A Parental Right. 14
3. Right to an Evidentiary Hearing 14
4. Father Filing A Voluntary Acknowledgement Of Paternity 15
5. A Biological Father May Hold No Parental Rights 15

D. "*IN LOCO PARENTIS*" DOES NOT RISE TO A PARENTAL RIGHT 15

1. In Loco Parentis Defined 15
2. *In Loco Parentis* Is Not A Parental Right 16

E. EQUITABLE ADOPTIONS NOT RECOGNIZED IN IDAHO. 16

1. Equitable Adoption Defined. 16
2. Equitable Adoption Not Recognized In Idaho. 16

F. IDAHO CASE LAW ADDRESSES "PARENT" 16

1. "Parent" and "Presumptive Parent" 16
2. Unmarried Biological Parent 16

G. ARGUMENT OF DUE PROCESS AT TERMINATION HEARING 17

1. "Parent" or "Presumptive Parent" 17
2. Unmarried Biological Father's Failure To Act 17

H. VOLUNTARY CONSENT TO TERMINATION—WAIVER OF NOTICE & APPEARANCE 17

1. Applicable Code Sections 17
2. Consent and Waiver Are Different and Have Different Purposes and Effects 18
3. Consent Is Not Allowed Without an Adoption Pending 18
4. Consent and Waiver Forms Should Not Be Combined 19

5. Motion to Rescind Consent to TPR 19
6. Conditional Consent Is Not Allowed 20
II. REASONABLE EFFORTS BY IDHW TO REUNIFY THE FAMILY 21
A. REASONABLE EFFORTS TO REUNIFY REQUIRED IN CPA CASES 21
1. Reasonable Efforts Under The Federal Adoption And Safe Families Act 21
2. Child Protective Act Requires Reasonable Efforts 21
3. Case Plan Requires Reasonable Effort 21
4. Reasonable Efforts Under Idaho Code §16-1622(2)(g) 22
5. Reasonable Efforts Found 22
B. REASONABLE EFFORTS AS AN AFFIRMATIVE DEFENSE 22
1. Editor's Note: 22
2. Affirmative Defense 23
C. CASE LAW DESCRIPTION OF REASONABLE EFFORTS 23
1. *In re Doe*, 149 Idaho 409 (2010) 23
2. *In re Doe*, 150 Idaho 36 (2010) 24
III. ABANDONMENT 25
A. APPLICABLE CODE SECTIONS CONCERNING ABANDONMENT. 25
1. Idaho Code § 16-2005(1)(a): Abandonment As A Ground. 25
2. Idaho Code § 16-2002(5): Defining Abandonment. 25
B. BURDEN OF PERSUASION 25
1. Petitioner Holds The Burden Of Persuasion 25
C. NO HARD-AND-FAST RULE DEFINES ABANDONMENT 25
1. Each Case Decided On Its Own Facts 25
D. WILLFUL FAILURE TO MAINTAIN NORMAL PARENTAL RELATIONSHIP 25
1. Willful Failure To Maintain Normal Relationship 25
2. Whether A Normal Parental Relationship Exists Unique To Each Case 26
3. Paying Reasonable Support or Having Regular Contact 26
4. Willful Failure 26
E. ANALYZING REASONABLE SUPPORT 27
1. Reasonable Support 27
2. Factors To Be Considered In Providing Reasonable Efforts 27

3. The Parent's Failure To Provide Support 28
4. Ability To Pay Child Support Must Be Considered 28
F. ANALYZING REGULAR PERSONAL CONTACT 29
1. Regular Personal Contact 29
2. No Contact By The Parent With The Children 29
3. Minimal Contact By The Parent With The Child 29
4. Incarceration 30
5. Analyzing The Parent's Ability To Maintain Regular Contact 31
6. The Payment Of Child Support 31
G. JUST CAUSE ANALYZED 31
1. Just Cause 31
2. Petitioner Has Burden Of Persuading That No Just Cause Exists 32
3. Effect Of Court Finding No Just Cause 32
4. Prima Facie Case Shifts Burden Of Persuasion 32
H. "JUST CAUSE" DEFENSES 32
1. Just Cause 32
2. Relevant Evidence On Just Cause 33
3. Financial And Logistical Difficulties 33
4. Idaho Cases Interpreting Just Cause 33
IV. NEGLECT BY CONDUCT OF THE PARENT 36
A. APPLICABLE CODE SECTIONS 36
1. Idaho Code § 16-2005(1)(b) 36
2. Idaho Code § 16-2002(3) 36
3. Neglect As Defined By Idaho Code §16-1602(31): Conduct 36
B. IDAHO CASE LAW ADDRESSING NEGLECT BY CONDUCT 37
1. Abdicating Parental Role 37
2. Abuse 38
3. Bad Influences Upon The Children 38
4. Bonding 38
5. Case Plan 38
6. Cleanliness Of The Home 39

7. Clothing 40
8. Counseling 40
9. Criminal Charges And Probation 41
10. Developmental Delays/Special Needs of Children 42
11. Domestic Violence 42
12. Education 43
13. Employment 43
14. Financial Habits 44
15. Foster Care Improvement 44
16. Harm To The Child 44
17. Health Of Child 44
18. Health Insurance/Medical Costs 45
19. Home Alone 45
20. Housing 45
21. Hygiene 45
22. Incarceration 46
23. Love 47
24. Mental Health 47
25. Moves 48
26. Necessities 49
27. Parenting Of The Child 49
28. Parenting Classes 49
29. Parent’s Late Accomplishments 50
30. Past Conduct Of The Parent & History of the Family 50
31. Preventing Harm To The Child 51
32. Prior Contacts With Department 51
33. Progress on Case Plan After Termination Petition Filed 52
34. Relinquishment Of Parental Duties 52
35. School Absences 52
36. Sexual Offenders In Presence Of Children 52
37. Shelter Care 52

38. Stable Home 52
39. Substance Abuse 53
40. Support And Necessities 56
41. Unsupervised Child 57
42. Visits 58
V. NEGLECT BY FAILING THE CASE PLAN 60
A. APPLICABLE CODE SECTIONS 60
1. Idaho Code § 16-2005(1)(b) 60
2. Case Plan Neglect As Defined By Idaho Code §16-2002(3)(b). 60
3. Time Standards Of Idaho Code § 16-1622(2)(g) 60
B. APPLICABLE LEGAL STANDARDS 60
1. Case Law 60
2. Case Law Addressing The Time Standards 61
C. COURT MUST ANALYZE THE CASE PLAN IN DETAIL 62
1. Parent Knew Of Case Plan 62
2. Court Must Analyze Each Task In The Case Plan 62
3. Caseworker's Testimony Regarding The Case Plan 62
4. Impossibility Defense 62
D. IDAHO CASE LAW ADDRESSING SPECIFICS OF CASE PLAN NEGLECT 65
1. Budget 65
2. COVID-19 Pandemic 65
3. Developmental Delays/Special Needs of Children 65
4. Domestic Violence 66
5. Excuses By The Parent 66
6. Harm To The Child 66
7. Incarceration 66
8. Modifying The Case Plan 67
9. Parenting Classes 67
10. Probationary Terms 67
11. Psychological Evaluations/Mental Health Treatment 67
12. Relationships With Other Adults 68

13. Reports of Caseworker and GAL 68
14. Safe And Stable Home 68
15. Substance Abuse 68
16. Time in Care 69
17. Visits 69
VI. ABUSED CHILDREN 71
A. APPLICABLE STATUTES 71
1. Idaho Code § 16-2005(1)(b) 71
2. Idaho Code §16-2002(4) 71
3. Idaho Case Law 71
VII. TERMINATION IN BEST INTERESTS OF PARENT AND CHILD 72
A. APPLICABLE CODE SECTIONS 72
1. Idaho Code §16-2005(3) 72
B. IDAHO CASE LAW 72
1. Delusional Thinking Of The Parent 72
2. Child's Sense Of Finality 72
3. Incarceration 72
4. Parent's Affection 72
5. Support 73
6. Quantity Of Children 73
7. Reunification Unlikely 74
8. Child's Affection For or Desire to Reunite With Parent 74
9. Sexual Offender 74
10. Successfully Completing The Case Plan 74
11. Psychological Best Interests 75
12. Relationship With Siblings 75
13. Department Not Seeking Termination of Rights to Siblings 76
14. Parent Bad Influence on the Child 76
VIII. INABILITY TO DISCHARGE PARENTAL RESPONSIBILITIES 77
A. APPLICABLE STATUTE 77
1. Idaho Code § 16-2005(1)(d) 77

2. Idaho Case Law 77
IX. INCARCERATED PARENT 79
A. APPLICABLE STATUTE 79
1. Idaho Code § 16-2005(1)(e). 79
X. BEST INTERESTS OF THE CHILD 81
A. APPLICABLE LAW 81
1. The Two-Part Test For Termination 81
2. Applicable Idaho Statutes Addressing Best Interests 81
3. Test When Minimal Grounds For Termination Exist 82
B. SPECIFIC ISSUES ADDRESSING BEST INTERESTS 82
1. Best Interests of Adoptive Parents Not a Factor 82
2. Caregiver's Effect On Child 83
3. Child's Fear Of The Parent 83
4. Child's Wishes 83
5. Criminal Behavior 83
6. Drug Usage 84
7. Financial Contributions 84
8. Harm To Child 85
9. Improvement In Child When Away From Parent 85
10. Incarceration 86
11. Long Recovery Period 87
12. Parent's Shortcomings 88
13. Passage Of Time 88
14. Professional Opinions 88
15. Relapses 89
16. Religion 90
17. Reunification Of Family Unlikely 90
18. Stability and Permanency 90
19. Unclean Home 91
20. Unemployment 91
21. Visitation Only Task Accomplished 91

XI. DISABILITY OF A PARENT **93**
A. IDAHO STATUTES 93
1. Defining Disability 93
2. Adaptive Equipment Or Supportive Services 93
B. IDAHO CASE LAW 93
1. Interpreting Idaho Code § 16-2005(1)(d) 93
2. Parent's Burden Of Persuasion On Supportive Services 94
3. Supportive Services Ineffective 94
4. Appointment of GAL for Parent 94
XII. COURT TRIALS, PROCEDURE, DEFAULT & WRITTEN FINDINGS **96**
A. TRADITIONAL CIVIL Default IS NOT PERMITTED IN TPR PROCEEDINGS 96
1. Three-Day Notice 96
2. Entry of Default 96
B. PRESIDING JUDGE CONSISTENCY THROUGHOUT CP AND TPR PROCEEDINGS 96
1. Judge Who Presided At Trial Should Issue Written Opinion or Replacement Judge Must Carefully Review Factual Findings Made by Original Judge 97
C. Written Findings and Conclusions 97
1. Written Findings and Conclusions Required 97
2. Party Preparing Written Opinion – Court Must Carefully Review, Edit and "Make the Opinion Its Own" 98
D. THE PERMANENCY GOAL(S) DETERMINATION 98
1. Department's Duty to File & Measurement of 15-Month Time Period 98
2. Early Permanency Permitted Due to Lack of Case Plan Progress 99
3. 15-Month Time Period Does Not Apply to Neglect Under I.C. §16-2002(3)(A) 99
4. Timing of TPR Petition Filing 100
E. PROCEDURAL & EVIDENTIARY ISSUES 100
1. Applicable Rules 100
2. Amendment of TPR Petition - Notice 100
3. Appeal – Finality 101
4. Continuance of TPR Trial 101
5. Court's Alleged Over-Emphasis of Future Substance Abuse 102

6. Court's Recitation of Facts ... 103
7. Evidence of Incidents Involving Substance Abuse ... 103
8. Exclusive Jurisdiction ... 103
9. Hearsay ... 104
10. Parent Incarcerated in Another State – Due Process ... 105
11. Placement Not a Necessary Factor in Determining Best Interests ... 106
12. Remoteness of Evidence ... 106
13. Testimony by Video or Phone—Constitutional Right to Be Present ... 106
14. TPR Petition Defects ... 108
15. Transcript Deficiencies ... 108
16. UCCJEA Applies ... 109
XIII. INDIAN CHILD WELFARE ACT CASES ... 110
A. APPLICABLE CODE SECTIONS AND RULES ... 110
1. I.J.R. 58 ... 110
2. ICWA, 25 U.S.C. §§1901-1922 ... 110
B. IDAHO CASE LAW ... 111
1. "Indian Child" Determination ... 111
2. Active Efforts to Prevent Breakup of the Indian Family ... 112
3. Consent to TPR ... 113
4. Correct Application of ICWA Is Question of Law ... 113
5. Due Process and Procedural Safeguards ... 114
6. ICWA Notices: Hearsay ... 114
7. Qualified Expert Witness (QEW) ... 114
8. State Courts Have Concurrent Jurisdiction ... 114

I. IS THE PARTY A PARENT?

A. A PARTY MUST FIT A STATUTORY DEFINITION OF PARENT

1. The Court First Determines If A Parental Right Exists

The underlying premise in a parental rights termination action is that the defendant holds some parental right to his or her child, which should be terminated. Only after a parental interest has been identified can a court properly evaluate whether this interest may be terminated. *In re Doe*, 150 Idaho 140, 244 P.3d 1226, 1229 (2010) (quoting *Doe v. Roe*, 142 Idaho 202, 204-05, 127 P.3d 105, 107-108 (2005).

In order to terminate a parent and child relationship, there must be a parent. The Act defines a "parent," and by doing so it excludes other relationships with a child from being that of a parent. *In re Doe*, 150 Idaho 140, 244 P.3d 1226, 1228 (2010).

If a party in a termination proceeding is not a parent, a court cannot terminate his or her nonexistent parental rights. The court can only enter an order stating that the person has no parental rights. *In re Doe*, 150 Idaho 140, 244 P.3d 1226, 1229 (2010).

B. RECOGNIZED PARENTS

1. Definition Of A Parent Under I.C. §16-2002(11)

Idaho Code § 16-2002(11) states, in relevant part, that a "parent" is either the birth or adoptive mother, the adoptive father, the biological father of a child conceived or born during the father's marriage to the birth mother, or the unmarried biological father whose consent to an adoption of the child is required pursuant to I.C. §16-1504. *In re Doe*, 2010 WL 5176851 (Idaho App. 2010).

2. Definition Of A Presumptive Father

Idaho Code §16-2002(12) defines a "presumptive father" as a "man who is or was married to the birth mother and the child is born during the marriage or within three hundred (300) days after the marriage is terminated." *In re Doe*, 2010 WL 5176851 (Idaho App. 2010).

3. Unmarried Biological Father

Idaho Code § 16-2002(11) states that a parent is the "the unmarried biological father whose consent to an adoption of the child is required pursuant to I.C. § 16-1504." In re Doe,

2010 WL 5176851 (Idaho App.2010). (Emphasis added.) Consent to adoption is required from "an unmarried biological father of an adoptee only if the requirements and conditions of I.C. §16-1504(2)(a) or (b) have been proven." *In re Doe*, 150 Idaho 88, 244 P.3d 232, 235 (2010).

C. ANALYZING THE UNMARRIED BIOLOGICAL FATHER/CONSENT TO ADOPTION

1. Idaho Code § 16-1504(2)(a)

Idaho Code § 16-1504(1)(e) states that consent to adoption is required from "'an unmarried biological father of an adoptee only if the requirements and conditions of subsection (2)(a) or (b) of this section have been proven." Subsection (2)(a) provides, in relevant part:

> (i)…[A]n unmarried biological father shall have developed a substantial relationship with the child, taken some measure of responsibility for the child and the child's future, and demonstrated a full commitment to the responsibilities of parenthood by financial support of the child, of a fair and reasonable sum and in accordance with the father's ability, when not prevented from doing so by the person or authorized agency having lawful custody of the child; and either:
>
> 1. Visiting the child at least monthly when physically and financially able to do so, and when not prevented from doing so by the person or authorized agency having lawful custody of the child; or
> 2. Have regular communication with the child or with the person or agency having the care or custody of the child, when physically and financially unable to visit the child, and when not prevented from doing so by the person or authorized agency having lawful custody of the child.
>
> (ii) The subjective intent of an unmarried biological father, whether expressed or otherwise, unsupported by evidence of acts specified in this subsection shall not preclude a determination that the father failed to meet any one (1) or more of the requirements of this subsection.

In re Doe, 150 Idaho 88, 244 P.3d 232, 235 (2010).

(a) Substantial Relationship Analyzed

Under I.C. § 16-1504(2)(a), the appellant did not develop the required "substantial relationship" with the child when he had but two visits with her in four years. *In re Doe*, 150 Idaho 88, 244 P.3d 232, 235 (2010).

(b) Financial Support Analyzed

Under I.C. § 16-1504(2)(a), the appellant had not "demonstrated a full commitment to the responsibility of parenthood by financial support" by providing financial support on only two

occasions in a four year period". *In re Doe*, 150 Idaho 88, 244 P.3d 232, 235 (2010).

(c) Father Was Not Prevented From Having Relation With The Child

Each of the requirements in subsection (2)(a) is conditioned by the phrase "when not prevented from doing so by the person or authorized agency having custody of the child". The appellant failed to grasp the opportunity to make a significant connection with the child who he knew might be his, and he was not prevented from doing so by Mother or the Department. *In re Doe*, 150 Idaho 88, 244 P.3d 232, 236 (2010).

2. Effect Of Court Adjudication Recognizing A Parental Right.

Consent to an adoption is required from a "biological parent who has been adjudicated to be the child's father by a court of competent jurisdiction prior to the mother's execution of consent". I.C. § 16-1504(d)(1); *In re Doe*, 150 Idaho 88, 244 P.3d 232, 235 (2010).

3. Right to an Evidentiary Hearing

The Idaho Supreme Court held that a father had waived his right to an evidentiary hearing on the issue of whether or not he attained the status of "parent":

Idaho Code section 16–2007(5) provides, in pertinent part "notice under this section is not required unless such putative father is one of those persons specifically set forth in section 16–1505(1), Idaho Code." In turn, I.C. § 16–1505(1) provides:

Notice of an adoption proceeding shall be served on each of the following persons:

> (a) Any person or agency whose consent or relinquishment is required under section 16–1504, Idaho Code, ***unless that right has been terminated by waiver,*** relinquishment, consent or judicial action, or their parental rights have been previously terminated; … (Emphasis added.)

> Subsection (1)(a) redirects us, by implication, to the subsection of Idaho Code title 16, chapter 15, that controls the waiver of parental rights. That subsection is I.C. § 16–1513(4), which provides in pertinent part:

> ***Any father of a child born out of wedlock who fails to file and register his notice of the commencement of paternity proceedings*** prior to the placement for adoption of the child in the home of prospective parents or ***prior to the date of commencement of any proceeding to terminate the parental rights of the birth mother,*** whichever event occurs first, ***is deemed to have waived and surrendered any right in relation to the child*** and shall be barred from thereafter bringing or maintaining any action to establish his paternity of the child. Failure of such filing or registration shall constitute an abandonment of said child. (Emphasis added.)

* * *

> Doe has never contended, either in the magistrate court or in this Court on appeal, that he commenced paternity proceedings before the Department petitioned to terminate Mother's parental rights. Therefore, the magistrate judge correctly held that Doe was not even entitled to notice of the "nonestablishment" hearing, much less the opportunity to present evidence at that hearing.

In re Doe, 155 Idaho 36, 37–39, 304 P.3d 1202, 1203–05 (2013).

With regard to the Due Process Clause, the statutory scheme did not violate the putative father's due process rights:

> Like Lehr, Doe was not afforded an evidentiary hearing prior to a court order proclaiming that he had no parental rights in his biological child. And, as with Lehr, the lack of an evidentiary hearing was directly attributable to Doe's failure to take steps to ensure his legal recognition as a father. Thus, like Lehr, Doe's due process rights were not violated.

In re Doe, 155 Idaho at 39–40, 304 P.3d at 1205–06.

4. Father Filing A Voluntary Acknowledgement Of Paternity.

Consent to an adoption is also required from an "unmarried biological father who has filed a voluntary acknowledgement of paternity with the vital statistics unit of the Department of Health and Welfare pursuant to section 7-1106, Idaho Code". I.C. § 16-1504 (1)(i); *In re Doe*, 150 Idaho 88, 244 P.3d 232, 235 (2010).

(a) Paternity Test Alone Is Insufficient Evidence.

Merely entering a paternity test into evidence during a termination action does not satisfy the requirements of I.C. §16-1504(1)(d). *Doe v. Roe*, 142 Idaho 202, 205, 127 P.3d 105, 108 (2005); *In re Doe*, 150 Idaho 88, 244 P.3d 232, 235 (2010).

5. A Biological Father May Hold No Parental Rights

The Idaho Supreme Court affirmed the magistrate's order finding that the appellant's interest in Jane never ripened into a parental right and, therefore, appellant had no parental rights in Jane. *In re Doe*, 150 Idaho 88, 244 P.3d 232, 236 (2010).

D. "*IN LOCO PARENTIS*" DOES NOT RISE TO A PARENTAL RIGHT

1. In Loco Parentis Defined

The doctrine of *in loco parentis* is defined as "relating to, or acting as a temporary guardian or caretaker of a child, taking on all or some of the responsibilities of a parent".

BLACK'S LAW DICTIONARY 803 (8th ed. 2004); *In re Doe*, 150 Idaho 195, 245 P.3d 506 (Ct.App. 2010).

2. In Loco Parentis Is Not A Parental Right

A party acting *in loco parentis* does not possess parental rights subject to termination under I.C. § 16-2005. *In re Doe,* 150 Idaho 195, 245 P.3d 506 (Ct.App. 2010).

E. EQUITABLE ADOPTIONS NOT RECOGNIZED IN IDAHO.

1. Equitable Adoption Defined.

The doctrine of equitable adoption applies equity to create a status which confers certain benefits to a child, such as child support or an inheritance. *In re Doe*, 2010 WL 5176851 (Idaho App. 2010).

2. Equitable Adoption Not Recognized In Idaho.

Idaho does not recognize equitable adoption for the purpose of establishing parental rights. Consequently, the Idaho Court of Appeals declined to apply the doctrine in termination hearings to recognize equitable parental rights in the appellant. *In re Doe*, 2010 WL 5176851 (Idaho App. 2010).

F. IDAHO CASE LAW ADDRESSES "PARENT"

1. "Parent" and "Presumptive Parent"

At the termination hearing, the appellant did not argue that he and Mother were married or that he was Jane's adoptive parent. In addition, the paternity test established that the appellant was not Jane's biological father. Therefore, substantial and competent evidence supported the magistrate's determination that appellant was never married to Mother and was not Jane's adoptive or biological father. As a result, the magistrate did not err when it determined that John did not meet the statutory definition of a "parent" or "presumptive father" under the Termination of a Parent and Child Relationship Act. *In re Doe*, 2010 WL 5176851 (Idaho App. 2010).

2. Unmarried Biological Parent

Joe Doe contended that he was the father of child based upon an order entered in a child support proceeding. Recognizing the child support order, the Department claimed in the

termination proceeding that John Doe was the "legal father" and sought to terminate his parental rights. The Idaho Supreme Court reversed the termination of the "legal father's" parental rights, holding that "John Doe cannot meet the statutory definition of a 'parent' applicable to proceedings to terminate a parent and child relationship because he is neither the child's adoptive nor biological father". Idaho Code § 16-2002(11)(b), (c), and (d); *Idaho Dep't of Health & Welfare v. Doe I*, 150 Idaho 140, 244 P.3d 1226 (2010).

G. ARGUMENT OF DUE PROCESS AT TERMINATION HEARING

1. "Parent" or "Presumptive Parent"

The appellant failed to prove that his relationship with the child created a liberty interest protected by the Due Process Clause of the Fourteenth Amendment. In so holding, the Idaho Court of Appeals stated, "No jurisdiction has identified a liberty interest in a non-biological person who is neither a legal guardian, adoptive parent, step-parent, blood relative, nor foster parent. Therefore, because (the appellant) has failed to demonstrate that he possesses a liberty interest in parenting Jane, we cannot conclude that his constitutional right to parent has been violated". *In re Doe*, 2010 WL 5176851 (Idaho App. 2010).

2. Unmarried Biological Father's Failure To Act

The Idaho Supreme Court recognized that John Doe failed to grasp the opportunity to establish the parental rights available to him. John Doe knew that Mother became pregnant around the time of their relationship and later gave birth to Jane, and he maintained some contact with Mother and Jane over the following four years. Yet John Doe never took any of the steps available for him to establish himself as Jane's parent. He never filed a voluntary acknowledgement of paternity with the Department. He never initiated legal proceedings to be adjudicated the child's biological father. He never established a substantial relationship, demonstrated a commitment to the responsibilities of parenthood by providing financial support, nor did he visit Jane monthly or maintain regular contact with Jane, Mother, or the Department. Thus, John Doe failed to assert his parental rights under Idaho law and never acquired the substantial protection afforded by the due process clause to a parent's interest in their biological child. *In re Doe,* 150 Idaho 88, 244 P.3d 232, 236-37 (2010).

H. VOLUNTARY CONSENT TO TERMINATION—WAIVER OF NOTICE & APPEARANCE

1. Applicable Code Sections

Idaho Code §16-2005(4) allows a court to grant an order terminating the relationship

without a hearing where a consent to termination in the manner and form prescribed in the statute has been filed by the parents of the child. Otherwise, the court must hold a TPR hearing. I.C. §16-2005(5). The statute requires that the consent "be substantially in" the form set forth therein. I.C. §16-2005(4). The statute sets out specific requirements for when a court must accept a "consent or a surrender and release" executed in another state.

Idaho Code §16-2007(3) permits the written waiver of notice and appearance by a parent in the manner and form prescribed in the statute has been filed. The statute requires that the consent "be substantially in" the form set forth therein. I.C. §16-2007(3). The statute sets out specific requirements for when a court must accept a waiver executed in another state. I.C. §16-2007(4).

2. Consent and Waiver Are Different and Have Different Purposes and Effects

> The Idaho Legislature set out the statutory scheme governing termination of the parent-child relationship in Chapter 20, Title 16 of the Idaho Code. Within this chapter, two forms are set forth, addressing separate processes related to termination proceedings. Section 16-2005(4) contemplates a voluntary *consent to terminate* one's parental rights filed in conjunction with a petition for *adoption.* I.C. § 16-2005(4). Section 16-2007(3), on the other hand, contemplates *waiver of notice and appearance* in a termination proceeding. *See* I.C. § 16-2007(3).
>
> In order for a form under either statute to be valid, the form must "be substantially in the ... form" set out in each statute. *See* I.C. §§ 16-2005(4), 16-2007(3). A close reading of the forms indicates they fulfill two very different purposes: one form results in the parent consenting to termination of her parental rights in the context of an adoption, while the other form waives the parent's right to notice and an opportunity to appear in a termination proceeding. The form set out in Idaho Code section 16-2005(4) requires the parent "give [her] full and free consent to the complete and absolute termination of [her] parental right(s)." Consent in this statute is only in the context of adoption. The form set out in Idaho Code section 16-2007(3) results in the parent waiving her "right to notice and [her] right to appear in any action seeking termination of [her] parental rights."

Matter of Doe I (2019-22), 166 Idaho 759, 463 P.3d 393 (2020), *reh'g denied* (May 29, 2020).

3. Consent Is Not Allowed Without an Adoption Pending

Idaho Code §16-2005(4) states:

> The court may grant an order terminating the relationship where a consent to termination in the manner and form prescribed by this chapter has been filed by the parent(s) of the child **in conjunction with a petition for adoption initiated by the person or persons proposing to adopt the child, or where the consent to termination has been filed by a licensed adoption agency,** no subsequent hearing on the merits of the petition

shall be held. (Emphasis added.)

Idaho’s appellate courts have determined and later confirmed that consent cannot be grounds for TPR where the conditions of the above statute are not met:

> [T]he magistrate court found that termination was warranted under section 16-2005(4). As explained above, this provision permits termination where voluntary consent is filed with a petition for adoption or where a licensed adoption agency files its consent to termination. I.C. § 16-2005(4); *In re Termination of Parental Rights of Doe (2013-17)*, 155 Idaho 896, 900, 318 P.3d 886, 890 (2014). **Due to this conditional language, the provision applies in the specific context where parents are consenting to a concurrent adoption.** *See In re Adoption of Doe*, 156 Idaho 345, 352, 326 P.3d 347, 354 (2014) (Horton, J., specially concurring).

Idaho Dep't of Health & Welfare v. Doe I (2017-21), 163 Idaho 83, 95, 408 P.3d 81, 93 (2017) (emphasis added).

> Idaho Code section 16-2005(4) is the exclusive form to be used when the child is being adopted. **Since Son was not being adopted, Mother should not have been asked to consent to the termination of her parental rights. Idaho Code section 16-2007(3) was the only operative statute and the form provided in that statute should have been the form used.**

Matter of Doe I (2019-22), 166 Idaho 759, 463 P.3d 393, 403-04 (2020), *reh'g denied* (May 29, 2020) (emphasis added).

4. Consent and Waiver Forms Should Not Be Combined

It is inappropriate to combine the two forms contained in I.C. §16-2005(4) (consent) and I.C. §16-2007(3) (waiver) because the forms created by the legislature are designed to deal with two different scenarios. *Matter of Doe I (2019-22)*, 166 Idaho 759, 463 P.3d 393, 403-04 (2020), *reh'g denied* (May 29, 2020).

5. Motion to Rescind Consent to TPR

After consenting, Doe subsequently filed a consent to terminate her rights, which consent she moved to set aside ten days after it was accepted by the magistrate court. The standard to be applied in an adoption where a parent wants to set aside a consent to the adoption is more stringent; the consent is irrevocable absent a showing of fraud, duress or undue influence. (*See Petition of Steve B.D.*, 111 Idaho 285, 292, 723 P.2d 829, 836 (1986)). Because the form Doe executed in this could only waive her right to notice and an opportunity to be heard in the termination proceeding against her, the standard in *Petition of Steve B.D.* did

not apply. *Dep't of Health & Welfare v. Doe*, *(2019-22)*, 166 Idaho 759, 463 P.3d 393 (2020).

6. Conditional Consent Is Not Allowed

The Idaho Supreme Court noted that "the critical requirement for voluntary consent to termination is that the parent gives 'full and free consent to the complete and absolute termination' of parental rights. The requirement that "free" consent is given means the consent is given "by choice, rather than by compulsion or constraint." Black's Law Dictionary 734 (9th ed.2009). 'Complete' indicates that the termination must be of the entirety of the parent-child relationship. 'Absolute' means '[f]ree from restriction, qualification, or condition.' *Id.* at 7. 'Termination' means the parent is divested of '*all* legal rights, privileges, duties, and obligations.' I.C. § 16–2011 (emphasis added). Consistent with these principles, this Court has previously decided that a conditional consent to termination of parental rights renders a termination order invalid. *In re Baby Boy Doe,* 127 Idaho 452, 456–57, 902 P.2d 477, 481–82 (1995)." *In re Termination of Parental Rights of Doe,* 155 Idaho 896, 901, 318 P.3d 886, 891 (2014).

II. REASONABLE EFFORTS BY IDHW TO REUNIFY THE FAMILY

A. REASONABLE EFFORTS TO REUNIFY REQUIRED IN CPA CASES

1. Reasonable Efforts Under The Federal Adoption And Safe Families Act

The Federal Adoption and Safe Families Act requires states to exercise reasonable efforts to reunify families with a primary concern for the health and safety of the child. *In re Doe*, 2010 WL 1194462 (Idaho App. 2010)(J. Gutierrez dissenting).

2. Child Protective Act Requires Reasonable Efforts

The state in each case is required to make reasonable efforts to reunite the family because the overarching goal behind the CPA is to "preserve, protect, enhance, and reunite the family relationship". I.C. § 16-1601. *Idaho Dept. of Health & Welfare v. Doe*, 150 Idaho 36, 244 P.3d 180 (2010).

Doe's contention that parental rights may be terminated without any reasonable efforts is not supported by law. The Child Protective Act requires reasonable efforts (citing I.C. §§16-1610(2)(i)(iii), 16-1615(5)(b), 16-1619(6), 16-1621(3), 16-1621(5), 16-1622). *In re Doe (2019-31),* 156 Idaho 682, (Ct.App.2020).

Idaho Code § 16-1601 provides some guidance for what efforts are to be expended. The section provides that the health and safety of the child are the primary concerns, but also requires that, in the event of removal, "the state of Idaho shall, to the <u>fullest extent</u> possible, seek to preserve, protect, enhance, and reunite the family relationship". *In re Doe*, 2010 WL 1194462 (Idaho App. 2010)(J. Gutierrez dissenting).

3. Case Plan Requires Reasonable Effort

Idaho Code § 16-1621(3) states: "The case plan shall set forth reasonable efforts which will be made to make it possible for the child to return to his home and shall concurrently include a plan setting forth reasonable efforts to place the child for adoption, with a legal guardian, or in another approved permanent placement."

In a dissenting opinion, Judge Gutierrez noted that Idaho Code § 16-1621(1) requires the Department to prepare a case plan "in every case in which the child is determined to be within the jurisdiction of the court". Idaho Code § 16-1621(3) provides that "the case plan shall set forth <u>reasonable efforts</u> which will be made to make it possible for the child to return to his home…[and] shall state with specificity the role of the department". *In re Doe*, 2010 WL

1194462 (Idaho App. 2010)(J. Gutierrez dissenting).

4. Reasonable Efforts Under Idaho Code §16-1622(2)(g)

The time standards under Idaho Code § 16-1629(2)(g) provide "[t]here shall be a rebuttable presumption that if a child is placed in the custody of the department and was also placed in out of the home care for a period not less than fifteen (15) out of the last twenty-two (22) months from the date the child entered shelter care, the department shall initiate a petition for termination of parental rights." Such a presumption may be rebutted if the court finds that there are compelling reasons why filing a petition to terminate parental rights would not be in the best interests of the child or the Department has not made reasonable efforts to reunify the child with his or her family.

5. Reasonable Efforts Found

Trial court did not err by finding that the IDHW made reasonable efforts to reunify Mother with her children: (a) IDHW complied with Idaho Code section 16–1621(3)(c) by developing four case plans, which identified issues needing attention, set forth tasks for Mother and the IDHW, and stated with specificity the role of the IDHW; (b) IDHW provided Mother with a variety of resources and support to allow her to comply with the case plans such as three alcohol and drug treatment programs; (c) two opportunities to live at the Haven Shelter; (d) numerous parenting counseling programs; and (e) and many opportunities to progress towards a GED. *Idaho Dep't of Health & Welfare v. Doe,* 160 Idaho 824, 835–36, 379 P.3d 1094, 1105–06 (2016).

B. REASONABLE EFFORTS AS AN AFFIRMATIVE DEFENSE

1. Editor's Note:

The language requiring reasonable efforts comes from the Child Protective Act, not the Termination of the Parent-Child Relationship Act. The Termination of the Parent-Child Relationship Act does not require the Department make reasonable efforts to reunify the family before termination can occur. (Indeed, in terminations where no CPA filing exists, the reasonable efforts language is inapplicable.) The question in cases where the termination petition is filed in a CPA file is whether the state provided reasonable efforts as a part of its case in chief, or whether the parent claims, as an affirmative defense, that the Department did not undertake reasonable efforts to reunify the family. The Idaho Court of Appeals has addressed

this issue in two cases:

> There may be important policy reasons that the legislature provided for statutory appellate review of reasonable efforts in the child protection case and did not include reasonable efforts as a required finding once a termination petition has been filed. Such considerations may include concerns for permanency and stability for the child. See I.C. § 16-1622(2)(g) (requiring the Department to file a petition to terminate parental rights once the child has been in the temporary or legal custody of the Department for fifteen of the most recent twenty-two months); see also 42 U.S.C. § 671(a)(15)(C) (2019) (providing that, if continuation of reasonable efforts at reunification is inconsistent with the permanency plan for the child, reasonable efforts should be made to place the child in accordance with the permanency plan and complete whatever steps are necessary to finalize permanent placement). Whatever the policy considerations may be, such choices are within the purview of the legislature, not the judiciary. [Footnote omitted.] See Idaho State AFL-CIO v. Leroy, 110 Idaho 691, 698, 718 P.2d 1129, 1136 (1986) (stating that, in the absence of a legislative invasion of constitutionally protected rights, the judicial branch of government must respect and defer to the legislature's exclusive policy decisions).
>
> It is well-settled that the Department's efforts at reunification are not relevant to the magistrate court's termination decision under I.C. § 16-2005. The Idaho Supreme Court recently reaffirmed this principle in In re Doe, 164 Idaho 883, 889, 436 P.3d 1232, 1238 (2019) and rejected an assertion, similar to Doe's, that this principle violates due process. Id. at 889-90, 436 P.3d at 1238-39. Doe has failed to identify any due process flaw in when or how the Department's reasonable efforts are considered and reviewed in Idaho.

In re Doe (2019-31), Idaho Docket No. 47443 (Ct.App.2020); *In re Doe,* 156 Idaho 682, 688, note 3, 330 P.3d 1040, 1046, note 3 (2014).

2. Affirmative Defense

As an affirmative defense, Doe claimed that the Department had not made a reasonable effort to reunify her and her children. *In re Doe*, 149 Idaho 409,__, 234 P.3d 733, 738 (2010).

Editor's Note: Doe chose to file her claim as an affirmative defense. The Idaho Supreme Court did not hold that an affirmative defense must be filed.

C. CASE LAW DESCRIPTION OF REASONABLE EFFORTS

1. *In re Doe*, 149 Idaho 409 (2010)

The Idaho Supreme Court affirmed the finding of the magistrate court, as there was substantial evidence to support the finding of the court that the Department had made a reasonable effort to reunify Doe with her children. The Department entered into two case plans with the primary purpose of reunification. The Department also scheduled weekly supervised

visits and paid Doe's fuel expenses so that she could visit her children. The Department scheduled regular telephone calls between Doe and her children and paid for Doe's weekly therapy sessions. Moreover, the commitment of the Department to reunification was shown on August 1, 2006, when the Department recommended that the children be returned to Doe's custody. *In re Doe*, 149 Idaho 409, 234 P.3d 733, 738 (2010).

2. *In re Doe*, 150 Idaho 36 (2010)

The evidence in the record indicated that the Department made reasonable efforts to reunite Doe with her two children throughout the entire history of the case, including conducting numerous visits to the household, providing written notices to Doe detailing the steps necessary to make the house suitable for the children, sending a nurse from the health district to Doe's home to evaluate the household and make suggestions, and providing regular access to the children while they were in foster care. Additionally, the Department developed two different case plans in order to assist Doe in reuniting with her children and provided financial assistance to help facilitate Doe's compliance with the case plans. More specifically, the Department paid for Doe to obtain a psychological evaluation, paid for her to attend parenting classes, and paid the security deposit on an apartment, allowing Doe to move into subsidized housing, all of which were efforts by the Department to help Doe comply with the case plan. The magistrate court found that Doe had failed to take advantage of any of the resources or programs made available to her in order to reunite with her children. *Idaho Dept. of Health & Welfare v. Doe*, 150 Idaho 36, 244 P.3d 180 (2010).

III. ABANDONMENT

A. APPLICABLE CODE SECTIONS CONCERNING ABANDONMENT.

1. Idaho Code § 16-2005(1)(a): Abandonment As A Ground.

Idaho Code §16-2005(1)(a) makes abandonment a ground for termination.

2. Idaho Code § 16-2002(5): Defining Abandonment.

Idaho Code §16-2002(5) defines “abandoned.”

B. BURDEN OF PERSUASION

1. Petitioner Holds The Burden Of Persuasion

The petitioner holds and retains the burden of persuasion to show that abandonment has occurred. *In the Interest of Jane Doe*, 149 Idaho 392, 234 P.3d 716 (2010).

C. NO HARD-AND-FAST RULE DEFINES ABANDONMENT

1. Each Case Decided On Its Own Facts

No hard-and-fast rule controls the question of whether a parent has abandoned his or her child; instead, each case must be decided on its own particular facts. *In re Adoption of Doe,* 143 Idaho 188, 191, P.3d 1057 (2006); *Crum v. Dep’t of Health & Welfare*, 111 Idaho 407, 409, 725 P. 2d 112 (1986). *See also In re Doe*, 156 Idaho 532, 537, 328 P.3d 512, 517 (2014) (whether a parent maintains a normal parental relationship depends on the facts and circumstances of each case).

There is no universal standard for what constitutes a normal parental relationship. Whether such a relationship exists depends on the facts and circumstances of each case. *In re Doe*, 193 Idaho 188, 191, 141 P.3d 1057 (2006).

D. WILLFUL FAILURE TO MAINTAIN NORMAL PARENTAL RELATIONSHIP

1. Willful Failure To Maintain Normal Relationship

Idaho Code § 16-2002(5) allows termination by abandonment when “the parent has willfully failed to maintain a normal relationship including but not limited to reasonable support or regular personal contact.” (Emphasis added.) This statutory standard supersedes the common law standard which required specific intent that the parent wanted to sever all parental rights and responsibilities. *Doe I v Doe*, 138 Idaho 893, 902, 71 P.3d 1040 (2003).

2. Whether A Normal Parental Relationship Exists Unique To Each Case

No universally applicable "normal parental relationship" exists; whether such relationship exists depends on the circumstances of each case. *In re Adoption of Doe*, 143 Idaho 188, 191, 141 P.3d 1057 (2006); *Maier v. Matthews*, 97 Idaho 99, 104 540 P.2d 284 (1975).

3. Paying Reasonable Support or Having Regular Contact

The willful failure to maintain a normal parental relationship can be based upon either the failure to pay reasonable support or the failure to have regular personal contact, or some other failure. *In re Doe*, 148 Idaho 713, 228, P.3d 980 (2010). The lack of a normal relationship can be shown by the absence of reasonable support and/or the absence of regular contact. *In re Doe*, 138 Idaho 893, 901, 71 P.3d 1040 (2003).

4. Willful Failure

For one to willfully fail to do something, he or she must have the ability to do it. *In re Doe*, 148 Idaho 713, 716, 228 P.3d 980 (2010). A parent does not willfully fail to maintain a normal parental relationship unless the parent has the ability to do so and does not. *In re Doe*, 713, 288 P.3d 930 (2010).

The father's failure to successfully complete a rider is not a willful failure to maintain a normal parental relationship. The court must look at what actions taken by the parent in prison to maintain contact with his child. *Doe v. State*, 137 Idaho 758, 761-62, 53 P.3d 341 (2002).

Mother representing herself willfully failed to maintain a normal parental relationship with the child:

> Mother failed to contact JLS for over a year, even though at times she was geographically close to him. Even after this abandonment occurred, when she eventually was in contact with him under the visitation stipulation, her visits were sporadic and she took advantage of only a fraction of the visits available to her. Mother's argument that she could not navigate the legal system is unconvincing because she attempted to vacate the guardianship hearing on her own and represented herself in the preliminary stages of the termination suit.

In re Doe, 155 Idaho 505, 510, 314 P.3d 187, 192 (2013).

A court should consider evidence of the logistical and financial difficulties associated with maintaining the parental relationship. *In re Doe,* 156 Idaho 532, 537, 328 P.3d 512, 517 (2014). The failure of a parent to send cards or communicate with a child via telephone is not dispositive of a parent's failure to communicate where the age of a child lessens the meaningfulness of that

form of communication. *Id.* Evidence of a hostile relationship between parents may also be evidence of just cause and may mitigate against a parent's failure to take advantage of all possible avenues of reconnection. *Id.*

The existence of a guardianship, in and of itself, will not prevent a finding that abandonment was willful. *In re Doe,* 157 Idaho 59, 66, 333 P.3d 874, 881 (Ct. App. 2014). A guardianship is not the type of forced absence that prevents a finding of willful abandonment because a guardianship, unlike incarceration or a court order, does not legally prohibit the parent from having contact with his or her child. *Id.* Instead, it simply requires the parent to utilize the courts to establish legally enforceable visitation rights if the guardians are unwilling to allow contact. *Id.; see also Doe,* 155 Idaho at 509, 314 P.3d at 191 (rejecting a mother's argument that she was prohibited by a guardianship from contacting her child when a court-granted visitation schedule expired and that she was not required to subsequently secure visitation through the courts).

Although Parents were of limited financial means, they had the resources to support Siblings and to allow Father to maintain a relationship with his daughter in California, which included regular road trips and stays in motels. Further, Father was underemployed by choice and failed to provide any support of any kind for Child for a period in excess of two years. *Matter of Doe II*, 163 Idaho 1, 407 P.3d 588 (2017).

E. ANALYZING REASONABLE SUPPORT

1. Reasonable Support

In relevant part, *Idaho Code* § 16-2002(5) says "abandoned" means "the parent has willfully failed to maintain a normal parental relationship including but not limited to, reasonable support or regular personal contact." (Emphasis added.)

2. Factors To Be Considered In Providing Reasonable Efforts.

In deciding abandonment by failing to provide reasonable support, the magistrate considered the following:

(a) The father failed to provide voluntary financial support;
(b) The father's contributions were gained by garnishment;
(c) The amount garnished did not constitute reasonable support;
(d) A $5 contribution upon the mother's request did not show a sincere desire by the father to support the child and was evidence of willfulness; and

(e) Father was employed enough to reasonably expect him to contribute to the support of the minor child.

Doe I v. Doe, 138 Idaho 893, 901, 71 P.3d 1040 (2003).

With respect to the lack of support, the Idaho Supreme Court found willfulness upon the fact that the father had the ability to pay support, but failed to do so. *In re Doe*, 148 Idaho 713, 718, 228 P.3d 980 (2010) (discussing *Doe I v. Doe*, 138 Idaho 893, 901, 71 P.3d 1040 (2003)).

3. The Parent's Failure To Provide Support

Mother provided almost no support of the child since the day the child was born. Beginning just a month after the child was born, the Does provided for all of the child's financial, educational, and emotional needs. *In re Doe*, 157 Idaho 59, 65, 333 P.3d 874, 880 (Ct. App. 2014).

The mother's abandonment of her children was evidenced by her failure, over a period in excess of one year, to provide regular support, and by her failure to provide clothing, necessities, and medical and educational expenses. *In Interest Of Brown*, 112 Idaho 901, 903-04, 736 P.2d 1355 (Ct. App. 1987).

Between the filing of the petition in October 2006 and the trial's conclusion in May 2008, the father paid no child support. *In re Doe,* 146 Idaho 759, 762 (2009).

Between September 1982 and April 27, 1983, the father made no contributions towards the support of his children. *In Interest of Crum*, 111 Idaho 407, 409, 725 P.2d 112 (1986). The father's failure to provide any support for his children (coupled with other considerations) was sufficient evidence to support a finding of abandonment. *In Interest of Crum*, 111 Idaho 407, 409, 725 P.2d 112 (1986).

4. Ability To Pay Child Support Must Be Considered

The Idaho Supreme Court reversed the trial court's order of termination because the trial court failed to consider the father's ability to pay child support. *In re Adoption of Doe*, 143 Idaho 188, 192, 141 P.3d 1057 (2006). *See also In re Doe*, 148 Idaho 713, 717, 228 P.3d 980 (2010).

F. ANALYZING REGULAR PERSONAL CONTACT

1. Regular Personal Contact

Idaho Code § 16-2002(5) states, in relevant part, that "abandoned" means "the parent has willfully failed to maintain a normal parental relationship including, but not limited to, reasonable support or regular personal contact". (Emphasis added.)

2. No Contact By The Parent With The Children

Mother left the child with Great Grandmother in March 2008, and had no contact with him until May 2009. Even though she was geographically close enough to visit, she chose not to "because [she] was out doing things that [the child] didn't need to be around." Thus, Mother failed to have contact with her child for over a year even though she was able to do so. *In re Doe,* 155 Idaho 505, 509, 314 P.3d 187, 191 (2013).

The father's failure to make any real attempt to communicate with his children for over one year, despite the fact that he knew their mother was unable to care for them and that they had been placed in foster care, was proper evidence to support a finding of abandonment. *In Interest of Crum*, 111 Idaho 407, 409, 725 P.2d 112 (1986).

3. Minimal Contact By The Parent With The Child

Mother failed to maintain regular personal contact with the child; even when the mother was sober and was not incarcerated, in treatment or absconding, she only saw the child once every two weeks in addition to occasional calls and letters as the child got older. This contact was further limited by the mother's decision to terminate most visits after just twenty minutes, so even if the mother's contention that she saw the child an average of once a week is accepted, by her own estimation the average time the mother spent with her child in an average year was seventeen hours. This does not constitute regular personal contact that is indicative of a normal parental relationship under the circumstances, even when combined with the occasional phone calls and letters. *In re Doe,* 157 Idaho 59, 65–66, 333 P.3d 874, 880–81 (Ct. App. 2014).

Mother failed to have contact with her child for over a year even though she was able to do so. *In re Doe,* 155 Idaho 505, 509, 314 P.3d 187, 191 (2013).

Between June 14, 1982, and April 27, 1983, the father saw his children only on two brief occasions. In September 1982, the father was advised to maintain regular contact with the children but he did not initiate any contact with them. *In Interest of Crum*, 111 Idaho 307, 309, 725 P.2d 112 (1986).

4. Incarceration

In analyzing incarceration, the court should look at the parent's efforts to maintain a normal parental relationship while incarcerated, as well as the parent's efforts to maintain a normal parental relationship while not incarcerated. *In re Doe*, 137 Idaho 758, 53 P.3d 341 (2002).

(a) Efforts Made While Incarcerated

In *Doe v. State*, 137 Idaho 758, 759, 53 P.3d 341 (2002), the parent had been incarcerated the entirety of the child's life. Even though the parent was severely restricted in what he could do to establish a relationship with his child, the record indicated that the parent did all he could to establish a relationship. The parent sent his child gifts and made efforts to contact the child through the Department and the child's maternal grandmother, but was unsuccessful. The Idaho Supreme Court therefore vacated the judgment terminating the parental rights of the father. Father did not contact his child during the times that he was incarcerated and his contacts with the Department were severely limited. *In re Doe*, 146 Idaho 759, 762, 363 P.3d 689 (2009). (Father sent two letters to the Department while incarcerated.)

In *Doe v. State*, 137 Idaho 758, 53 P.3d 341 (2002), the parent's actions were restricted while he was in prison, but the parent still attempted to establish a relationship with his child despite those restrictions. In the instant case, the father faced no such restrictions while he was not incarcerated, yet he made virtually no attempt to establish a relationship with his child. *In re Doe*, 146 Idaho 759, 763 203 P.3d 689 (2009).

(b) Efforts Made While Not Incarcerated

When the father was not incarcerated and thus free to maintain personal contact with his child, he failed to do so. *In re Doe*, 146 Idaho 759, 762, 203 P.3d 689 (2009). (Father had one in-person contact with the child from the time she came into the care of the Department on October 1, 2006 until his parental rights were terminated in July 2008).

In re Doe, 146 Idaho 759, 693-94, 203 P.3d 689 (2009), the father visited the child only once while out of custody, failed to complete any step of the case plan, and made no attempt to establish a relationship with the child. As to the mother, she had limited contact with the child despite being out of custody for six months, failed to complete a single step of the case plan, and only initiated contacts with the child after her release from prison and after the Department sought to terminate her parental rights. The Idaho Supreme Court consequently affirmed the

magistrate's termination of the mother and father's parental rights.

While out of custody, the father failed to complete any steps of the Department's case plan. *In re Doe*, 146 Idaho 759, 763, 203 P.3d 689 (2009).

Recognizing that custody places significant restrictions on a parent's ability to maintain personal contact with a child, the court directed its attention to the time the mother was out of custody and free to maintain personal contact with her child. *In re Doe*, 146 Idaho 759 763, 203 P.3d 689 (2009). (Mother visited her child four or five times when not incarcerated.)

Although the mother had limited contact with her child beginning in March 2008, she had no contact with her daughter from October 1, 2006, despite having been out of custody for approximately six months. The mother did not complete a single step of the Department's case plan. Even after she was placed on probation, the mother had no contact with her child. It was only after the Department sought to terminate her parental rights that the mother insisted on contact with her child. *In re Doe,* 146 Idaho 759, 763, 203 P.3d 689 (2009).

5. Analyzing The Parent's Ability To Maintain Regular Contact

The magistrate failed to give any consideration to the father's ability to maintain regular contact with his daughter. In the magistrate's findings, "[t]here was no discussion of the financial difficulties with traveling [1,400 miles] from Phoenix to Lewiston." *In re Adoption Of Doe*, 143 Idaho 188, 192, 141 P.3d 1057 (2006). *See also In re Doe*, 148 Idaho 713, 717, 228 P.3d 980 (2010).

6. The Payment Of Child Support

While it is true that a parent's failure to provide reasonable support for his or her child or a parent's failure to maintain regular personal contact with his or her child are independent grounds for finding abandonment under Idaho Code § 16-2005(5), certainly there is a stronger case for abandonment when a parent has failed to contribute to his or her child's well-being. *In re Doe,* 150 Idaho 46, 244 P.3d 190, 196 (2010). (Father regularly paid support by military service limited regular personal contact).

G. JUST CAUSE ANALYZED

1. Just Cause

In relevant part, Idaho Code §16-2002(5) states: "Failure of the parent to maintain this relationship without just cause for a period of one (1) year shall constitute prima facie evidence of abandonment under this section;…" (Emphasis added.)

2. Petitioner Has Burden Of Persuading That No Just Cause Exists

Mother's desire to avoid apprehension while on the run for more than six months cannot, as a matter of law, constitute just cause for her willful failure to maintain a normal parental relationship with the child. Thus, the Does established their prima facie case of willful abandonment without just cause, shifting the burden of production to the mother. *In re Doe,* 157 Idaho 59, 68, 333 P.3d 874, 883 (Ct. App. 2014).

The petitioner holds and retains the burden of persuasion to show that abandonment has occurred. This includes a showing that the defendant parent is without just cause for not maintaining a normal relationship with the child. *In re Adoption of Doe,* 143 Idaho 188, 192, 141 P.3d 1057 (2006); *In re Doe*, 138 Idaho 893, 903-04, 71 P.3d 1040 (2003); *In re Doe*, 149 Idaho 392, 234 P.3d 716 (2010). (Emphasis added.)

3. Effect Of Court Finding No Just Cause

If the trier of facts finds that there are no valid defenses or "just cause", then the petitioning party has met the burden of persuasion. *In re Adoption of Doe,* 143 Idaho 188, 192, 141 P.3d 1057 (2006); *In re Doe,* 149 Idaho 392, 234 P.3d 716 (2010).

4. Prima Facie Case Shifts Burden Of Persuasion

If the petitioning party makes a prima facie case, then the defendant parent holds the burden of persuasion to present evidence of just cause. *In re Adoption of Doe*, 143 Idaho 188, 192, 141 P.3d 1057 (2006); *In re Doe*, 149 Idaho 392, 234 P.3d 716 (2010).

Mother failed to meet this burden, as there were no financial, physical, or logistical barriers preventing the mother from contacting the child during the more than six-month period or otherwise. Mother lived close to the Does and was often employed when not incarcerated, in treatment, or evading arrest. Does facilitated visits by bringing the child to see the mother when the mother could not afford to come to the child. These visits usually occurred at the mother's request, and there was no evidence indicating that Does had ever or would have ever denied the mother's request to have Does facilitate a visit while the mother was sober and free. *In re Doe,* 157 Idaho 59, 68, 333 P.3d 874, 883 (Ct. App. 2014).

H. "JUST CAUSE" DEFENSES

1. Just Cause

In relevant part, Idaho Code §16-2002(5) states: "Failure of the parent to maintain this

relationship without just cause for a period of one (1) year shall constitute prima facie evidence of abandonment under this section;…" (Emphasis added.) Even if a parent has the ability to maintain a normal relationship but fails to do so, there can be "just cause" for such failure. *In re Doe*, 148 Idaho 713, 718, 228 P.3d 980 (2010).

2. Relevant Evidence On Just Cause

Relevant evidence on the issue of just cause can include the following:

(a) The distance between the parties (1,400 miles);
(b) Parent's financial difficulty;
(c) Parent missed seven months' work in two years due to injury;
(d) Parent's ability to pay support relative to his income and expenses; and
(e) The daughter's young age (between one and two years) tended to lessen the meaningfulness of cards and letters.

In Re Adoption Of Doe, 143 Idaho 188, 192, 141 P.3d 1057 (2006); *In re Doe,* 156 Idaho 532, 537–40, 328 P.3d 512, 517–20 (2014).

3. Financial And Logistical Difficulties

The Idaho Supreme Court has specifically recognized that evidence regarding the financial and logistical difficulties associated with maintaining a relationship with one's child is evidence of just cause that should be adequately considered by the magistrate court. *In re Doe*, 150 Idaho 46, 244 P.3d 190, 194 (2010); *In re Doe,* 156 Idaho 532, 537–40, 328 P.3d 512, 517–20 (2014).

4. Idaho Cases Interpreting Just Cause

Termination of Father's parental rights was premature where record demonstrated that:

(a) Mother secreted herself and Child from Father;
(b) Father was active in Child's life up until Mother asked Father to terminate his rights and then changed her number, job, and place of residence;
(c) Father sent birthday and Christmas gifts to Mother and/or the grandparents, which Mother returned;
(d) Father was not required to hire a private investigator, especially where the need for a private investigator arose from the conduct of the person seeking termination of parental rights;
(e) Father was not required to exhaust all possible connections, where Father's interactions with Mother's friends were that of hostility and it was reasonable for Father to believe that aggressively harassing Mother's family and friends would not be in Child's best interests; and
(f) Father's interactions with Child up until Mother's disappearance demonstrated a pattern of him supporting Child financially.

In re Doe, 156 Idaho 532, 537–40, 328 P.3d 512, 517–20 (2014).

Mother did not present evidence of just cause because: (a) the mother made choices, and those choices did not include any attempt to communicate with the child or maintain any semblance of a parental relationship; (b) abandonment had occurred well before visitation was prevented; (c) IDHW made extensive efforts to support renewal of the relationship between the child and his mother, including scheduling and rescheduling visits on short notice, waiting when the parents were late, and providing transportation while Mother only visited her son a total of six times in seven months, and continued a lifestyle that included drug abuse and multiple arrests; (d) failure to maintain contact by explaining that she "was out doing things that [the child] didn't need to be around" was not a valid excuse. *In re Doe,* 155 Idaho 505, 511, 314 P.3d 187, 193 (2013).

The mother actively opposed any contact between the children and their father even when his treating therapist expressly advocated for contact to be permitted. *In re Doe*, 148 Idaho 713, 718, 228 P.3d 980 (2010).

The Idaho Supreme Court has recognized that evidence of a hostile relationship between parents may also be evidence of just cause for failing to maintain a normal parental relationship with the child. *In re Doe*, 150 Idaho 46, 244 P.3d 190 (2010).

The Idaho Supreme Court reversed the magistrate's finding of abandonment on the ground that the father had no just cause for failing to maintain regular personal contact with his child. The Supreme Court found the magistrate court's finding deficient for several reasons:

> (a) The court did not adequately consider how the father's position in the military may have severely limited his ability to maintain a normal relationship with his child;
> (b) Because of the military, the father was not free to travel when he wanted, and that would have been difficult to get leave approved to visit Idaho;
> (c) The father testified that he did not have the money to travel from North Carolina to Idaho.

In re Doe, 150 Idaho 46, 244 P.3d 190, 195 (2010).

The father's phone calls with the mother were hostile. The mother would turn the conversation to financial matters and would only occasionally let the father speak to his son. *In re Doe*, 150 Idaho 46, 244 P.3d 190, 196 (2010).

Although the father held employment, married and had a subsequent child, he could not muster the emotional energy to act as a father to the child who was the subject of the

termination proceeding. *In re Doe*, 138 Idaho 893, 901, 71 P.3d 1040 (2003) (substantial and competent evidence supported the magistrate's finding that the father's failure to maintain a normal relationship with the child was without just cause).

The magistrate's interpretation of "normal parental relationship" did not adequately consider the extremely difficult position in which the father was placed; the record indicated that mother had thwarted father's attempts to visit the child, and that the father believed exercising visitation would have been detrimental to the child based on father's relationship with mother. *Maier v. Matthews*, 97 Idaho 99, 104, 540 P.2d 284 (1975).

The magistrate should have considered whether there was just cause for a father's failure to maintain a normal parental relationship with his son when the father believed that exercising his visitation rights would be detrimental to the child because of the mother's hostility and prior attempts to frustrate visitation. *In re Matthews*, 97 Idaho 99, 104, 540 P.2d 284 (1975).

IV. NEGLECT BY CONDUCT OF THE PARENT

A. APPLICABLE CODE SECTIONS

1. Idaho Code § 16-2005(1)(b)

Idaho Code §16-2005(1)(b) authorizes the court to terminate the relationship if it finds that termination of parental rights is in the best interests of the child and that the parent has neglected the child."

2. Idaho Code § 16-2002(3)

Idaho Code § 16-2002(3)(a) defines "neglected" to include conduct as defined in section 16-1602(31), Idaho Code; … (Emphasis added.)

3. Neglect As Defined By Idaho Code §16-1602(31): Conduct

Idaho Code §16-2002(3)(a) says "neglected" means conduct as defined by Idaho Code § 16-1602(31) of the *Child Protective Act.* Idaho Code § 16-1602(31) states that "neglected" means a child:

> (a) Who is without proper parental care and control, or subsistence, education, medical or other care or control necessary for his well-being being of the conduct or omission of his parents, guardian or other custodian or their neglect or refusal to provide them provided, however, no child whose parent or guardian chooses for such child treatment by prayers through spiritual means alone in lieu of medical treatment, shall be deemed for that reason alone to be neglected or lack parental care necessary for his health and well-being, but further provided this subsection shall not prevent the court from acting pursuant to section 16-1627, Idaho Code; or
> (b) Whose parents, guardian or other custodian are unable to discharge their responsibilities to and for the child and as a result of such inability, the child lacks the parental care necessary for his health, safety or well-being; or
> (c) Who has been placed for care or adoption in violation of law; or
> (d) Who is without proper education because of the failure to comply with section 33-202, Idaho Code.

(a) Idaho Case Law Recognizing I.C. §16-1602(31) (formerly §16-1602(25))

The magistrate's decision in this case was based upon I.C. §16-2005(1)(b), which provides that a parent-child relationship may be terminated when it is in the child's best interest and the parent has abused or neglected the child. A "neglected" child is defined in I.C. § 16-1602(31)(a) and (b) as a child:

> (a) Who is without proper parental care and control, or subsistence, medical or other case or control necessary for his well-being because of the conduct or omission of his parents, guardian, or other custodian or their neglect or refusal to provide them… or

(b) Whose parents, guardian, or other custodian are unable to discharge their responsibilities to and for the child and, as a result of such inability, the child lacks the parental care necessary for his health, safety, or well-being…

In re Doe, 149 Idaho 431, 234 P.3d 755, 758 (Ct. App. 2010).

B. IDAHO CASE LAW ADDRESSING NEGLECT BY CONDUCT

For many years, "neglected" meant "situations in which the child lacks proper support or parental care necessary for his health, morals or well-being." Under that standard, numerous Idaho cases analyzed whether behavior by a parent constituted neglect.

In 2005, the Idaho legislature revised the statutory definition of neglect and thus many of the cases in this section are addressing a now repealed definition of neglect. Nonetheless, the cases decided using the old definition of neglect remain helpful in analyzing neglect under the present-day statutes.

In the context of neglect, "'[w]illfulness ... is not necessary to a finding of neglect, and therefore its absence is not a defense to neglect.' *Doe (2015-01)*, 158 Idaho at 768, 351 P.3d at 1226." Neglect is not found on the basis of what a parent is able to do, but rather based on what is necessary for a child's well-being. *Doe v. Doe I (2017-15)*, 162 Idaho 653, 402 P.3d 1106, 1112 (2017).

1. Abdicating Parental Role

The question is whether, due to the conduct or omission of the parent, the child is without proper *parental* care and control, or subsistence, medical, or other care or control necessary for the child's well-being. I.C. § 16-1602(31)(a). A parent can neglect a child by failing to provide proper parental care even if the child's needs are being met by others. As such, the magistrate court did not err by focusing solely on Doe's efforts to provide proper parental care for the child. *Interest of Doe (2020-37),* 168 Idaho 74, 479 P.3d 467, 472 (Ct.App.2021).

Father has never been a primary caregiver; he historically relied on Mother and then on the children's foster parents to meet the children's daily nonfinancial needs. His plan to rely on his mother-in-law in the future to provide the children's daily needs was not realistic. *In the Interest of Doe (2020-48),* 168 Idaho 536, 484 P.3d 220 (Ct.App.2021).

The evidence overwhelmingly established that Doe was unable to provide proper parental care and control for the child and had never been a father to the child. *In re Doe,* 156

Idaho 682, 689, 330 P.3d 1040, 1047 (2014).

While there is a fine line between helping a parent with daily chores and taking on the actual responsibility of being a parent, there was evidence that the older daughter, age six in 2007, was responsible not only for supervising her siblings, but taking care of mother as well. *In re Doe*, 149 Idaho 165, 233 P.2d 96, 99 (2010).

The father abdicated his role as a parent with his child. *In Re Dayley*, 112 Idaho 522, 524, 733 P.2d 743 (1987) (father placed child in custody of the Department).

2. Abuse

In deciding neglect, a magistrate can consider the presence of abuse. Thus, the father used mental and physical abuse against his children. *Matter Of Aragon*, 120 Idaho 606, 609, 818 P.2d 310 (1991) (hitting the children and bending the daughter's arms up behind her back).

3. Bad Influences Upon The Children

The record showed that the parents associated the minor child with parental friends of improper influence. *In Interest Of Bush*, 113 Idaho 873, 876, 749 P.2d 492 (1988).

4. Bonding

The psychologist ultimately determined that Doe has no understanding of her children's emotional needs or their lives and recommended that the children not be returned to Doe at any time in the future because she did not have the capacity to parent her children in an appropriate, healthy, and safe fashion, and that was unlikely to change. *In re Doe*, 149 Idaho 431, 234 P.3d 755, 759 (Ct. App. 2010).

There was no positive bonding of the children to their father. Matter Of Aragon, 120 Idaho 606, 609, 818 P.2d 310 (1991).

5. Case Plan

In deciding neglect under *Idaho Code* § 16-1602(31), the parent's failure on the case plan is just one of many factors to be considered as the court analyzes neglect. Idaho case law addresses case plans as follows:

(a) Court Can Consider The Case Plan

The definition of neglect under I.C. § 16-1602(31)(b) is "broad enough to encompass the consideration of a parent's compliance with a case plan." *In re Doe*, 151 Idaho 356, 364, 256 P.3d 764, 772 (2011). *Interest of Doe (2020-37),* 168 Idaho 74, 479 P.3d 467, 473 n.4 (Ct.App.2021).Idaho case law has long held that a court may consider the case plans and

contracts signed by the parent, and the parent's performance thereon. *In re Doe*, 122 Idaho 644, 647, 837 P.2d 319 (Ct. App. 1992); *In* re *Doe*, 123 Idaho 502, 504-505, 849 P.2d 963 (1993).

(b) Significance Of Signing The Case Plan

The parents signed an agreement acknowledging and accepting the conditions imposed by the court. Thus, the parents were unequivocally on notice that violation of the conditions would jeopardize their parental rights. *In Interest of Bush, 113 Idaho 873, 875, 749 P.2d 492* (1988).

(c) Failing To Complete The Case Plan

The court noted that, contrary to the case plan, Mother continued using methamphetamine and actually increased the amount of methamphetamine she was using while working her case plan. The court also noted that, contrary to the case plan, Mother stopped attending drug treatment. *Matter of Doe,* 165 Idaho 46, 437 P.3d 922, 928 (2019).

In dicta, the magistrate considered that the mother failed to successfully complete her case plans in a timely manner. *In re Doe*, 122 Idaho 644, 647, 837 P.2d 319 (Ct. App. 1992).

The magistrate found that the mother failed to make reasonable efforts to fulfill the case plan. *In Interest of Brown*, 112 Idaho 901, 903, 736 P.2d 1355 (Ct. App.1987).

(d) Successfully Completing The Case Plan.

The ground for termination in this case was the claim that the termination of parental rights was in the best interests of the parent and child under Idaho Code § 16-2005(3). While it is not a neglect case, the language is helpful in analyzing the successful completion of a case plan. The record revealed that mother and child had a strong emotional bond, that their interactions were positive and healthy, and that mother could adequately provide for the child. Further, the mother went above and beyond the case plan in order to provide adequate parenting to the child. Public policy requires that a parental termination be overturned where the parent fully complied with the Department's reunification plan and any court directives. The court went on to say that the mother went above and beyond the case plan to provide appropriate parenting to the child. *In re Doe*, 142 Idaho 594, 598-99, 130 P.3d 1132 (2006) (termination of parental rights reversed).

<u>6. Cleanliness Of The Home</u>

Officer found the home was a mess with garbage, dog feces, old food, and piles of clothes. Other witnesses testified that the piles of dirty clothes in the house at one point

reached five-feet high, items rested against the wood stove, mold grew in a cup in child's room, and sharp objects were within child's reach. Hence, the fact that Mother and Father's homes were dirty and cluttered from 2009 until 2013 is a factor the trial court could rely on to find neglect. *In re Doe,* 157 Idaho 694, 702, 339 P.3d 755, 763 (2014).

In dicta, Idaho case law has held that a magistrate may consider the cleanliness of the home. In re Doe, 123 Idaho 502, 504, 849 P.2d 963 (Ct. App. 1993) (The house was dirty with maggots in uneaten food). A court may consider the condition of the home. In re Doe, 122 Idaho 644, 646, 837 P.2d 319 (Ct. App. 1992) (The home was found in complete disarray).

7. Clothing

The mother failed to provide for the children's clothing. *In Interest of Brown*, 112 Idaho 901, 903, 736 P.2d 1355 (Ct. App. 1987). The clothing worn by the children was dirty, did not fit and was inadequate for the weather at the time. *In re Doe*, 123 Idaho 502, 504, 849 P.2d 963 (Ct. App. 1993).

8. Counseling

The court noted that, contrary to the case plan, Mother stopped attending drug treatment. *Matter of Doe,* 165 Idaho 46, 437 P.3d 922, 928 (2019).

In deciding neglect under *Idaho Code* §16-1602(25), the magistrate considered the mother's failure to engage in counseling prior to her release from incarceration. *In re Doe*, 145 Idaho 662, 665, 182 P.3d 1196 (2008).

A court may consider a parent's failure to follow through with court-ordered counseling programs. *In re Doe*, 133 Idaho 826, 830, 992 P.2d 1226 (Ct. App. 1999) (dismissal from chemical dependency program); *In Interest of Baby Doe*, 130 Idaho 47, 53, 936 P.2d 690 (Ct. App. 1997) (failure to attend parenting program); *In re Doe*, 122 Idaho 644, 647, 837 P.2d 319 (Ct. App. 1992) (mother attended but refused to participate in or learn from the classes). The magistrate considered the father's failure to attend parenting classes, and his unsuccessful experience in the anger management classes. *Matter of Aragon*, 120 Idaho 606, 613, 818 P.2d 310 (1991) (J. Bistline specially concurring).

9. Criminal Charges And Probation

In deciding neglect, the trial court may consider a parent's criminal history. Abundant case law discusses this issue.

(a) Criminal Charges Can Be Considered

A parent's past criminal behavior is certainly relevant in considering whether to terminate parental rights. *In Re Dayley*, 112 Idaho 522, 525, 733 P.2d 743, 747 (1987) (past character evidence may be relevant in determining future behavior). A court may consider the criminal charges lodged against the parent and the parent's failure to abide by the terms of probation. *In re Doe*, 133 Idaho 826, 830-31, 992 P.2d 1226 (Ct. App. 1999); *In re Doe*, 142 Idaho 174, 179, 125 P.3d 530 (2005).

The court also noted Mother failed to comply with the case plan when she missed several scheduled visits with Child, failed to notify the Department of new felony charges, and failed to obtain an ordered neuropsychological evaluation. *Matter of Doe,* 165 Idaho 46, 437 P.3d 922, 928 (2019).

The father had been continuously involved in criminal activity. *In Re Dayley*, 112 Idaho 522, 524, 733 P.2d 743 (1987). In deciding neglect under *Idaho Code* § 16-1602(25), the magistrate considered past criminal charges. *In re Doe*, 145 Idaho 662, 665, 182 P.3d 1196 (2008).

(b) Probation

The court may consider the parent's failure to abide by the terms of probation. *In re Doe*, 133 Idaho 826, 830-31, 992 P.2d 1226 (Ct. App. 1999); In re Doe, 142 Idaho 174, 179, 125 P.3d 530 (2005).

Doe's probation officer testified that she violated probation conditions by repeatedly testing positive for methamphetamine, by not obtaining employment, by not making herself available without permission and by actively avoiding supervision. *In re Doe*, 149 Idaho 59, 232 P.3d 837, 843 (Ct. App. 2009).

The father absconded his probation, fled the state and remained out of contact with his daughter. The nominal amount of time he spent with his daughter and his inability to comply with the law is contrary to providing for the health, morals and well- being of the daughter. In re Doe, 143 Idaho 343, 346-47, 144 P.3d 597, 600-01 (2006). The mother violated her probation by using methamphetamine, refusing to abide by curfew and failing to attend drug treatment

sessions. In re Doe, 133 Idaho 826, 830, 992 P.2d 1226 (Ct. App. 1999)

(c) Effect Of Past Criminal Behavior On Analyzing Neglect

However, past criminal behavior may not by itself constitute sufficient and competent evidence to support the magistrate's conclusions to terminate parental rights. *In re Doe,* 142 Idaho 594, 597, 130 P.3d 1132 (2006) (mother doing a successful probation); *In re Doe,* 137 Idaho 758, 761-62, 53 P.3d 341 (2002) (a father's incarceration throughout the child's life was not sufficient and competent evidence to support parental termination).

10. Developmental Delays/Special Needs of Children

Mother does not understand the children's many and various special needs and cannot provide for those needs. All five children have various levels of developmental delays including verbal, physical, emotional, social, and academic. Many of these delays are serious in nature. One child has autism, is nonverbal, and is learning sign language in foster care. As a result of the children's numerous needs, Mother has difficulty engaging with all five children during visitations, struggles to respond to the children's diverse behaviors, continues to demonstrate an inability to understand the children's needs, and has not developed the parenting skills to deal with the children's "adverse behaviors." *In the Interest of Doe (2020-47),* 168 Idaho 496, 500, 483 P.3d 1039, 1043 (Ct.App.2021).

All five children have various levels of developmental delays including verbal, physical, emotional, social, and academic. Many of those delays are serious in nature. One child has autism, is nonverbal, and is learning sign language in foster care, although Father has not made a concerted effort to learn sign language. Father "was not aware of special needs for his children," and "despite completing [parenting] classes, [Father] has not demonstrated the skill learned from the classes." *In the Interest of Doe (2020-48),* 168 Idaho 536, 541, 484 P.3d 220, 225 (Ct.App.2021).

In dicta, the child suffered significant developmental delays in motor skills, communication and its social development while in his parent's care. *In Interest Of Baby Doe*, 130 Idaho 47, 53, 936 P.2d 690 (Ct. App. 1997); *In re Doe*, 145 Idaho 662, 665, 182 P.3d 1196 (2008).

11. Domestic Violence

The father's violence had a detrimental effect on his family and his daughter. *In re Doe,* 143 Idaho 343, 347, 144 P.3d 597, 601 (2006). In dicta, the magistrate considered domestic

violence as he decided neglect. *In re Doe,* 122 Idaho 644, 646, 837 P.2d 319 (Ct. App. 1992) (In a three-month period, police were called to the family residence twenty-one times primarily because of fights between the father and mother.)

A child need not suffer demonstrable harm before the parent-child relationship can be terminated. Rather, infliction of perpetual domestic violence, even if not directed at the children, supports a finding of parental neglect as it provides for an unstable and dangerous home environment. *In re Doe*, 143 Idaho 343, 347, 144 P.3d 597, 601 (2006). *See also In re Doe*, 122 Idaho 644, 646, 837 P.2d 319 (Ct. App. 1992).

12. Education

Idaho Code §16-1602(25)(a) specifically states that "neglected" means a child who is without education necessary for his well-being because of the conduct or omission of his parents.

Idaho case law is also instructive on this point. Thus a trial court properly considered that one child was educationally underdeveloped at the time she was removed from the mother's home but, after being in the foster home, the child progressed to a normal level of achievement. In Interest *of Brown*, 112 Idaho 901, 903, 736 P.2d 1355 (Ct. App. 1987). The educational needs of the child were disregarded. *In Interest Of Baby Doe*, 130 Idaho 47, 53, 936 P.2d 690 (Ct. App. 1997).

13. Employment

Idaho case law allows a court to consider a parent's employment history as a factor in determining neglect. *In re Doe*, 122 Idaho 644, 647, 837 P.2d 319 (Ct. App. 1992); *In the Interest of Cheatwood*, 108, Idaho 218, 220, 697 P.2d 1232 (Ct. App. 1985). The court may consider the parent's inability to maintain consistent employment. In re Doe, 142 Idaho 174, 179, 125 P.3d 530 (2005).

Doe has never maintained a job with which to provide subsistence for the child. *In re Doe,* 156 Idaho 682, 689, 330 P.3d 1040, 1047 (2014).

The evidence showed that Doe did not obtain and maintain a consistent source of financial support. *In re Doe*, 149 Idaho 59, 232 P.3d 837, 843 (Ct. App. 2009).

In dicta, the magistrate considered that the mother had not been able to keep a job, support herself or contribute to the support of the children and at the hearing presented poor prospects for increasing her employability. *In re Doe*, 122 Idaho 644, 647, 837 P.2d 319 (Ct. App.

1992). The mother did not have a job. *In Interest Of Brown*, 112 Idaho 901, 903, 736 P.2d 1355 (Ct. App. 1987). The mother was unable to hold jobs more than a few days at a time. *In Interest Of Cheatwood*, 108 Idaho 218, 220, 697 P.2d 1232 (Ct. App. 1985). The father failed to maintain steady employment. *In Re Dayley*, 112 Idaho 522, 524, 733 P.2d 743 (1987).

14. Financial Habits

The record showed poor financial habits by the parent. *In Interest Of Bush*, 113 Idaho 873, 876, 749 P.2d 492 (1988).

15. Foster Care Improvement

While in foster care, the children made steady progress emotionally, educationally, developmentally, and socially, with regular school attendance and multiple therapies. *In the Interest of Doe (2020-47),* 168 Idaho 496, 483 P.3d 1039 (Ct.App.2021).

One child was educationally underdeveloped at the time she was removed from her mother's home. However, after being in the foster home, the child progressed to a normal level of achievement. The evidence also showed that both children, when removed from the mother's custody, were exhibiting undesirable sexual and social behavior. Under foster care, the children were correcting these problems. *In Interest Of Brown*, 112 Idaho 901, 903, 736 P.12d 1355 (Ct. App.1987).

16. Harm To The Child

"One of the goals of Idaho's termination statutes is to prevent harm, not just to alleviate it." *In re Doe*, 122 Idaho 644, 645, 837 P.2d 319 (Ct. App. 1992); *In re Doe,* 157 Idaho 765, 770, 339 P.3d 1169, 1174 (2014).

Nothing in the statutory definition of "neglect" suggests that a child must suffer demonstrable harm before the parent-child relationship can be terminated. *In the Interest of Cheatwood*, 108 Idaho 218, 220, 697 P.2d 1232 (Ct. App. 1985).

17. Health Of Child

Idaho Code § 16-1602(25)(a) states that "neglect means a child who is without medical care necessary for his well-being because of the conduct or omission of his parents.

Idaho case law is also instructive on this point. Thus, a trial court noted that one child was covered in insect bites, while another child's skin was pale and clammy, and he appeared to have trouble breathing. *In re Doe*, 122 Idaho 644, 646, 837 P.2d 319 (Ct. App. 1992). Another court considered that the child frequently smelled, was not clean, and looked unhealthy. The

child's eyes were matted and he regularly had diaper rash. *In Interest of Baby Doe*, 130 Idaho 47, 53, 936 P.2d 690 (1997). The parents failed to follow a feeding schedule recommended by a nurse. *In Interest Of Baby Doe*, 130 Idaho 47, 53, 936 P.2d 690 (Ct. App. 1997).

18. Health Insurance/Medical Costs

The father failed to provide for his child's health insurance or medical costs. *In re Doe*, 142 Idaho 174, 179, 125 P.3d 530 (2005).

19. Home Alone

Doe freely admitted that she regularly left the children home alone and unsupervised with no way to seek help starting in May 2008, in order to accommodate her boyfriend who was not interested in her children. *In re Doe*, 149 Idaho 431, 234 P.3d 755, 758 (Ct. App. 2010).

20. Housing

Mother, when not incarcerated, lived with sister until they had a disagreement; then temporarily with grandmother (but no room for the child); and had no independent housing at time of trial. *In re Doe (2019-32),* 166 Idaho 173, 457 P.3d 154 (At.App.2020).

Doe did not obtain housing and remained homeless until absconding probation and fleeing to Oregon. *In re Doe (2019-12),* Idaho Docket No. 47007 (Ct.App.2019).

The magistrate considered that the parents lived for some time in a home that lacked adequate plumbing, a safe heating system and was not a safe or healthy environment for the children. *In re Doe*, 141 Idaho 511, 514, 112 P.3d 799 (2005). The mother did not have a home sufficient to care for the children. *In Interest Of Brown*, 112 Idaho 901, 903, 736 P.2d 1355 (Ct. App. 1987). The father did not have physical accommodations for the children to visit or live as he was living out of his van. *Matter Of Aragon*, 120 Idaho 606, 609, 818 P.2d 310 (1991).

21. Hygiene

The child frequently smelled, was not clean, and looked unhealthy. His eyes were matted and he regularly had a diaper rash. *In Interest Of Baby Doe*, 130 Idaho 47, 53, 936 P.2d 690 (Ct. App. 1997). The record showed instances of poor hygiene. *In Interest Of Bush*, 113 Idaho 873, 876, 749 P.2d 492 (1988).

The mother argued that it was unfair to penalize her for having failed to plan nutritious meals and attend to personal hygiene of her children prior to the intervention of the Department. However, evidence of the mother's past is directly relevant to her ability to presently provide for her children. *In Interest Of Brown*, 112 Idaho 901, 903, 736 P.2d 1355 (Ct.

App. 1997).

22. Incarceration

In 2005, the Idaho legislature enacted Idaho Code § 16-2005(1)(e) which allows termination of parental rights if: "(e) The parent has been incarcerated and is likely to remain incarcerated for a substantial period of time during the child's minority." Thus, incarceration is an independent ground (unique from neglect) for terminating parental rights. However, incarceration may also be considered as one of the many factors constituting neglect. Abundant case law addresses incarceration as a factor in the court's analysis of neglect.

(a) Analyzing Incarceration As Neglect

Evidence of incarceration is competent evidence of neglect. A parent who is incarcerated for a substantial portion of the child's life cannot provide any amount of parental care and control, subsistence, medical or other care, or control necessary for the child's well-being. Further, an incarcerated parent is unable to discharge his or her responsibilities to and for his or her children and he or she is leaving his or her children without the parental care necessary for the children's health, safety, or well-being. A parent's inability to comply with the law is contrary to providing for the health, morals, and well-being of a child. *Idaho Dep't of Health & Welfare v. Doe*, 162 Idaho 400, 397 P.3d 1159, 1163 (Ct. App. 2017), *review denied* (July 10, 2017).

In deciding neglect and abandonment, the court must consider what actions the parent could have taken, once in prison, to maintain contact with his child. Reality must play a part at two levels: First, the incarcerated parent was severely restricted in what he could do. Within that context, the father tried to establish a relationship with his child; and secondly, the department did little or nothing to assist in that effort. *In re Doe*, 137 Idaho 758, 761-62, 53 P.3d 341 (2002). *See also In re Doe (2019-32),* 166 Idaho 173, 457 P.3d 154 (At.App.2020) (mother unable to visit child for 4 months due to incarceration).

In a dissent, Justice Burdick more thoroughly described the required nature of this two-tiered analysis. First, courts must recognize the context in which incarcerated parents attempt to establish or maintain a relationship; incarcerated parents are severely restricted in what they can do. Second, courts must assess the Department's efforts to assist the parent in establishing or maintaining that relationship. *In re Doe*, 143 Idaho 343, 349, 144, P.3d 597 (2006) (J. Burdick dissenting).

(b) Incarceration Evidence To Be Considered By The Courts

Courts should consider evidence establishing the quality and extent of time spent with the child prior to incarceration, the nature and circumstances that led to incarceration, as well as prior charged or uncharged criminal behavior while in the home that might impact the child's well-being. Previous incarcerations or rehabilitations can also be relevant to future ability to properly care for children. Courts must also examine specific evidence establishing the impact incarceration has had on the child's mental, physical or social well-being, and the quality of contacts or efforts made by the incarcerated parent to keep a meaningful relationship with the child while incarcerated. *In re Doe*, 143 Idaho 343, 349, 144 P.3d 597 (2006) (J. Burdick dissenting).

Sufficient evidence existed of the father's neglect of his daughter prior to the time he was imprisoned, so that it is not necessary to evaluate his conduct while imprisoned. The father's half-hearted efforts to contact his daughter while incarcerated simply were not enough to overcome the prior years of neglect. *In re Doe*, 143 Idaho 343, 348, 144, P.3d 597 (2006).

23. Love

There was no contention that mother did not love her children. However, that love did not translate into the ability to discharge her parental responsibilities. *In re Doe*, 149 Idaho 165, 233 P.3d 96, 102 (2010).

24. Mental Health

The court found that mother's depression and PTSD could be adequately managed through medication and would not prevent her from being an adequate parent. However, her intellectual functioning was such that she did not understand what she needed to do in order to parent her children and provide safety, stability, and security for them. The court found the mother's intellectual functioning cannot be improved with medication or education because it is simply a function of her lower intellect and is not expected to change in the future. *In re Doe*, 149 Idaho 165, 233 P.2d 96, 100 (2010).

In dicta, the court considered that the mother suffered from a borderline personality disorder. Although the mother was considered intelligent enough to care for the children, her psychological make-up caused her to have an explosive temper, many volatile and unstable relationships with men, to primarily focus on her own problems to the exclusion of others, a refusal to acknowledge responsibility for her acts, and a pronounced tendency to blame others

for her problems. One of the psychologists testified that he believed the mother loved her children, but would place her needs before theirs. The same psychologist stated that such disorders are very hard to change and require years of extensive psychotherapy. In re Doe, 122 Idaho 644, 646, 837 P.2d 319 (Ct. App. 1992).

In dicta, the psychological evaluation reported that the father was impulsive, self-centered, arrogant and unwilling to take responsibility for his actions. The evaluator reported that the father's restricted problem-solving capabilities and poor judgment impaired his ability to place the child's needs above his own. In Interest of Baby Doe, 130 Idaho 47, 51, 936 P.2d 690 (1997).

Because of the mother's recent treatment in the state mental health facility and because she had shown some improvement while taking medications and was attending mental health counseling, the magistrate decided not to hold that termination was in the best interests of the children at that time. Instead, the magistrate continued the matter for six months to give the mother an opportunity to establish that she had progressed to a level where she could properly care for the children. When the mother made little progress, the magistrate held a second termination hearing and decided her parental rights should be terminated. *In re Doe*, 123 Idaho 502, 505, 849 P.2d 963 (Ct. App. 1993) (relying on now-repealed Idaho Code §16-2005(d) which held that a parent's mental condition provided a basis for termination of her parental rights).

In dicta, the magistrate considered the mother's psychological make-up as he decided neglect. In re Doe, 122 Idaho 644, 646, 837 P.2d 319 (Ct. App. 1992) (mother's psychological make-up caused her to have an explosive temper, to place her needs before the children, and would require years of extensive therapy to change.)

<u>EDITOR'S NOTE</u>: Idaho Code § 16-2002(17) includes mental impairments as a disability. Idaho Code § 16-2005(6) states: "If the parent has a disability, ... the parent shall have the right to present evidence to the court regarding the manner in which the use of adaptive equipment or supportive services will enable the parent to carry out the responsibilities of parenting the child."

<u>25. Moves</u>

Housing moves were relevant because they were evictions for non-payment and not planned moves which are more emotional and traumatic on a family. Evictions were part of Mother and Father's larger problem of instability and supported the court's neglect finding. *In re Doe,* 157 Idaho 694, 701–02, 339 P.3d 755, 762–63 (2014).

In dicta, the magistrate considered that the mother and her family had moved thirteen times in four years, at times living with relatives and friends. *In re Doe,* 122 Idaho 644, 647, 837 P.2d 319 (Ct. App. 1992). From August 1993 through September 1995, the mother changed residences seven different times. *In re Doe*, 133 Idaho 805, 809, 992 P.2d 1205 (1999).

26. Necessities

The mother failed to provide for the children's necessities. *In Interest Of Brown*, 112 Idaho 901, 903 736 P.2d 1355 (Ct. App. 1987).

27. Parenting Of The Child

Several Idaho cases discuss the issue of parenting as it relates to neglect.

(a) Attentive Care Needed In Parenting

"We approach this question mindful of a remark attributed to Luther Burbank, the famous botanist: 'If we had paid no more attention to our plants than we have to our children, we would now be living in a jungle of weeds.' Burbank's confession pointedly reminds us that children do not grow into healthy adults by accident. They need attentive care.'" *In Interest Of Cheatwood*, 108 Idaho 218, 219, 697 P.2d 1232 (Ct. App. 1985).

(b) Parental Care To Be Exercised

The record indicated the mother had not exercised full-time care of the child since November 1979 through the filing of the termination petition in April 1982. The mother never made any meaningful attempts to provide parental care necessary for the child's health, morals and well-being. The mother simply relied on the generosity of others. *Thompson v. Thompson*, 110 Idaho 93, 96, 714 P.2d 62 (Ct. App. 1986).

(c) Parental Care Cannot Be Delegated

A parent is not relieved of his or her responsibility to provide appropriate parental care by informally relinquishing custody of a child to a relative or friend. *Thompson v. Thompson*, 110 Idaho 93, 96, 714 P.2d 62 (Ct. App. 1986).

28. Parenting Classes

Mother completed only seven parenting classes over a period of eleven months; Father completed only three classes over an eight-month period; and although Mother completed a parenting class in prison, she only did so more than four months after the State had moved to terminate her parental rights. *In Matter of Doe,* 161 Idaho 398, 406, 387 P.3d 66, 74 (2016).

Although Doe took parenting classes and did all the evaluations she was supposed to,

there nevertheless is ample evidence to support the magistrate's determination that these intervention efforts have not given Doe the necessary insight to parental responsibility, and that she is in denial that there are multiple impairments to her capacity to safely parent. *In re Doe*, 149 Idaho 431, 234 P.3d 755, 759 (Ct.App. 2010).

The magistrate held that Doe neglected D.C. by failing to demonstrate consistency in housing, employment, and/or abstinence from controlled substances, impairing her ability to provide proper parental care for the child. *In re Doe,* 149 Idaho 401, 234 P.3d 725 (2010).

The evidence showed that Doe did not attend Department-approved parenting classes. *In re Doe*, 149 Idaho 59, 232 P.3d 837, 843 (Ct. App. 2009).

29. Parent's Late Accomplishments

Although Mother continued to participate in drug court and mental health therapy, maintained sobriety since her incarceration, was working full time, had the support of her mother and sister, and has a close emotional connection with Child, the magistrate court did not err in concluding that terminating Mother's parental rights was in the best interests of Child. Progress was too little, too late. *In re Doe (2019-32),* 166 Idaho 173, 457 P.3d 154 (At.App.2020).

The magistrate made clear in his opinion that he considered Jane's progress while incarcerated, noting "she is to be commended for that." Although the magistrate might not have specifically written each accomplishment that Jane suggests is relevant, it is nevertheless clear that the magistrate considered all the relevant evidence in reaching its decision. *Matter of Doe Children*, 162 Idaho 69, 394 P.3d 112, 120 (Ct. App. 2017).

Court considered Doe's progress toward maintaining sobriety and completing her case plan in the two years since the child had been born. However, the magistrate found that considerable time was still necessary for Doe to establish a parental relationship with the child and achieve successful reunification. *Idaho Dep't of Health & Welfare v. Doe,* 162 Idaho 400, 397 P.3d 1159, 1164 (Ct. App. 2017), *review denied* (July 10, 2017).

30. Past Conduct Of The Parent & History of the Family

It is well-settled that a court may properly consider the history of the family both prior to and at the time of State intervention in determining whether clear and convincing evidence of neglect exists. A court is not constrained to considering only the conditions as they exist at the time of the hearing. *Matter of Doe Children*, 162 Idaho 69, 394 P.3d 112, 119 (Ct. App. 2017); *State v. Doe*, 144 Idaho 839, 843, 172 P.3d 1114, 1118 (2007).

Evidence of the father's past conduct was considered in determining whether he would be a neglectful parent at the present time and in the future. Remoteness concerns the weight of evidence, not its admissibility. *Interest of Dayley*, 112 Idaho 522, 525, 733 P.2d 743 (1987). Past character evidence may be relevant in determining future behavior. *In re Doe*, 142 Idaho 174, 178, 125 P.3d 530 (2005).

31. Preventing Harm To The Child

Nothing in the statutory definition of "neglect" suggests that a child must suffer harm before the parent-child relationship can be terminated. The termination statutes of this state exist not merely to alleviate harm but to prevent it. *In Interest Of Cheatwood*, 108 Idaho 218, 220, 697 P.2d 1232 (Ct.App. 1985); *In re Doe*, 133 Idaho 805, 808, 992 P.2d 1205 (1999); *In re Doe,* 122 Idaho 644, 645, 837 P.2d 319 (Ct. App. 1992).

Because of the mother's inability to protect her children from the father the magistrate court had substantial and competent evidence the mother neglected her children. Testimony suggests that the mother is not strong enough mentally to stand up to the father and enforce her safety plan. *In Interest of Doe Children (2017-27),* 163 Idaho 367, 413 P.3d 767 (2018).

Trial court could consider that Doe was not diligent about seeking or completing counseling services; did not actively participate in parenting classes; was aware that E.M.W. displayed inappropriate behavior toward K.W. concerning K.W.'s body but did not intervene concerning this behavior; and struggled to discipline his children and never set boundaries for them. *In re Doe Children,* 159 Idaho 664, 668, 365 P.3d 420, 424 (Ct. App. 2015).

In *In Re Interest Of Castro*, 102 Idaho 218, 222, 628 P.2d 1052 (1981), the Idaho Supreme Court affirmed the termination of a father's parental rights on grounds of neglect because he did not prevent his wife from harming their child stating that, "at the very least he acquiesced in the physical abuse of his daughter and failed to take any preventive measures to assure the child's future protection."

32. Prior Contacts With Department

Doe has had many contacts with the state since her first child was born and there have been numerous attempts to educate Doe about her neglectful behavior. However, all of these attempts failed because Doe's behavior was not impacted by any of the attempts to work with her concerning the children's safety. *In re Doe*, 149 Idaho 431, 234 P.3d 755, 759 (Ct. App. 2010).The Department's caseworkers had repeatedly answered calls or complaints about the

parents since 1977. (The termination petition was filed in 1981.) *In Interest Of Cheatwood*, 108 Idaho 218, 220, 697 P.2d 1232 (Ct. App. 1985).

33. Progress on Case Plan After Termination Petition Filed

"[T]his Court affirmed a neglect finding where a father failed to demonstrate signs of improvement or compliance with his case plan until *after* the Department initiated the termination proceedings. *In re Doe,* 151 Idaho 356, 366, 256 P.3d 764, 774 (2011). Similarly, here the termination proceedings began in May 2013, and most of Mother's claimed progress is unproven and has occurred since then. Because the progress is recent, it does not outweigh the long track record of neglect of her children." *In re Doe,* 157 Idaho 694, 702, 339 P.3d 755, 763 (2014).

34. Relinquishment Of Parental Duties

A parent is not relieved of his or her responsibility to provide appropriate parental care by informally relinquishing custody of a child to a relative or a friend, or placed in the custody of the Department. *In re Doe*, 133 Idaho 826, 830, 992 P.2d 1226 (Ct. App. 1999).

35. School Absences

The school age children were absent from school an alarming number of days. *In re Doe*, 147 Idaho 353, 356, 209 P.3d 650 (2009).

36. Sexual Offenders In Presence Of Children.

In dicta, the mother exposed her children to known sexual offenders and entered into a relationship with a man who had previously been convicted of child molestation. *In re Doe*, 122 Idaho 644, 647, 837 P.2d 319 (Ct. App. 1992).

37. Shelter Care

In dicta, a court may consider the events that result in a child being taken into shelter care. *In re Doe*, 122 Idaho 644, 646, 837 P.2d 319 (Ct. App. 1992). In deciding neglect under *Idaho Code* §16-1602(25), the magistrate considered the events leading to shelter care. *In re Doe*, 145 Idaho 662, 665, 187 P.3d 1196 (2008).

38. Stable Home

Observations of the condition of the room in which the parent was living, coupled with her arrest at another address, led the case manager to believe the mother failed to establish a stable home for her child. *In re Doe e*, 133 Idaho 826, 831, 992 P.2d 1226 (Ct. App. 2000). In deciding neglect under Idaho Code §16- 1602(25, the magistrate considered the lack of stable

housing. *In re Doe*, 145 Idaho 662, 665, 182 P.3d 1196 (2008).

39. Substance Abuse

Abundant Idaho case law addresses the issues of alcohol and drugs in deciding neglect.

(a) The General Standard

Idaho case law suggests how drug and alcohol factor into a parent's neglect. A drug problem that interferes with parenting supports a determination of neglect. *In re Doe (2019-32),* 166 Idaho 173, 457 P.3d 154 (At.App.2020).

Consequently, a history of alcohol abuse which interferes with the parent's ability to care for his or her children is relevant evidence in termination proceedings. *In re Doe*, 133 Idaho 805, 808, 992 P.2d 1205 (1999); *Hofmeister v. Bauer*, 110 Idaho 960, 719 P.2d 1220 (Ct. App. 1986). The courts should consider both the history of the subject's substance abuse, and his or her prognosis for recovery. The court then considers how these two factors affect the parent's ability to provide a stable environment for the child. *In re Doe*, 133 Idaho 805, 809, 992 P.2d 1205 (1999).

(b) History Of Substance Abuse

Mother has a lengthy and pervasive history of drug abuse beginning when she was seventeen years old. As a result of her drug abuse, the children have been the subject of three child protection cases in two different states; all of the children have tested positive for methamphetamine at least once; and some of them have tested positive more than once. Mother has failed to demonstrate an understanding of the impact that her drug abuse has on the children. Further, she has failed to demonstrate the ability or a feasible plan to remain drug-free. Despite many opportunities, she has not completed or maintained a support program, after care, counseling, or sponsorship to maintain sobriety. *In the Interest of Doe (2020-47),* 168 Idaho 496, 483 P.3d 1039 (Ct.App.2021).

Father's history does not support a finding that he is capable of remaining sober. Father began using methamphetamine when he was seventeen years old, stopped his drug use "cold turkey" once, and twice participated in treatment programs but that Father has relapsed each time. Father failed to take responsibility for his substance abuse and blamed others for his drug use, including his co-workers, friends, and social media. Finally, Father was "not in any active counseling or treatment or support program" but instead unrealistically planned "to avoid 'toxic people' who 'make him' fall back into drug use." Substantial and competent evidence, including

Father's testimony, supports these findings, which are contrary to Father's assertion that he has successfully addressed his substance abuse issues. *In the Interest of Doe (2020-48),* 168 Idaho 536, 484 P.3d 220 (Ct.App.2021).

Mother's argument that her issue with alcohol did not rise to a level that warranted termination because she admitted her past issues, reached out for help, and successfully went through an earlier child protection action, must fail. Both parents had episodes of alcohol abuse for extended periods of time and were unable to care for the children or maintain a clean and sanitary home. The record supported the trial court's decision that alcohol contributed to neglect. *In re Doe,* 157 Idaho 694, 701, 339 P.3d 755, 762 (2014).

In deciding neglect, it was appropriate for the court to consider the history of the parent's marijuana usage and alcohol abuse. In re Doe, 142 Idaho 174, 179, 125 P.3d 530 (2005). In deciding neglect under Idaho Code § 16-1602(25), the magistrate considered past drug and alcohol abuse. *In re Doe*, 145 Idaho 662, 665, 182 P.3d 1196 (2008).

The parents whose rights were terminated had histories of alcohol abuse which interfered with their ability to care for the children to the point that the children were without proper parental care. In each case the parent failed to successfully resolve the alcohol problem. Hofmeister v. Bayer, 110 Idaho 960, 719 P.2d 1220 (Ct. App. 1986); In Interest Of Cheatwood, 108 Idaho 218, 697 P.2d 1232 (Ct. App. 1985). See also In re Doe, 133 Idaho 805, 808, 992 P.2d 1205 (1999).

In dicta, the magistrate considered the father's intoxication. In re Doe, 143 Idaho 343, 347, 144 P.3d 547 (2006). The record showed illicit drug and alcohol usage. In Interest Of Bush, 113 Idaho 873, 876, 749 P.2d 492 (1988).

(c) Ability To Care For Child

Substantial and competent evidence supporting the magistrate court's finding that Doe's continued use of methamphetamine resulted in an inability to provide proper parental care and control of the children. *In re Doe,* 157 Idaho 765, 771, 339 P.3d 1169, 1175 (2014).

Doe acknowledges using methamphetamine while she was pregnant, and she had the child with her in a vehicle containing illegal drugs when Doe was arrested for possession of methamphetamine with intent to deliver. Doe placed the child in danger at least temporarily by taking him to stay at the house of a known methamphetamine trafficker. In re Doe, 149 Idaho 59, 232 P.3d 837, 842 (Ct. App. 2010).

The trial court properly considered that the father endangered his unborn child by encouraging the mother to use drugs up to one month before his daughter's birth. CASI Foundation, Inc. v. Doe, 142 Idaho 397, 400, 128 P.3d 934 (2006).

The mother regularly consumed alcohol and illegal drugs and was found lying unconscious in the early morning hours with the minor child upset and crying by her side. One of her ex-boyfriends testified that he often had to take care of the minor child because the mother was either in bed or unwilling to take on the responsibilities herself. In re Doe, 133 Idaho 805, 809, 992 P.2d 1205 (1999).

In exercising visits, the mother was nearly always intoxicated. Hofmeister v. Bauer, 110 Idaho 960, 965, 719 P.2d 1220 (Ct. App. 1986).

(d) The Parent Failing Substance Abuse Programs

The court is allowed to consider a parent's dismissal from chemical dependency programs. In re Doe, 133 Idaho 826, 830, 992 P.2d 1226 (Ct. App. 1999). The court may consider a parent's severe alcohol problem, and the parent's continued drinking following attendance at alcohol rehabilitation programs. In the Interest of Cheatwood, 108, Idaho 218, 220, 697 P.2d 1232 (Ct. App. 1985).

The court noted that, contrary to the case plan, Mother continued using methamphetamine and actually increased the amount of methamphetamine she was using while working her case plan. The court also noted that, contrary to the case plan, Mother stopped attending drug treatment. *Matter of Doe,* 165 Idaho 46, 437 P.3d 922, 928 (2019).

Court properly considered Doe's long-standing difficulties with substance abuse (drug court followed by relapse, Veterans Administration services were effective, outpatient treatment at the Easter Seals which he "didn't really like it that much;" treatment with Ascent which was unsuccessful because his "follow through wasn't there". *In re Doe,* 157 Idaho 765, 770, 339 P.3d 1169, 1174 (2014).

Doe was shown to be unwilling or unable to remain drug-free or to undergo treatment even when threatened with incarceration and the loss of her parental relationship with her child. *In re Doe*, 149 Idaho 59, 232 P.3d 837, 843 (Ct. App. 2009).

(e) Prognosis For Recovery

The trial court focused on the mother's long history of substance abuse and the fact that it was unlikely she would recover from her addictions and be able to provide a stable

environment for her daughter before her daughter reached the age of majority. In re Doe, 133 Idaho 805, 809, 992 P.2d 1205 (1999).

The mother entered several alcohol rehabilitation programs, but she continued drinking. *In Interest of Cheatwood*, 108 Idaho 218, 220, 697 P.2d 1232 (Ct. App. 1985).

40. Support And Necessities

Idaho Code § 16-1602(25)(a) specifically states that "neglected" means a child who is without subsistence because of the parent's conduct or omission. Numerous Idaho cases look at the parents' abilities to support the children and provide for their necessities as the court decides the issue of neglect.

(a) Failure To Provide Support

Doe shirked his court-ordered parental responsibility by failing to pay child support. *In re Doe*, 156 Idaho 682, 689, 330 P.3d 1040, 1047 (2014). Doe did not obtain employment or make an effort to provide any means of financial support. *In re Doe (2019-12),* Idaho Docket No. 47007 (Ct.App.2019).

The magistrate found that Jane Doe failed to contribute financially to the needs of the children before and after incarceration. That is, the magistrate expressly noted that Jane Doe was unable to contribute financially while incarcerated, but chose not to while she was free from incarceration. *In re Doe*, 145 Idaho 662, 665, n. 2, 182 P.3d 1196 (2008).

The father provided no support or care for his daughter during the two years he was not incarcerated. *In re Doe*, 143 Idaho 343, 346-47, 144 P.3d 597, 600-01 (2006).

There was no credible evidence that the father paid anything towards the support of his child. *In re Doe*, 142 Idaho 174, 179, 125 P.3d 530 (2005).

In dicta, the magistrate found that the mother paying but $30 in support over four years was not reasonable. *In Interest of Brown*, 112 Idaho 901, 903, 736 P.2d 1355 (Ct. App. 1997).

The court may note that the father did not furnish adequate financial support for his children. Matter of Aragon, 120 Idaho 606, 609, 818 P.2d 310 (1991) (The father failed to provide a schedule of financial contribution and a plan of support for his children as requested by the caseworker, resulting in the father's wages being garnished).

A court may consider both a parent's failure to provide child support, *In Interest of Brown*, 112 Idaho 901, 903, 736 P.2d 1355 (Ct. App. 1987), and the employment history and income of the parent. *In re Doe*, 122 Idaho 644, 648, 837 P.2d 319 (Ct. App. 1992). A court may

note that the father had not furnished adequate support for the children. *Matter of Aragon*, 120 Idaho 606, 609, 818 P.2d 310 (1991).

(b) Use Of Public Assistance

The court can consider that the mother depended on public assistance to support the child. *In the Interest of Cheatwood*, 108, Idaho 218, 220, 697 P.2d 1232 (Ct. App. 1985).

(c) Failing To Seek Public Assistance

Regarding financial support, the magistrate noted a persistent pattern of the parents being unable to obtain sufficient resources with which to support themselves and their children, as well as failing to take advantage of assistance programs. *In re Doe*, 142 Idaho 511, 514, 112 P.3d 799 (2005).

41. Unsupervised Child

Doe argues that he has a fundamental right to choose the circumstances in which he raises his child, suggesting that Doe is justified in relying upon his teenaged children for child care. A parent's liberty interest in maintaining a relationship with his or her child does not override the parent's responsibility to ensure the proper supervision of that child. *Idaho Dep't of Health & Welfare v. Doe,* 161 Idaho 647, 651, 389 P.3d 192, 196 (Ct. App. 2016).

Mother was under the influence of drugs and alcohol in her bedroom and did not supervise the children. Mother allowed child's health to grow poor enough that he was diagnosed with failure to thrive. *In re Doe,* 157 Idaho 694, 702, 339 P.3d 755, 763 (2014).The mother was raised in Africa but now lived in Idaho. Her children were seen at a nearby playground, the apartment parking lot, a convenience store, and a swimming hole one-half mile away, all without supervision by mother or any other adult. Whatever may be the circumstances in an African village, it is not appropriate in Idaho to permit children between four and ten to roam freely without adult supervision. In re Doe, 149 Idaho 165, 233 P.3d 96, 99 (2010).

The children were without proper parental care when they would spend time with her parents and the parents were unable to appropriately discharge their responsibilities as parents, as evidenced by their lack of supervision over the children. The health, safety, and well-being of the children were at risk when they were in their parents' care, which meets the definition of neglect in I.C. § 16- 1602(25). *In re Doe,* 147 Idaho 353, 356, 209 P.3d 650 (2009).

The court considered that the child was found unattended in the home, where his mother had passed out from intoxication. *In the Interest of Cheatwood*, 108, Idaho 218, 220,

697 P.2d 1232 (Ct. App. 1985). A court may consider that a child was playing unsupervised in the middle of the street. *In re Doe*, 122 Idaho 644, 646, 837 P.2d 319 (Ct. App. 1992). The mother occasionally left her children without supervision at night. *Hofmeister v. Bauer*, 110 Idaho 960, 965, 719 P.2d 1220 (Ct. App. 1986).

42. Visits

Doe did not participate in counseling or treatment for the child and was only interested in communicating sporadically by telephone or letter. Even these forms of communication were described as being too disturbing for the child, and they were discontinued by recommendation of the child's counselors. The communication's negative impact on the child prompted the magistrate to suspend visitation between the child and Doe. *In re Doe (2019-12),* Idaho Docket No. 47007 (Ct.App.2019).

Although the parents attended most visitations, they were unable to set safe and healthy boundaries and spent much of their time complaining about IDHW and accusing IDHW of providing inadequate care to their children. The parents' visits had a negative impact on the children—the children were always exhausted, would throw fits, and one child would often have a fever. *In Matter of Doe,* 161 Idaho 398, 406, 387 P.3d 66, 74 (2016).

Doe continued this pattern of failing to be present for the child by refusing to contact the Department and declining to participate in sanctioned visitation. *In re Doe,* 156 Idaho 682, 689, 330 P.3d 1040, 1047 (2014).

The trial judge found that the father's visitation with his child was sporadic and infrequent. Over a three and one-half year period, the father visited his baby approximately ten times for a total of nineteen and one-half hours and had approximately ten to thirteen telephone conversations of relatively short duration. In re Doe, 142 Idaho 174, 179, 125 P.3d 530 (2005).

The record shows that neither parent made any reasonable effort to visit their child once physical custody was awarded to the grandparents. *In Interest of Bush*, 113 Idaho 873, 876-77, 749 P.2d 492 (1988). The mother failed over a period of time to maintain regular personal contacts with the children. *In Interest of Brown*, 112 Idaho 901, 903, 736 P.2d 1355 (Ct. App. 1987). The father never sought visitation while his children were in the Department's care. *Matter of Aragon*, 120 Idaho 606, 609, 818 P.2d 310 (1991).

The father absconded from the state while on probation and he remained out of contact

with his daughter. He provided no support or care throughout this time and was apprehended a year later and placed in prison for violating his probation. The nominal amount of time he spent with his daughter (six weeks out of a possible two years) and his inability to comply with the law was contrary to providing for the health, morals and well-being of his daughter. *In re Doe*, 143 Idaho 343, 346-47, 144 P.3d 597 (2006).

V. NEGLECT BY FAILING THE CASE PLAN

A. APPLICABLE CODE SECTIONS

1. Idaho Code § 16-2005(1)(b)

Idaho Code §16-2005(1)(b) authorizes the court to terminate the parent-child relationship if the parent has neglected or abused the child.

2. Case Plan Neglect As Defined By Idaho Code §16-2002(3)(b).

Idaho Code§16-2002(3)(b) says "neglected" means:

> (b) The parent(s) has failed to comply with the court's orders or the case plan in a child protective case and: (i) The department has had temporary or legal custody of the child for fifteen (15) of the most recent twenty-two (22) months; and (ii) Reunification has not been accomplished by the last day of the fifteenth month in which the child has been in the temporary or legal custody of the department.

3. Time Standards Of Idaho Code § 16-1622(2)(g)

In relevant part, Idaho Code § 16-1622(2)(g) reads "[i]f a child is placed in the temporary or legal custody of the Department for fifteen (15) of the most recent twenty-two (22) months, the department shall file, prior to the last day of the fifteenth month, a petition to terminate parental rights" absent certain findings.

Where IDHW took custody of the children in March 2017, the termination trial occurred on June 26, 2018, and the magistrate court ordered termination of Mother's parental rights on July 17, 2018, the children were in the custody of IDHW for fifteen of the most recent twenty-two months at the time that the magistrate court ordered termination of Mother's parental rights and reunification had not been accomplished by the last day of the fifteenth month. As a result, substantial and competent evidence supported the magistrate court's finding that Mother neglected the children as defined by Idaho Code section 16-2002(3)(b). *Matter of Doe Children*, 164 Idaho 486, 432 P.3d 35, 40 (2018).

B. APPLICABLE LEGAL STANDARDS

1. Case Law

Failure to comply with the case plan and the court's orders mandating such compliance can form the basis for neglect as defined in I.C. §16- 2002(3)(b). *In re Doe*, 148 Idaho 832, 836,

230 P.3d 442 (Ct. App. 2010).

Parents completely failed to comply with the case plan during the first fifteen months of the case, IDHW had temporary custody of the children for the required time period, and reunification was not accomplished in the required time period. Both Mother and Father did not attend some visitations, did not provide releases to IDHW, did not submit to drug testing, did not remain drug free, and did not participate in counseling. *In re Doe,* 157 Idaho 694, 701, 339 P.3d 755, 762 (2014).

Under Idaho Code § 16-2005(1)(b), neglect is a ground for the termination of parental rights. Idaho Code § 16-1602(3)(b) provides that neglect is established if the parent fails to comply with the case plan and reunification of the child with the parent does not occur within the time limit set by Idaho Code § 16-1629(9). *In re Doe III,* 149 Idaho 409, 234 P.3d 733, 735 (2010).

A child is neglected, as defined by I.C. § 16-2002(3)(b), if the parent has failed to comply with the case plan and reunification has not occurred where the child has been in foster care for at least fifteen out of the last twenty-two months. In re Doe, 148 Idaho 832, 836, 230 P.3d 442 (Ct. App. 2010).

A finding of neglect, coupled with the determination that termination is in the best interests of the child, is grounds for terminating the parent-child relationship. I.C. §16-2005(1)(b); *In re Doe*, 148 Idaho 832, 836, 230 P.3d 442 (Ct. App. 2010).

2. Case Law Addressing The Time Standards

> This statute [former I.C. §16-1629(9)] "merely creates a presumption in favor of the department initiating a termination petition when a child has been in the state's custody and not in the parent's care for fifteen out of twenty-two months. It does not create a presumption that it is in the best interests of the child to terminate parental rights."

In re Doe, 149 Idaho 401, 234 P.3d 725 (2010).

Editor's Note. The statute was subsequently amended and the findings required to find that a TPR petition need not be filed are now contained in Idaho Code §16-1622(2)(g). For the best interest analysis, the statute requires a finding of "compelling reasons why termination of parental rights is not in the best interests of the child." This also relates to funding, so it is important that such a finding be made and placed on the record.

C. COURT MUST ANALYZE THE CASE PLAN IN DETAIL

1. Parent Knew Of Case Plan

Doe had signed the case plan, knew of its terms, and had simply been unwilling to comply. *Idaho Dept. of Health & Welfare v. Doe*, 150 Idaho 36, 244 P.3d 180 (2010).

2. Court Must Analyze Each Task In The Case Plan

The magistrate court engaged in a detailed analysis of each task Doe was ordered to complete and the progress she had made on each one. *Idaho Dept. of Health & Welfare v. Doe*, 150 Idaho 36, 244 P.3d 180 (2010).

In its decision the magistrate summarized the evidence as it pertained to each area of the case plan and discussed the specific tasks that Doe was required to perform. The magistrate found "[Doe] has failed to comply on numerous portions of her plan". *In re Doe*, 149 Idaho 627, 238 P.3d 724, 727 (Ct. App. 2010).

3. Caseworker's Testimony Regarding The Case Plan

The social worker testified to precise aspects of the case plan that Doe and her husband failed to comply with, as well as the steps the Department had taken to assist Doe and her husband in complying. *Idaho Dept. of Health & Welfare v. Doe*, 150 Idaho 36, 244 P.3d 180 (2010).

4. Impossibility Defense

Idaho adopted the impossibility defense in the context of neglect due to failure to comply with the case plan in 2016:

> We acknowledge that the text of Idaho Code section 16–2002(3)(b) supports the magistrate's decision, as the statute does not include a requirement of willfulness. Rather, the statute simply requires a parent's failure "to comply with the court's orders or the case plan" and the Department having custody of the child for a specified duration. A statement from this Court may also be read as supporting the magistrate court's view that impossibility is not a defense to a claim of neglect predicated upon Idaho Code section 16–2002(3)(b). We recently stated: "Mother argues that because of her disabilities, the trial court could not have found she willfully failed to comply with the case plan or willfully neglected her children. However, willful neglect and willful non-compliance with the case plan is not the standard." *In re Doe (2014–17)*, 157 Idaho at 700, 339 P.3d at 761.
>
> Nevertheless, we now hold that impossibility may be asserted as a defense to a claim of neglect founded upon failure to comply with the requirements of a case plan. …
>
> This is not to say, however, that a trial court must find willful non-compliance with the

> terms of a case plan as a prerequisite to a finding of neglect under Idaho Code section 16–2002(3)(b). **Instead, the trial court must find that the parent is responsible, whether directly or indirectly, for non-compliance with the requirements of a case plan.[2] This requirement reflects the reality presented by parents who engage in behavior that results in non-compliance with no apparent thought or consideration of the effect of that behavior upon the case plan.** For example, in *In re Doe (2014–17)*, Mother's failure to comply with her case plan consisted of missed visitations, failure to provide required releases, failure to submit to drug testing, continued methamphetamine use and failure to participate in counseling. 157 Idaho at 701, 339 P.3d at 762. **These failures were not the product of impossibility resulting from a disability; rather, they reflected her decision to continue methamphetamine use with the consequence being noncompliance with her case plan.**

Idaho Dep't of Health & Welfare v. Doe, 161 Idaho 596, 600, 389 P.3d 141, 145 (2016).

(a) Mental Health

Where mental health concerns make compliance with the case plan impossible, termination may still be warranted under another provision:

> In cases where the parent's mental health issues prevent compliance with the terms of the case plan, termination may be sought under Idaho Code section 16–2005(1)(d) if "[t]he parent is unable to discharge parental responsibilities and such inability will continue for a prolonged indeterminate period and will be injurious to the health, morals or well-being of the child."

Id. at footnote 2.

The Court further explained the boundaries of the defense in 2017:

> Doe asserts that the magistrate court found that it was impossible for Doe to comply with her case plan because of her mental health issues. The magistrate court made no such finding. While the magistrate court found that Doe's mental health issues impacted her ability to comply with the case plan, it concluded that Doe's non-compliance was willful. The magistrate court did not mince words; it emphasized that "Doe is responsible, both directly and indirectly, for non-compliance with the requirements of the case plan. Her failures to comply ... were not the result of accident or disability." Doe's claim that the magistrate court found it impossible for her to comply with her case plan is clearly false.
>
> The magistrate court's findings undercut Doe's impossibility defense. In *Idaho Department of Health & Welfare v. Doe (2016-14)*, this Court provided that impossibility was a defense to termination based on neglect for failure to comply with a case plan when the circumstances were beyond the parent's control. *Id.* at 600, 389 P.3d at 145. However, this Court plainly stated that impossibility was not a defense in instances where the parent was responsible, whether directly or indirectly, for case plan non-compliance. *Id.* Here, the magistrate court found that Doe's non-compliance was willful. Accordingly, Doe's impossibility defense is unavailing. *Idaho Dep't of Health & Welfare v.*

> *Doe,* 162 Idaho 236, 395 P.3d 1269, 1278 (2017).
>
> Based on Mother's unequivocal testimony set forth above, Mother was responsible, either directly or indirectly, for not complying with her case plan. While Mother was incarcerated for some of the time *during* her case plans, she conceded fault for failing to: (1) stay sober; (2) find stable housing; (3) submit budgets to IDHW; and (4) ensure the safety and well-being of Children. As Mother testified, "[she] can't blame anyone ... because it was all [her] choice. It was all [her] decision. [She] can't blame anyone else but [her]self."

Idaho Dep't of Health & Welfare v. Doe, 161 Idaho 754, 759, 390 P.3d 1281, 1286 (2017).

Magistrate court properly considered in analyzing the impossibility defense Idaho Department of Correction records showing that Doe committed thirteen disciplinary offenses after M.R. was removed from the home; minutes from a hearing held before the Commission of Pardons and Parole (Commission) showing that Doe failed to complete the therapeutic community program that Doe committed three disciplinary offenses which resulted in restrictions; and the minutes from a hearing held by the Commission on Doe's petition for reconsideration of parole noting five disciplinary offenses. *Idaho Dep't of Health & Welfare v. Doe (2017-3),* 162 Idaho 380, 397 P.3d 1139, 1142 (2017).

(b) Child Placed Out of State

Doe argued that moving her child out of state made it impossible for her to complete "important and significant portions" of her case plan making it improper to terminate her rights for failing to do so. In particular, Doe asserted that placing the child out of state made it impossible for her to participate in regular visits with the child and to demonstrate an ability to provide for the child's basic developmental, medical, and other needs. The magistrate court acknowledged that the out-of-state placement made those tasks more difficult, but not insurmountable. The Court affirmed, noting Doe's failure to participate in scheduled visitations belied her impossibility claim. The Court also affirmed the magistrate court's conclusion that providing the child with a single box of toys was insufficient to demonstrate the ability to provide for the child's needs, which included significant medical care. *In re Doe (2019-31),* 156 Idaho 682, 458 P.3d 226 (Ct.App.2020).

D. IDAHO CASE LAW ADDRESSING SPECIFICS OF CASE PLAN NEGLECT

1. Budget

The case plan required Doe to "develop a budget to address the financial needs of herself and her daughter." The court stated that the one task Doe could perform, with no prospects for employment to ensure continued financial stability, was to create and live by a budget and Doe failed to consistently perform this task. *In re Doe*, 149 Idaho 627, 238 P.3d 724, 727 (Ct. App. 2010).

2. COVID-19 Pandemic

Court rejected argument that during the time of the coronavirus pandemic the ability of a parent to work a case plan and visit the children was severely impacted.

> While the pandemic has undoubtedly changed the manner in which a parent must perform a case plan, Mother fails to articulate how the pandemic adversely impacted her ability to perform her case plan. Also, contrary to Mother's assertion that visitation during the pandemic "is almost totally non-existent," the record in this case demonstrates that during the pandemic the Department has provided virtual visitations.

In the Interest of Doe (2020-47), 168 Idaho 496, 483 P.3d 1039 (Ct.App.2021).

Magistrate court expressly acknowledged the pandemic "severely" impacted the "nature and quality" of visitation with the children in 2020, including physical visitation. The court did not attribute visitation difficulties related to the pandemic to Mother. *Id.* Mother already had failed to have physical contact with the children from February 2019 until at least November 2019 as a result of her immigration detention in Washington. Mother's failure to address her immigration status caused this detention, which seriously impacted Mother's ability to complete her case plan before the pandemic occurred. *Id.*

3. Developmental Delays/Special Needs of Children

Mother does not understand the children's many and various special needs and cannot provide for those needs. All five children have various levels of developmental delays including verbal, physical, emotional, social, and academic. Many of these delays are serious in nature. One child has autism, is nonverbal, and is learning sign language in foster care. As a result of the children's numerous needs, Mother has difficulty engaging with all five children during visitations, struggles to respond to the children's diverse behaviors, continues to demonstrate an inability to understand the children's needs, and has not developed the parenting skills to deal with the children's "adverse behaviors." *In the Interest of Doe (2020-47),* 168 Idaho 496, 483

P.3d 1039 (Ct.App.2021).

All five children have various levels of developmental delays including verbal, physical, emotional, social, and academic. Many of those delays are serious in nature. One child has autism, is nonverbal, and is learning sign language in foster care, although Father has not made a concerted effort to learn sign language. Father "was not aware of special needs for his children," and "despite completing [parenting] classes, [Father] has not demonstrated the skill learned from the classes." *In the Interest of Doe (2020-48),* 168 Idaho 536, 484 P.3d 220 (Ct.App.2021).

4. Domestic Violence

The case manager testified that Doe had not provided her with proof of the ordered fifty-two weeks of domestic violence treatment. *In re Doe,* 149 Idaho 401, 234 P.3d 725 (2010); *In the Matter of John Doe (2019-27),* 166 Idaho 197, 457 P.3d 849 (2020).

5. Excuses By The Parent

Doe "deflected issues that needed to be addressed and placed blame on others for the issues that prevented [the child] from safely returning to her care." *In re Doe (2019-31),* 166 Idaho 357, 458 P.3d 226 (Ct.App.2020).

While Doe offered several excuses for why she failed to comply with parts of the case plan, the magistrate specifically rejected her justifications, noting that the tasks Doe claimed she was still working on were simple tasks that would take relatively little time to complete. *Idaho Dept. of Health & Welfare v. Doe*, 150 Idaho 36, 244 P.3d 180 (2010).

6. Harm To The Child

Idaho Code § 16-2002(3)(b) does not require the court to make a finding of harm or a risk of harm before finding neglect. … Instead, the plain language of the statute only requires the court to find the parent had failed to comply with the court's orders or the case plan and that reunification has not occurred within the statutory time frame in order for the definition of neglect to be satisfied. *Idaho Dept. of Health & Welfare v. Doe*, 150 Idaho 36, 244 P.3d 180 (2010).

7. Incarceration

The actions of a parent are severely restricted while incarcerated, and the court thus focuses on the parent's actions when not incarcerated. *In re Doe*, 148 Idaho 832, 838, 230 P.3d 442 (Ct. App. 2010).

Doe was on felony probation at the time the case plan was created. Following repeated

violations of her probation, Doe was given a rider. Doe failed the rider and was ordered to do her original sentence of five years, with two years determinate. Doe's argument that she needed more time to finish her incarceration and resolve her legal issues proved unavailing as Doe's actions resulted in her extended incarceration. *In re Doe*, 148 Idaho 832, 837, 230 P.3d 442 (Ct. App. 2010).

8. Modifying The Case Plan

The magistrate also found that even if Doe was truly unable to qualify for services she was required to obtain pursuant to the case plan, she should have contacted the Department to modify the plan. *Idaho Dept. of Health & Welfare v. Doe*, 150 Idaho 36, 244 P.3d 180 (2010).

9. Parenting Classes

The case plan required Doe to "participate in parenting education provided by South Central District Health". Doe instead took parenting programs offered by the Magic Valley Ministry Center. The magistrate found the Magic Valley Ministry Center's program was different than the program Doe was required to take and that she could not use it as a substitute. Further, several witnesses testified that any instruction that was given to Doe to upgrade her parenting skills was either rejected or not adopted in Doe's parenting. *In re Doe*, 149 Idaho 627, 238 P.3d 724, 728-29 (Ct. App. 2010); *In the Matter of John Doe (2019-27),* 166 Idaho 197, 457 P.3d 849 (2020).

10. Probationary Terms

It was not the Department's responsibility to complete Doe's case plan for her. Nor were the probation officers obligated to fulfill the terms of Doe's probation. Doe was responsible to work her case plan and comply with the terms of her probation. She failed to do so. *In re Doe*, 148 Idaho 832, 839, 230 P.3d 442 (Ct. App. 2010).

11. Psychological Evaluations/Mental Health Treatment

Mental health issues went unaddressed. *In re Doe (2019-31),* 156 Idaho 682, 458 P.3d 226 (Ct.App.2020). "Mother testified that she tried to obtain a mental health assessment but was repeatedly denied. Credible evidence was not provided to show compliance with this aspect of the case plan, or that Mother made reasonable efforts to accomplish the same in a timely manner." *In the Matter of John Doe (2019-27),* 166 Idaho 197, 457 P.3d 849 (2020).

The court also noted Mother failed to comply with the case plan when she missed several scheduled visits with Child, failed to notify the Department of new felony charges, and failed to

obtain an ordered neuropsychological evaluation. *Matter of Doe,* 165 Idaho 46, 437 P.3d 922, 928 (2019).

The magistrate found Doe failed to participate in a psychological evaluation as required in the case plan. The court found that she provided responses in testing that were so deceptive that they invalidated the results. *In re Doe,* 149 Idaho 627,_, 238 P.3d 724, 727 (Ct. App. 2010).

12. Relationships With Other Adults

The case plan prevented Doe from engaging "in relationships with other adults who have criminal histories involving violence, sexual abuse or substance abuse." The case plan didn't place an absolute ban on contacts; it simply prevented Doe from engaging in relationships. *In re Doe III*, 149 Idaho 409, 234 P.3d 733, 737 (2010).

13. Reports of Caseworker and GAL

The reports of the Department and the Guardian *ad Litem* submitted to the court for the various review hearings similarly indicated that Doe consistently failed to comply with the case plan. *Idaho Dept. of Health & Welfare v. Doe*, 150 Idaho 36, 244 P.3d 180 (2010).

14. Safe And Stable Home

The magistrate found Doe failed to provide a safe and stable home because of concerns regarding domestic violence. It is for the trial court to weigh the evidence regarding domestic violence, including the circumstances, frequency, and severity in assessing household safety and stability. In re Doe, 149 Idaho 627, 238 P.3d 724, 728 (Ct. App. 2010); *In the Matter of John Doe (2019-27),* 166 Idaho 197, 457 P.3d 849 (2020).

There is also evidence that Doe has not been able to provide a safe home, as Doe has invited criminals and chaos into her life. *In re Doe*, 149 Idaho 409, 234 P.3d 733, 736 (2010).

15. Substance Abuse

Mother has a lengthy and pervasive history of drug abuse beginning when she was seventeen years old. As a result of her drug abuse, the children have been the subject of three child protection cases in two different states; all of the children have tested positive for methamphetamine at least once; and some of them have tested positive more than once. Mother has failed to demonstrate an understanding of the impact that her drug abuse has on the children. Further, she has failed to demonstrate the ability or a feasible plan to remain drug-free. Despite many opportunities, she has not completed or maintained a support program, after

care, counseling, or sponsorship to maintain sobriety. *In the Interest of Doe (2020-47),* 168 Idaho 496, 483 P.3d 1039 (Ct.App.2021).

Father's history does not support a finding that he is capable of remaining sober. Father began using methamphetamine when he was seventeen years old, stopped his drug use "cold turkey" once, and twice participated in treatment programs but that Father has relapsed each time. Father failed to take responsibility for his substance abuse and blamed others for his drug use, including his co-workers, friends, and social media. Finally, Father was "not in any active counseling or treatment or support program" but instead unrealistically planned "to avoid 'toxic people' who 'make him' fall back into drug use." Substantial and competent evidence, including Father's testimony, supports these findings, which are contrary to Father's assertion that he has successfully addressed his substance abuse issues. *In the Interest of Doe (2020-48),* 168 Idaho 536, 484 P.3d 220 (Ct.App.2021).

Contrary to the case plan, Mother continued using methamphetamine and actually increased the amount of methamphetamine she was using while working her case plan. The court also noted that, contrary to the case plan, Mother stopped attending drug treatment. *Matter of Doe,* 165 Idaho 46, 437 P.3d 922, 928 (2019); *In the Matter of John Doe (2019-27),* 166 Idaho 197, 457 P.3d 849 (2020). *See also In re Doe (2019-31),* 156 Idaho 682, 458 P.3d 226 (Ct.App.2020) (Doe continued to test positive for controlled substance during the child protection case and was not forthright about her substance abuse issues).

16. Time in Care

At the time of the trial, the children had been out of the home for approximately forty-two months, which indicates reunification had not occurred within the time standards set out in I.C. §16-1629(9). *Idaho Dept. of Health & Welfare v. Doe*, 150 Idaho 36, 244 P.3d 180 (2010).

17. Visits

Doe's visitations with the child were inconsistent and Doe's hostility toward the foster mother negatively impacted her visitations. *In re Doe (2019-31),* 156 Idaho 682, 458 P.3d 226 (Ct.App.2020).

a. Child Placed Out of State

With respect to visitation, the evidence presented at trial showed that the Department attempted to assist with visitation by referring Doe to an independent service provider so that visits could take place through an independent party. However, Doe missed so many visits that she was dropped from the service. The Department resumed facilitating

the visitations and Doe again missed the majority of them. After the magistrate court authorized out-of-state placement when the child's foster parents moved, the foster family facilitated video calls between Doe and the child, as well as an in-person visit when the family returned to Idaho. However, the in-person visit "did not go well." Doe's failure to participate in scheduled visitations was within her control and not rendered impossible by the child's placement out of state.

In re Doe (2019-31), 156 Idaho 682, 458 P.3d 226 (Ct.App.2020).

VI. ABUSED CHILDREN

A. APPLICABLE STATUTES

1. Idaho Code § 16-2005(1)(b)

Idaho Code § 16-2005(1)(b) authorizes the court to terminate the parent-child relationship if the parent has neglected or abused the child." (Emphasis added.)

2. Idaho Code §16-2002(4)

Idaho Code § 16-2002(4) states that "abused" means conduct as defined in *Idaho Code* §16-1602(1). Under Idaho Code §16-1602(1), "abused" means any case in which a child has been the victim of:

> (a) Conduct or omission resulting in skin bruising, bleeding, malnutrition, burns, fracture of any bone, subdural hematoma, soft tissue swelling, failure to thrive or death, and such condition or death is not justifiably explained, or where the history given concerning such condition or death is at variance with the degree or type of such condition or death, or the circumstances indicate that such condition or death may not be the product of an accidental occurrence; or
>
> (b) Sexual conduct, including rape, molestation, incest, prostitution, obscene or pornographic photographing, filming or depiction for commercial purposes, human trafficking as defined in section 18-1602, Idaho Code, or other similar forms of sexual exploitation harming or threatening the child's health or welfare or mental injury to the child.

3. Idaho Case Law

The testimony of the caseworker is more than sufficient to establish that Doe abused the child: "[Doe] was hitting the stepmother with a baseball bat in the side while driving, [the child] tried to interject and was hit on the top of the hand with a baseball bat." This testimony provides substantial and competent evidence supporting the magistrate's finding that the child was abused. *In re Doe (2019-12),* Idaho Docket No. 47007 (Ct.App.2019).

VII. TERMINATION IN BEST INTERESTS OF PARENT AND CHILD

A. APPLICABLE CODE SECTIONS

1. Idaho Code §16-2005(3)

Idaho Code §16-2005(3) states: "The court may grant an order terminating the relationship if termination is found to be in the best interest of the parent and child."

B. IDAHO CASE LAW

1. Delusional Thinking Of The Parent

In deciding it was in the father's best interests to terminate his parental rights to his daughter, the magistrate considered:

(a) It was in the father's best "psychological" interest to have his parental rights terminated in order to bring him closure and help him push past his delusions and seek the help he needs in psycho-sexual treatment; and

(b) The father lived in a world of delusion and denial. *In re Doe*, 143 Idaho 383, 390, 146 P.3d 649 (2006).

2. Child's Sense Of Finality

Children are residing together in a pre-adoptive placement; the children have bonded to each other and to the foster family; the children have progressed while in foster care; and the children are thriving and looking forward to the stability and permanency that will result from adoption. *Idaho Dep't of Health & Welfare v. Doe,* 160 Idaho 824, 833, 379 P.3d 1094, 1103 (2016).

In deciding whether termination was in the best interest of the parent and child, the magistrate noted the child would benefit from a sense of finality, normalcy and permanency following termination and adoption. *In re Doe*, 143 Idaho 383, 383-84, 146 P.3d 649 (2006).

3. Incarceration

In deciding whether termination was in the best interest of the parent and child, the magistrate noted the father would be in prison for 9½ years and unable to provide financial support. *In re Doe*, 143 Idaho 383, 387, 146 P.3d 649 (2006).

4. Parent's Affection

Parental affection is a priceless advantage. However, a child cannot live on parental affection alone. In addition to love and affection and the satisfaction of his physical needs, a

child requires moral guidance and training to allow the child to grow into a well-adjusted normal adult. *In re Doe*, 143 Idaho 383, 389, 146 P.3d 649 (2006).

<u>5. Support</u>

In deciding best interests of parent and child, Idaho case law distinguishes between 1) the parent paying support and 2) the child receiving support or financial assistance.

(a) Parent

It was error for the magistrate to have considered the removal of the support duty as being in the parent's best interest. *In re Doe*, 143 Idaho 383, 390, 146 P.3d 649 (2006).

(b) Child

In deciding if it was in the best interest of the parent and child to terminate parental rights, the magistrate considered that the child would receive public financial benefits if she were adopted. In re Doe, 143 Idaho 383, 387, 146 P.3d 649 (2006).

The trial court may consider a parent's inability to provide support when examining the child's best interest, within certain limits. While a parent has the duty to financially support a child, the fact that a child might be in a better financial situation after adoption is not an "end all" of the analysis. *In re Doe*, 143 Idaho 383, 390, 146 P.3d 649 (2006) (magistrate properly considered financial support for child in examining her best interest where father could provide no financial support because of his incarceration while in contrast the child would be well-supported by her maternal great- aunt if termination occurred).

<u>6. Quantity Of Children</u>

Mother's acknowledgment about her frustration with raising multiple children was one factor supporting the magistrate court's determination that allowing Mother and Father more time would "result in an unknown outcome." Therefore, the magistrate court did not improperly use the number of Mother and Father's children as a factor in its analysis; instead, it considered Mother's own statements about her ability to handle competing demands from her children, which is relevant to the question of whether she would be likely to provide adequate care for A.V. in the future. *In re Doe (2019-19),* Idaho Docket No. 47200 (2019).

The magistrate found that terminating parental rights to the one child would better enable the mother to care for her other two children (her husband's child and one of their own). The Idaho Supreme Court disagreed, stating that the quantity of children is not a relevant factor in determining whether to terminate a parental relationship. *In re Doe*, 142 Idaho 594, 598, 130

P.3d 1132 (2006).

7. Reunification Unlikely

Court can consider that Mother cannot provide her children with a permanent, safe, and stable environment, nor can she provide adequate food, shelter, and clothing; and Mother's history demonstrates that it is unlikely that she would be able to provide care, and a safe and stable home environment for the children in the near future. *Idaho Dep't of Health & Welfare v. Doe,* 160 Idaho 824, 833, 379 P.3d 1094, 1103 (2016).

The magistrate's finding that the chances of reuniting the family would be extremely remote falls within the condition permitting termination in the best interests of the parent and child. *In Re Dayley*, 112 Idaho 522, 526, 733 P.2d 743 (1987).

8. Child's Affection For or Desire to Reunite With Parent

Although child's desire to reside with his mother carries some weight, magistrate courts are vested with broad discretion when making determinations regarding what is in the best interests of the children in these cases. *In the Matter of John Doe* (2019-27), 166 Idaho 197, 457 P.3d 849 (2020).

In deciding whether the termination of parental rights was in the child's best interest, the magistrate noted the father and daughter shared a genuinely loving relationship and the daughter missed her father. The trial court determined the only benefit the daughter would receive from a continued relationship with her father would be a "sense of satisfaction" from having the court "abide by her expressed desire that termination not occur." That "sense of satisfaction," the magistrate determined, was outweighed by the many benefits termination would provide to the daughter. *In re Doe*, 143 Idaho 383, 398, 146 P.3d 649 (2006).

9. Sexual Offender

The father, a convicted sexual offender in prison, represented an unacceptable risk to the children. *In re Doe*, 143 Idaho 383, 390, 146 P.3d 649 (2006) (considering whether the termination of parental rights was in the children's best interests).

10. Successfully Completing The Case Plan

Mother cites to *Idaho Dep't of Health & Welfare v. Doe*, 150 Idaho 752, 250 P.3d 803 (Ct. App. 2011), as an analogous case of a parent struggling with addiction whose rights were improperly terminated. While the struggle with addiction is similar in both cases, there are several key differences:

(a) Father underwent consistent treatment, demonstrated substantial efforts at maintaining sobriety, and voluntarily attended additional programs like anger management counseling. In contrast, Mother's efforts to care for her mental health consists entirely of occasional court ordered counseling sessions and renewed participation in AA and NA programs.

(b) Second, while the father in Idaho Dep't of Health & Welfare v. Doe obtained housing for himself and worked towards purchasing a home for his children, Mother remains dependent on others for housing just as she has for the last nine years.

(c) While the father obtained employment and progressed professionally to provide for his family, Mother's employment remains sporadic, even if she is typically holding a job.

In short, the father showcased commitment and progress—despite setbacks and a relapse with alcohol—while Mother's evidentiary record shows consistent instability and unchanged behaviors. *In re Doe (2019-23),* Idaho Docket No. 47250 (2019).

The record revealed that mother and child had a strong emotional bond, that their interactions were positive and healthy, and that mother could adequately provide for the child. Further, the mother went above and beyond the case plan in order to provide adequate parenting to the child. Public policy requires that a parental termination be overturned where the parent fully complied with the Department's reunification plan and any court directives. *In re Doe*, 142 Idaho 594, 598, 130 P.3d 1132 (2006).

11. Psychological Best Interests

The court concluded that termination would be in the father's "psychological" best interests was an appropriate ground to terminate the father's rights under *Idaho Code* 16-2005(3). *In re Doe*, 143 Idaho 383, 389-90, 146 P.3d 649 (2006) (father unrealistic in believing he can establish relationship with child he sexually offended).

12. Relationship With Siblings

A child's relationship with his siblings is a factor that the magistrate court may consider when determining the best interests of a child in a termination proceeding. *Matter of Doe*, 164 Idaho 511, 516, 432 P.3d 60, 65 (2018) (best interests analysis is an expansive analysis with no set list of factors a court must consider). *In re Doe (2019-18),* Idaho Docket No. 47190 (2019). However, a child's relationship with his parents and siblings is only one factor in a multi-factor test, and Mother does not argue that it is or should be determinative or given greater weight. *Cf., e.g., id.* (stating that a parent's ability to change his or her conduct to assume parental

responsibilities “is only one of many [factors] that goes into the best-interests analysis”).

13. Department Not Seeking Termination of Rights to Siblings

Supreme Court rejected argument that TPR is not appropriate when a parent is considered fit to raise two children but not a third. The standard for termination of parental rights is not parental fitness per se, but whether the evidence shows that one of the statutory grounds for termination has been met and that termination of parental rights would be in the child’s best interests. I.C. §16-2005(1). This statute allows for termination of parental rights not only when a parent is unable to provide a minimum level of care (*see, e.g.*, section 16-2005(1)(d)), but also when a parent is able to provide a minimum level of care but, for whatever reason, fails to do so (*see, e.g.*, section 16-2005(1)(b)). Therefore, it is not illogical for a court to terminate parental rights to only one child, even though the child has one or more siblings, when the evidence shows that the parents have neglected that child and that termination of parental rights is in his best interests. While it may be rare for a parent’s rights to be terminated as to some children but not others, this Court has upheld termination under those circumstances in at least one case. *Dep’t of Health & Welfare v. Doe*, 147 Idaho 353, 354, 209 P.3d 650, 651 (2009). *In re Doe (2019-19),* Idaho Docket No. 47200 (2019).

14. Parent Bad Influence on the Child

Mother’s close relationship with child, and statements and behavior in front of teenage child contributed to child using controlled substances. *In the Matter of John Doe* (2019-27), 166 Idaho 197, 457 P.3d 849 (2020).

VIII. INABILITY TO DISCHARGE PARENTAL RESPONSIBILITIES

A. APPLICABLE STATUTE

1. Idaho Code § 16-2005(1)(d)

Idaho Code § 16-2005(1)(d) reads:

> (1) The court may grant an order terminating the relationship where it finds that termination of parental rights is in the best interests of the child and that one (1) or more of the following conditions exist: …
>
> > (d) The parent is unable to discharge parental responsibilities and such inability will continue for a prolonged indeterminate period and will be injurious to the health, morals or well-being of the child.

2. Idaho Case Law

Substantial and competent evidence supported the magistrate court's determination that Father was unable to discharge his parental responsibilities:

- Child had *already* been placed with Grandmother pursuant to an out-of-home safety plan when the referral giving rise to this case was made.
- Father was referred for drug testing nine times, and only performed one such urinalysis, during which he tested positive for use of methamphetamine.
- Despite acknowledging his diagnosis of paranoid schizophrenia, Father never established that he was receiving treatment or taking medication to control it.
- Following Father's eviction from his housing, his only consistent housing was at Grandmother's house following her death, and the quality of this home environment declined dramatically over the three months he lived there.
- Father only engaged with the Department for visitation for a period of three months, during which the quality of his visits were observed to sharply deteriorate.
- Father was incarcerated as a result of a criminal assault on Social Worker during a visitation with Child. After this incarceration, Father refused to contact the Department or cooperate in Child's case in any way.
- Except for when Father was jailed, he could not establish where he was, what he was doing, or that he had any means of providing for himself, much less for Child.
- Father also had multiple active warrants out for his arrest, evidence that Father's stints in jail and run-ins with the legal system were likely to continue at least for some extended time.
- Father's rapid decline between April and June 2018 showed his inability to discharge his parental responsibilities.
- The *bare minimum* for discharging parental responsibilities is presence in a child's life. After June 29, 2018, Father effectively removed himself from Child's life. He did not appear for a year's worth of hearings, demonstrating that he did not have Child's best interest as a main priority.

- He did not stay in contact with his counsel over long stretches of time.

Interest of Doe I (2019-39), 166 Idaho 546, 462 P.3d 74, 86–87 (2020). Substantial and competent evidence supports the magistrate court's decision that Father was unable to discharge his parental responsibilities. *Id.*

Due to Father's ongoing incarceration, his alcohol abuse, and his violent and controlling behaviors, he is unable to discharge his parental responsibilities for a prolonged period, and this inability to parent is injurious to the child. *In re Doe*, 159 Idaho 192, 197, 358 P.3d 77, 82 (2015).

b. Mental Health Concerns

Where mental health concerns make compliance with the case plan impossible, termination may still be warranted under another provision:

> In cases where the parent's mental health issues prevent compliance with the terms of the case plan, termination may be sought under Idaho Code section 16–2005(1)(d) if "[t]he parent is unable to discharge parental responsibilities and such inability will continue for a prolonged indeterminate period and will be injurious to the health, morals or well-being of the child."

Idaho Dep't of Health & Welfare v. Doe, 161 Idaho 596, 600, 389 P.3d 141, 145 (2016), at footnote 2.

c. Financial and Housing Instability

When at the time of trial, Mother's financial and housing situations were unstable (worked for periods of time at various jobs, but she eventually lost those jobs because of frequent incarcerations, was still not in a position to provide for the children, was still behind thousands of dollars in child support, Mother resided at a transitional house where children would not be permitted to live, that unstable employment or housing) supported a finding of neglect. *Idaho Dep't of Health & Welfare v. Doe*, 161 Idaho 754, 760, 390 P.3d 1281, 1287 (2017).

d. Unwillingness of Parent

A finding of inability to discharge parental responsibilities cannot be satisfied by the unwillingness of the parent, where the parent is otherwise qualified and able to do so. *In re Doe (2017-21),* Idaho Supreme Court No. 45207 *15 (December 22, 2017).

IX. INCARCERATED PARENT

A. APPLICABLE STATUTE

1. Idaho Code § 16-2005(1)(e).

Idaho Code § 16-2005(1)(e) reads:

> (1) The court may grant an order terminating the relationship where it finds that termination of parental rights is in the best interests of the child and that one (1) or more of the following conditions exist: …
>
> (d) The parent has been incarcerated and is likely to remain incarcerated for a substantial period of time during the child's minority.

Court distinguished incarcerated parent case of Doe, 137 Idaho 758, 53 P.3d 341. Unlike Doe, Mother was not incarcerated for the child's entire lifetime or during the entirety of the case's pendency. Mother did not argue and no evidence supported a finding that the Department did little or nothing to assist Mother in performing the plan, as in Doe. State of Idaho, DHW v. Jane Doe (2021-13), Idaho Court of Appeals Docket No. 48706 (August 2021).

The trial court must make two factual findings: (1) "[t]he parent has been incarcerated"; and (2) the parent "is likely to remain incarcerated for a substantial period of time during the child's minority." By focusing on the duration of Doe's past incarceration, rather than the expected duration of her future incarceration, the magistrate court erred. *Idaho Dep't of Health & Welfare v. Doe*, 161 Idaho 596, 602, 389 P.3d 141, 147 (2016).

Considering Doe's multiple rule violations and overall poor performance in prison, the magistrate court's finding that Doe will remain incarcerated near to his sentence satisfaction date is supported by substantial and competent evidence. *Idaho Dep't of Health & Welfare v. Doe*, 162 Idaho 266, 396 P.3d 695, 699 (2017); *see also Idaho Dep't of Health & Welfare v. Doe*, 148 Idaho 832, 840, 230 P.3d 442, 450 (Ct.App.2010) (magistrate court did not err in finding Doe would remain incarcerated beyond the determinate term of her sentence based on, among other things, her prior performance on probation).

In determining whether a parent will be incarcerated for a "substantial period" during the child's minority, the court may consider factors including, but not limited to: the age of the child; the relationship, if any, that has developed between the parent and the child; and the likely period of time that the parent will remain incarcerated. *In re Doe*, 159 Idaho 192, 198, 358

P.3d 77, 83 (2015).

Father has failed to provide evidence that his criminal case is on appeal, reason to believe his conviction will be overturned other than his conclusory opinion, and any authority that a pending appeal on a criminal matter precludes reliance on this statutory ground. *In re Doe*, 159 Idaho 192, 198, 358 P.3d 77, 83 (2015).

X. BEST INTERESTS OF THE CHILD

A. APPLICABLE LAW

1. The Two-Part Test For Termination

> Under Idaho Code section 16-2005(1), a court may terminate parental rights if it finds that at least one of the grounds for termination is present and termination is in the best interests of the child. *In re Doe (2014–23)*, 157 Idaho 920, 923, 342 P.3d 632, 635 (2015). The grounds for termination of parental rights must be proven by clear and convincing evidence. *Idaho Dep't of Health & Welfare v. Doe (2016-14)*, 161 Idaho 596, 598, 389 P.3d 141, 143 (2016). Clear and convincing evidence is "evidence indicating that the thing to be proved is highly probable or reasonably certain." *Doe I v. Doe II*, 150 Idaho 46, 49, 244 P.3d 190, 193 (2010) (quoting *In re Adoption of Doe*, 143 Idaho 188, 191, 141 P.3d 1057, 1060 (2006)).

Matter of Doe I, 164 Idaho 883, 436 P.3d 1232, 1237 (2019); *see also* Idaho Code § 16-2005; *In re Doe*, 156 Idaho 103, 111, 320 P.3d 1262, 1270 (2014) (once a statutory ground for termination has been established, the trial court must next determine whether it is in the best interests of the child to terminate the parent-child relationship); *In re Doe*, 123 Idaho 502, 504, 859 P.2d 963 (Ct. App. 1993).

2. Applicable Idaho Statutes Addressing Best Interests

Idaho Code § 16-2005 describes "in the best interests of the child" in three subsections:

(a) Idaho Code § 16-2005(1)

Idaho Code § 16-2005(1) reads:

> (1) The court may grant an order terminating the relationship where it finds that termination of parental rights is in the best interest of the child and that one (1) or more of the following conditions exist:
>
> (a) The parent has abandoned the child.
> (b) The parent has neglected or abused the child.
> (c) The presumptive parent is not the biological parent of the child.
> (d) The parent is unable to discharge parental responsibilities and such inability will continue for a prolonged indeterminate period and will be injurious to the health, morals, or well-being of the child.
> (e) The parent has been incarcerated and is likely to remain incarcerated for a substantial period of time during the child's minority.

Idaho case law also holds that once a statutory ground for termination is found, the magistrate must determine what is in the best interest of the child. *Matter of Aragon*, 120

Idaho 606, 611, 818 P.2d 310 (1991); *In re Doe*, 156 Idaho 103, 111, 320 P.3d 1262, 1270 (2014); *Hofmeister v. Bauer*, 110 Idaho 960, 719 P.2d 1220 (Ct. App. 1986); *Rhodes v. State, Dep't of Health and Welfare,* 107 Idaho 1120, 695 P.2d 1259 (1985).

(b) Idaho Code § 16-2005(3)

Idaho Code § 16-2005(3) states: "The court may grant an order terminating the relationship if termination is found to be in the best interest of the parent and child."

(c) Idaho Code § 16-2005(2)

Idaho Code § 16-2005(2) states: "The court may grant an order terminating the relationship and may rebuttably presume that such termination of parental rights is in the best interests of the child where…" certain acts have occurred. (Emphasis added.)

3. Test When Minimal Grounds For Termination Exist

Where abuse or other grounds for termination are minimal, the best interests of the child test weighs the need for termination of parental rights with the statutory preference for preserving and strengthening family life. *Matter of Aragon,* 120 Idaho 606, 611, 818 P.2d 310 (1991).

B. SPECIFIC ISSUES ADDRESSING BEST INTERESTS

Idaho cases address specific issues considered by the courts as they determined whether the best interests of the child would be served by the termination of parental rights.

1. Best Interests of Adoptive Parents Not a Factor

Although the incident underlying Child's juvenile corrections proceeding places an obvious strain on the relationship between Child and the Does, the record also showed that the Does maintained a stable and certain environment, provided protective care and financial support, and satisfied other basic human needs of the children. Both Jane and John Doe reported that they wanted to be a part of Child's life, and that they did not want to terminate their rights due to the love and care they held for him. Collectively, these factors strongly indicate that the Does are able to provide a beneficial environment that is responsive to Child's needs. *In re Doe (2017-21),* Idaho Supreme Court No. 45207 *8-9 (December 22, 2017).

The magistrate court's finding as to Child's best interest seems to be based entirely on the idea that Child could not return to the Does' home. This conclusion is not supported by the record. Namely, the record does not include a court order or decree from the juvenile corrections proceeding that would foreclose his reentry into the home. The record is also absent

of any sort of expert report, opinion, or testimony providing details as to Child's medical, physical, or emotional condition that would support this idea. Moreover, the record is devoid of any documentation showing that alternative placement options were pursued other than conclusory statements that an option is not available. When asked for her opinion on Child's best interest, Jane Doe expressed her belief that Child was exactly where he needed to be while receiving treatment at the Utah facility. She later acknowledged that the treatment program is not permanent placement, and that once completed Child will essentially have no place to live. *Id.* at 9.

2. Caregiver's Effect On Child

The father was unpredictable, threatening and irrational; the stepfather was respectful, committed, and loving. *In the Interest of Jane Doe*, 149 Idaho 392, 234 P.3d 716 (2010).

The adopting grandparents had been the child's primary caregiver through most of his lifetime, providing a warm, loving and consistent home. The grandparents had provided security, love and stability in the child's life. In re Doe, 142 Idaho 174, 179, 125 P.3d 530 (2005).

3. Child's Fear Of The Parent

The child was afraid of the father's anger. *In re Doe*, 142 Idaho 174, 179, 125 P.3d 530 (2005).

4. Child's Wishes

The girls, while expressing affection for their mother, told the judge unequivocally that they felt insecure at her home and did not want to live there. *Hofmeister v. Bauer*, 110 Idaho 960, 966, 719 P.2d 1220 (Ct. App. 1986). The child desired to remain with the adopting grandparents. In re Doe, 142 Idaho 174, 179, 125 P.3d 530 (2005).

While it might be helpful to know whether the minor child desired termination, there is no requirement that a party seeking termination present expert testimony to support the assertion that termination would be in the best interests of the child. *In re Doe*, 133 Idaho 805, 809, 992 P.2d 1205 (1999).

5. Criminal Behavior

The court noted Mother failed to comply with the case plan when she missed several scheduled visits with Child, failed to notify the Department of new felony charges, and failed to obtain an ordered neuropsychological evaluation. *Matter of Doe,* 165 Idaho 46, 437 P.3d 922, 928 (2019).

Trial court may consider the parent's continuing problems with the law. *In re Doe,* 156 Idaho 103, 111, 320 P.3d 1262, 1270 (2014); *In re Doe,* 157 Idaho 765, 772, 339 P.3d 1169, 1176 (2014) (Doe has recurring problems with the law as he was repeatedly arrested during the child protection proceedings and was in jail at the time of the termination trial).

A parent's past criminal behavior is relevant in considering whether to terminate parental rights. The magistrate found that the mother continuously reverted into her old lifestyle of drugs and criminality when not incarcerated and that such behavior is not in the best interests of the child. In re Doe, 149 Idaho 59, 232 P.3d 837, 843 (Ct. App. 2010).

Although the mother was doing well on her second rider, substantial evidence supports the magistrate's finding that her performance on the rider was not as indicative of her future behavior as was her extensive history of misbehavior when not in custody. *In re Doe*, 149 Idaho 59, 232 P.3d 837, 843 (Ct. App. 2010).

6. Drug Usage

Substantial and competent evidence supports the magistrate court's finding that termination is in the children's best interests given Doe's failure to address her substance abuse issues, among other factors. *Dep't of Health & Welfare v. Doe (2020-47)*, 168 Idaho 496, 483 P.3d 1039 (Ct.App. 2021).

Doe was facing felony charges and still continued to struggle with substance abuse issues. *In re Doe,* 157 Idaho 765, 772, 339 P.3d 1169, 1176 (2014).

The magistrate court had based its determination that termination of parental rights was in the best interest of the children on the parents' "history and/or ongoing use and abuse of controlled substances, which has resulted in the children being in foster care for seventeen (17) of the last twenty-two (22) months…" *In re Doe*, 149 Idaho 474, 235 P.3d 1195, 1200 (2010).

7. Financial Contributions

Substantial and competent evidence supports the magistrate court's finding that termination is in the children's best interests given Doe's failure to secure appropriate housing, failure to provide evidence of the ability to provide for her children financially, among other factors. *Dep't of Health & Welfare v. Doe (2020-47)*, 168 Idaho 496, 483 P.3d 1039 (Ct.App. 2021).

Trial court may consider the financial contribution of the parent to the child's care after the child is placed in protective custody. *In re Doe,* 156 Idaho 103, 111, 320 P.3d 1262, 1270

(2014).

Grounds for termination in this case are not minimal. Mother continually disregarded the physical, emotional and educational needs of the children; repeatedly failed to undertake and discharge her parental obligations toward the care and control of the children; and failed to provide for their subsistence, education, medical or other care necessary for their well- being. *In re Doe*, 145 Idaho 662, 665, 182 P.3d 1186 (2008).

8. Harm To Child

Father did not resolve the safety concerns that caused his children to be removed from his care. *In re Doe,* 157 Idaho 765, 772, 339 P.3d 1169, 1176 (2014).

Actual injury is not required to find terminating parental rights is in the best interests of the children. *Idaho Dept. of Health & Welfare v. Doe*, 150 Idaho 36, 244 P.3d 180 (2010).

9. Improvement In Child When Away From Parent

While in foster care, the children have made steady progress emotionally, educationally, developmentally, and socially, with regular school attendance and multiple therapies. *In the Interest of Doe (2020-47),* 168 Idaho 496, 483 P.3d 1039 (Ct.App.2021).

The children were experiencing emotional disturbances and were developmentally and educationally deficient. After entering foster care, the children began consistently participating in educational programs and counseling services and have experienced significant progress in each of those areas. *Matter of Doe Children*, 162 Idaho 69, 394 P.3d 112, 122 (Ct. App. 2017).

Child with special needs requires a highly structured environment and diligent constant parenting. Although there was a basis to believe that Doe may be able to maintain sobriety, legal income, stable housing and provide for the basic needs of the child, there was no basis to believe Doe could provide the highly structured environment necessary to address the child's special needs. *Idaho Dep't of Health & Welfare v. Doe*, 162 Idaho 400, 397 P.3d 1159, 1164 (Ct. App. 2017), *review denied* (July 10, 2017).

Considerable testimony regarding Child's physical, emotional, and academic improvement since being removed from Parents' care. Child has made a lot of progress: from not being able to sleep alone to being able to sleep in her room; nightmares decreasing significantly; much more comfortable with different relationships with other people; her fear of men subsided; and. she started excelling in school. *Matter of Doe II*, 163 Idaho 1, 407 P.3d 588 (2017).

Father's removal from Child's life appears to have had a profoundly positive influence on Child's well-being. Child no longer has to live in fear; Child is in a loving and supportive family environment; and Child is doing well in school and the community. *In re Doe*, 159 Idaho 192, 199, 358 P.3d 77, 84 (2015); *see also In re Doe*, 156 Idaho 103, 111, 320 P.3d 1262, 1270 (2014)(court may consider improvement of the child while in foster care).

Children have been well cared for in foster care and have made improvements. *In re Doe,* 157 Idaho 765, 772, 339 P.3d 1169, 1176 (2014).

The foster parent testified to improvements in the children's behavior while in her care. In re Doe, 148 Idaho 832, 840, 230 P.3d 442 (Ct. App. 2010).

In further explanation of its decision to terminate Doe's parental rights, the magistrate gave a detailed version of the improvements in the children's development since they entered the state's custody. In re Doe, 149 Idaho 431, 234 P.3d 755, 760 (Ct. App. 2010).

When looking at the progress the children have made while in the state's custody, taken together with the professional opinions of the social worker, Department caseworker, guardian ad litem, and psychologist, there is adequate evidence to support the conclusion that it was in the child's best interest to terminate Doe's parental rights. *In re Doe*, 149 Idaho 431, 234 P.3d 755, 760 (Ct. App. 2010).

Evidence of improvement in the well-being of children while living apart from their parents is a factor appropriate to consider in determining what will serve their best interests. *In re Doe*, 141 Idaho 511, 517, 112 P.2d 799 (2005) (the court considered that the children were in a stable foster home and their special needs were being addressed);

The minor had a good relationship in the home of her father and stepmother. There was evidence that since the minor child had come to live with this family she became more outgoing, was a straight-A student and was involved in extra-curricular activities. *In re Doe*, 133 Idaho 805, 810, 992 P.2d 1205 (1999).

The magistrate noted testimony to the effect that the girls' behavior and school work generally improved while they were living away from the mother. *Hofmeister v. Bauer*, 110 Idaho 960, 965, 719 P.2d 1220 (Ct. App. 1986).

<u>10. Incarceration</u>

Trial court could consider that Father had been convicted of crimes violent in nature supports Mother's testimony regarding Father's violent tendencies, and Father had previously

been convicted of the felonies Rape III and Delivery of a Controlled Substance to a Minor. *In re Doe*, 159 Idaho 192, 199, 358 P.3d 77, 84 (2015).

Trial court could consider whether Father had demonstrated prior charged or uncharged criminal behavior in the home, including Mother's testimony that she was constantly in fear of Father because he was violent to both her and Child and that Father drank excessively every day. *In re Doe*, 159 Idaho 192, 199, 358 P.3d 77, 84 (2015).

The magistrate determined that termination was in the best interests of the children because it was likely Doe would remain incarcerated for a substantial period of the children's minority. While this finding would also provide a basis for termination under I.C. § 16-2005(1)(e), the Idaho Court of Appeals considered it only as a factor relevant to the best interest determination. The Court of Appeals affirmed the magistrate's findings. *In re Doe*, 148 Idaho 832, 840, 230 P.3d 442 (Ct. App. 2010).

11. Long Recovery Period

At the time of the hearing, Mother had only maintained sobriety for five months after being released from jail. Five months sober is an accomplishment, but after a decade of drug addiction, on-going sobriety is no guarantee. Further, Mother admitted that she would not be able to complete drug court for at least another year. *In re Doe (2019-32),* 166 Idaho 173, 457 P.3d 154 (At.App.2020)(Doe had only maintained sobriety for five months, did not have a permanent residence, and—between work, drug court appearances, counseling, drug testing, and probation appointments—did not have the time she needed to devote to the child).

"Our decision should not be understood, however, as a holding that a long recovery period for parents with substance addictions will alone always justify termination of parental rights….The evidence of Doe's longstanding high- risk lifestyle of drug use and crime when not incarcerated, which made her a danger to J.M.; Doe's lack of effort to comply with her case plan in order to reunify with J.M.; the extended time needed before Doe might become able to completely parent; and J.M.'s need for permanency and stability, all support the magistrate's conclusion that termination is in J.M.'s best interest." In re Doe, 149 Idaho 59, 232, P.3d 837, 844 (Ct. App. 2010).

The magistrate permissibly found from the evidence that the mother will need long term and extensive substance abuse treatment and must exhibit a significant period of sustained sobriety after successful completion of treatment before she could possibly begin to

demonstrate any parenting skills. *In re Doe,* 149 Idaho 59, 232 P.3d 837, 844 (Ct. App. 2010).

12. Parent's Shortcomings

Trial court may consider the parent's efforts to improve his or her situation. *In re Doe,* 156 Idaho 103, 111, 320 P.3d 1262, 1270 (2014).

There was a lack of stability in the father's life, including repeated hospitalizations, substance abuse and contacts with the criminal justice system. *In re Doe*, 149 Idaho 392, 234 P.3d 716, 721 (2010).

The magistrate noted that while the parents had made some improvements, they had not demonstrated an ability to provide the children with the type of home environment they needed in order to develop. *In re Doe*, 141 Idaho 511, 514, 112 P.2d 799 (2005).

Where the mother was taking no definite steps to obtain steady employment or provide a stable environment for the minor child to visit, and she lacked an understanding of her responsibilities as a mother, it was not in the best interests of the child to have to wait while possible other types of legal proceedings developed regarding visitation, custody and support. The child deserved stability and certainty in her life, none of which the mother could provide. *In re Doe*, 133 Idaho 805, 810, 992 P.2d 1205 (1999).

The father exhibited an inability to provide for the child's welfare by failing to maintain a stable lifestyle, with steady employment and a home. The physical, emotional and educational needs of the child were neglected. The father's failure to undertake and discharge the obligations to the child reasonably expected of a parent justified the magistrate's determination that the termination of the parent-child relationship was in the best interest of the child. *In Interest Of Baby Doe*, 130 Idaho 47, 53, 936 P.2d 690 (Ct. App. 1997).

13. Passage Of Time

Father's bond with his children had diminished as he was not their caregiver for the better part of eighteen months. *In re Doe,* 157 Idaho 765, 772, 339 P.3d 1169, 1176 (2014).

The magistrate took note that it had been more than sixteen months since the mother had been able to provide her children with a stable home. *In re Doe*, 145 Idaho 662, 665, 182 P.3d 1196 (2008).

14. Professional Opinions

Expert testimony is not required to establish that termination would be in the child's best interests. *In re Doe,* 156 Idaho 103, 111, 320 P.3d 1262, 1270 (2014).

After considering the professional opinions and testimony of the psychologist, the social worker, the Department caseworker, and the Guardian *ad Litem*, the magistrate stated that they "all agree that [Doe] has no parenting aptitude and that she presents a risk, both physically and emotionally to her children. They all agree that the children's best interests will be met by terminating [Doe's] parental relationship." *In re Doe*, 149 Idaho 431, 234 P.3d 755, 759-60 (Ct.App. 2010).

The psychologist testified that Doe's children should not be returned to her in the future because she does not have the capacity to parent her children in a safe and healthy fashion, and her inability to emotionally bond with others, including her own children, appears to be lifelong and may be permanent. *In re Doe*, 149 Idaho 431,__, 234 P.3d 755, 759 (Ct. App. 2010).

The social workers and the guardian ad litem all testified that termination of parental rights was in the children's best interests. Specifically, they testified to sporadic visitations and contact by the mother, the repeated drug relapses and issues regarding domestic violence. In re Doe, 145 Idaho 662, 665, 182 P.3d 1196 (2008).

The caseworker felt it was in the child's best interests to terminate parental rights because the child was three years old, had never lived with the mother and had been in foster care for eighteen months, and the child was developmentally delayed and thus a special needs child. In re Doe, 133 Idaho 826, 831, 992 P.2d 1226 (Ct. App. 1999).

The caseworker, who had been involved with the family for many years, stated that the girls needed a permanent, stable living arrangement that the mother had been unable to provide. Hofmeister v. Bauer, 110 Idaho 960, 966, 719 P.2d 1220 (Ct. App.1986).

15. Relapses

Father's "history does not support a finding that he is capable of remaining sober." For example, the court found that Father began using methamphetamine when he was seventeen years old, stopped his drug use "cold turkey" once, and twice participated in treatment programs but that Father has relapsed each time. Further, the court found Father fails to take responsibility for his substance abuse and blames others for his drug use, including his co-workers, friends, and social media. Finally, the court found Father is "not in any active counseling or treatment or support program" but instead unrealistically plans "to avoid 'toxic people' who 'make him' fall back into drug use." Substantial and competent evidence, including Father's testimony, supports these findings, which are contrary to Father's assertion that he has

successfully addressed his substance abuse issues. *In the Interest of Doe (2020-48),* 168 Idaho 536, 484 P.3d 220 (Ct.App.2021).

16. Religion

Court has a duty to remain neutral as to religion in custody matters and should not make its decision on that basis. *In re Doe,* 157 Idaho 59, 69, 333 P.3d 874, 884 (Ct. App. 2014).

17. Reunification Of Family Unlikely

The magistrate found that it was extremely remote that the family could ever be reunited. *In re Doe*, 148 Idaho 832, 840, 230 P.3d 442 (Ct. App. 2010).

18. Stability and Permanency

Magistrate court improperly considered Stepfather's relationship with Child because the court is permitted to consider the stability and permanency of a child's home. Part of this analysis would naturally include Stepfather's ability to care for Child. *Doe v. Doe I (2017-15)*, 162 Idaho 653, 402 P.3d 1106, 1113 (2017).

Trial court may consider the stability and permanency of the home. *In re Doe*, 156 Idaho 103, 111, 320 P.3d 1262, 1270 (2014); *In re Doe,* 157 Idaho 765, 772, 339 P.3d 1169, 1176 (2014) (children needed a safe, stable home).

The goals of permanency, and the needs of a fast-growing child, are not met by preserving Doe’s parental rights with the hope she could someday be capable of caring for the child. Substantial evidence supports the magistrate’s decision that the best interest of the child is served by termination of Doe’s parental rights. *In re Doe*, 149 Idaho 627, 238 P.3d 724, 730 (Ct. App. 2010).

The court found that it was in the children’s best interest to terminate mother’s parental rights. The children had been traumatized and needed a permanent, safe, and stable environment, which could not be provided by long-term foster care. The court determined the children needed supervision; a safe home; a parent who can address their specialized health, emotional, and educational needs; a parent who can provide consistent discipline and love; and a home environment where they have adequate food, shelter, and clothing. The Mother had not demonstrated that she had the ability to provide these things for her children. The court concluded that it in the best interests of the children to have the highest level of permanency and stability in their lives, and that this would be met terminating the mother’s parental rights, and placing the children in adoptive homes. *In re Doe*, 149 Idaho 165, 233 P.3d 96, 101 (2010).

The magistrate court found that it was in the best interest of D.C. to have Doe's parental rights terminated because Doe "cannot provide safety and stability to [D.C.]". In re Doe, 149 Idaho 401, 234 P.3d 725 732 (2010).

Relying on testimony from the guardian ad litem, the social worker, and a foster parent, nothing the children were in foster care for 3 ½ years, and the instability caused by living in different foster homes, the magistrate concluded that terminating parental rights was necessary to provide the children with stability and permanency. *Idaho Dept. of Health & Welfare v. Doe*, 150 Idaho 36, 244 P.3d 180 (2010).

The interest in affording the child a stable home life and stable parental relationship(s) is significant. *In the Interest of Jane Doe*, 149 Idaho 392, 234 P.3d 716 (2010).

19. Unclean Home

On review, the Idaho Supreme Court had to determine if there was substantial and competent evidence in the record to support the magistrate's conclusion that it was in the best interests of the children to terminate Doe's parental rights because of her unwillingness to provide her children with a safe and sanitary home, even though the children did not suffer any actual harm. In affirming the magistrate, the Supreme Court noted the Department first got involved because of environmental and safety issues in the home; that Doe was given a second chance, the children returned to the home but again were removed due to the home's condition and the children's hygiene; and that Doe was aware of what she needed to do to permanently reunite with her children, and she simply failed to do it. *Idaho Dept. of Health & Welfare v. Doe*, 150 Idaho 36, 244 P.3d 180 (2010).

20. Unemployment

Trial court may consider the unemployment of the parent. *In re Doe,* 156 Idaho 103, 111, 320 P.3d 1262, 1270 (2014).

Father has been unemployed for a significant length of time. *In re Doe,* 157 Idaho 765, 772, 339 P.3d 1169, 1176 (2014).

21. Visitation Only Task Accomplished

Substantial and competent evidence supported the magistrate court's conclusion that termination of Doe's parental rights to her two children is in the children's best interests. Doe's case plan required her to maintain a stable environment by remaining drug-free, refusing to associate with persons who might negatively impact Doe or her children, showing her ability to

obtain employment, completing an approved parenting course and mental health assessment, regularly visiting the children, and attending monthly meetings with assigned caseworkers. Of those requirements, Doe only complied with the task involving weekly visits with the children; the remaining requirements went unsatisfied. Further, although one child's desire to remain with his mother was entitled to some weight, magistrate courts have broad discretion to determine what is in the best interests of the child. *Dep't of Health & Welfare v. Doe (2019-27)*, 166 Idaho 197, 457 P.3d 849 (2020).

XI. DISABILITY OF A PARENT

A. IDAHO STATUTES

1. Defining Disability

Idaho Code § 16-2002(17) defines" disability."

2. Adaptive Equipment Or Supportive Services

Idaho Code § 16-2005(6) reads as follows:

> (6) If the parent has a disability, as defined in this chapter, the parent shall have the right to provide evidence to the court regarding the manner in which the use of adaptive equipment or supportive services will enable the parent to carry out the responsibilities of parenting the child. Nothing in this section shall be construed to create any new or additional obligation on state or local governments to purchase or provide adaptive equipment or supportive services for parents with disabilities.

B. IDAHO CASE LAW

1. Interpreting Idaho Code § 16-2005(1)(d)

Mother makes the broad statement that "[t]he child welfare system must comply with [the] ADA as well as Section 504 of the Rehabilitation Act as long as it receives federal funding. Agencies may not discriminate on the basis of disability and must provide reasonable accommodations to appropriately serve parents with disabilities." Mother fails to articulate any basis explaining how the magistrate court's decision in this case runs afoul of those requirements, and simply citing authority without linking it to the case at hand is not enough. *In re Doe (2019-18),* Idaho Docket No. 47190 (2019).

Mother's disabilities do not excuse her failure to comply with her case plan under Idaho Code section 16-2002(3)(b) (neglect through a parent's "conduct or omission" under §16-1602(31)). *In re Doe (2019-18),* Idaho Docket No. 47190 (2019).

Mother presents no authority or argument in support of the proposition that a parent's "mental disabilities" provide a defense against this basis for neglect, and she does not dispute that her conduct or omission in this case constituted neglect. *In Interest of Doe Children*, 163 Idaho 367, 372, 413 P.3d 767, 772 (2018) ("Even in an appeal from the termination of parental rights, [the Court] will not consider an issue which was not supported by cogent argument and authority.") (citing *In re Doe*, 156 Idaho 103, 109, 320 P.3d 1262, 1268 (2014)).

Trial court noted that the evidence suggested that Mother's memory issues might also be

drug-related; acknowledged that Mother testified that she had bi-polar disorder, but one of Mother's treating doctors instead testified it was major depressive disorder. Court noted Mother testified that her stroke and mental health condition did not affect her ability to clean and maintain the home, but only affected her ability to keep appointments. Therefore, the court did consider her disabilities, but also considered the fact that they were self-reported and occurring in conjunction with her drug and alcohol problems. *In re Doe*, 157 Idaho 694, 703–04, 339 P.3d 755, 764–65 (2014).

Magistrate correctly considered and rejected disability defense. *In re Doe*, 149 Idaho 207, 233 P.3d 138, 141 (2010).

2. Parent's Burden Of Persuasion On Supportive Services

Trial court found that Mother had not taken advantage of IDHW's services and instead blamed others. IDHW made repeated efforts to help the family, including returning phone calls, providing written schedules, and reminding Mother after every visitation of when the next visit was. *In re Doe,* 157 Idaho 694, 704, 339 P.3d 755, 765 (2014).

To establish a court erred in considering the parent's disability, a parent must point to evidence presented of supportive services which will enable the parent to carry out the responsibilities of parent the child. Doe did not present evidence of any specific services that she qualified for, had been approved for, or that those supportive services could sufficiently aid her in parenting. *In re Doe*, 149 Idaho 627,_, 238 P.3d 724, 729 (Ct. App. 2010).

3. Supportive Services Ineffective

The court found that even with supportive services, the parents would not have been able to discharge their parental responsibilities. *In re Doe*, 149 Idaho 207, 233 P.3d 138, 140 (2010).

4. Appointment of GAL for Parent

The failure to appoint a replacement guardian ad litem for a parent constituted error because there was still an outstanding question as to Mother's need for a guardian ad litem. The outstanding question hinged upon the results of Mother's psychological evaluations, where it was clear that Mother suffered from significant mental illness. *Matter of Doe I (2019-22)*, 166 Idaho 759, 463 P.3d 393, 404–05 (2020), *reh'g denied* (May 29, 2020).

Matter of Doe, 161 Idaho 393, 395, 386 P.3d 916, 918 (2016) states:

Mother contends on appeal that once a petition is filed to terminate a parent's parental

rights, the trial court is required to make a competency determination. That is not what the statute provides. It simply provides that when such a determination is made, the court is required to appoint a guardian ad litem. No determination was requested in this case until the morning of the evidentiary hearing. In addition, incompetency in a termination proceeding does not have the same consequences as incompetency in a criminal proceeding. In a criminal case, a defendant determined to be incompetent cannot "be tried, convicted, sentenced or punished for the commission of an offense so long as such incapacity endures." I.C. § 18–210. In a termination case, a guardian ad litem must be appointed for the parent but the proceedings can proceed.

XII. COURT TRIALS, PROCEDURE, DEFAULT & WRITTEN FINDINGS

A. TRADITIONAL CIVIL DEFAULT IS NOT PERMITTED IN TPR PROCEEDINGS

1. Three-Day Notice

Entry of default without the three-day notice to Doe was improper where: (a) Doe had appeared for all hearings in the child protection action, including the review hearing wherein the court scheduled the next hearing; (b) Doe was represented by counsel at all hearings leading up to the termination hearing; and (c) Doe was personally served with notice of the termination hearing but was given no notice that the Department would be seeking default. *In re Doe Children*, 159 Idaho 386, 391–92, 360 P.3d 1067, 1072–73 (Ct. App. 2015)(notice of the request for default could have been served upon counsel, which would have satisfied the requirements of I.R.C.P. 55(b)(2) and, had such service been made, the court could have proceeded in Doe's absence).

2. Entry of Default

Unlike general civil proceedings, in cases in which the Department is moving to terminate parental rights, the court cannot proceed to disposition on the default unless or until the Department establishes the basis for terminating parental rights and the court finds that terminating the parental relationship is in the best interest of the child by clear and convincing evidence. *In re Doe Children,* 159 Idaho 386, 392, 360 P.3d 1067, 1073 (Ct. App. 2015); I.C. § 16–2005. This is true even when a parent fails to appear at the termination hearing and default is entered. *Id.*

A court cannot enter an I.R.C.P. 55 default judgment, in lieu of a termination hearing, where no evidence has been presented. A parent's failure to appear cannot, in and of itself, be the basis for terminating the parental rights as the failure to appear is not one of the statutory bases for terminating parental rights. *In re Doe Children,* 159 Idaho 386, 392, 360 P.3d 1067, 1073 (Ct. App. 2015).

B. PRESIDING JUDGE CONSISTENCY THROUGHOUT CP AND TPR PROCEEDINGS

The Idaho Supreme Court amended Idaho Juvenile Rules 39(b) and 48(c) to require that the magistrate judge assigned to preside over the CPA case, including the TPR trial, retain responsibility for the case “until its conclusion.” The only exceptions to reassignment of the case to another judge are the judge no longer holding the same judicial office or other extraordinary

circumstances, such as disqualification, death, illness or other disability. The amendments took effect on January 1, 2021.

The rule changes followed the inclusion of a footnote in a 2020 Supreme Court case:

> While we recognize the press of cases in magistrate court, the practice of assigning the same child protection case to different magistrate judges is not appropriate. It should only be employed when no other option is available. If a different judge is assigned, a record of the reason necessitating the assignment should be made. Once a magistrate judge is assigned to a child protection case, it is *always* the best practice for that judge to retain responsibility for the case until its conclusion. Nat'l Council of Juv. & Fam. Ct. Judges, *Enhanced Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases* 34 (2016) (advocating use of "one family-one judge system throughout the life of a child protection case) ("When cases are heard in multiple courts by multiple judges, conflicting court orders and failure to share information among all involved creates havoc for families.").

Matter of Doe I (2019-22), 166 Idaho 759 n. 4, 463 P.3d 393, 397 n.4 (2020), *reh'g denied* (May 29, 2020).

1. Judge Who Presided At Trial Should Issue Written Opinion or Replacement Judge Must Carefully Review Factual Findings Made by Original Judge

The judge hearing the evidence should review and sign the proposed written findings and conclusions:

> We are disturbed by a court practice which allows a judge who did not hear the trial to sign written findings of fact and conclusions of law, apparently without reviewing the factual findings actually made by the judge who heard the matter.

Idaho Dep't of Health & Welfare v. Doe, 161 Idaho 596, 603–04, 389 P.3d 141, 148–49 (2016).

C. WRITTEN FINDINGS AND CONCLUSIONS

1. Written Findings and Conclusions Required

> Because of the statute's specificity in requiring written recitation of findings, we do not consider an order's "incorporation by reference" to be the functional equivalent of a written recital.
>
> * * *
>
> The court reporter's transcription of the oral proceedings did not constitute a written order of the court sufficient to satisfy the statutory requirement.

Matter of Doe Children, 162 Idaho 69, 394 P.3d 112, 117–18 (Ct. App. 2017).

<u>2. Party Preparing Written Opinion – Court Must Carefully Review, Edit and "Make the Opinion Its Own"</u>

> The plain language of I.C. § 16–2010(1) unambiguously requires courts to issue written findings as part of the termination judgment. … Although the magistrate conducted a thorough oral analysis of its findings of fact related to Doe's specific conduct at the conclusion of Doe's termination hearing, such analysis and specific findings were not incorporated into the magistrate's written findings of fact. Rather, the written findings of fact and conclusions of law appear to be a copy of the Department's verified petition to terminate parental rights and refers only to generic findings that closely mirror the language of the relevant statutes. Moreover, relating to the best interests of the children, the written judgment includes only a conclusory statement that termination of Doe's parental rights was in the children's best interests. **Given the gravity of parental right termination cases, we take this opportunity to express our disapproval of the practice of having attorneys prepare the written findings of fact and conclusions of law.**

Idaho Dep't of Health & Welfare v. Doe, 161 Idaho 745, 750 at footnote 2, 390 P.3d 866, 871 (Ct. App. 2017) (emphasis added). *See also In the Matter of John Doe (2019-27),* 166 Idaho 197, 457 P.3d 849 (2020)(magistrate's initial pronouncement of oral findings, followed by signing a document entitled "Findings of Fact and Conclusions of Law" prepared by counsel for the State, while not erroneous, is viewed with disfavor by this Court).

<u>D. THE PERMANENCY GOAL(S) DETERMINATION</u>

<u>1. Department's Duty to File & Measurement of 15-Month Time Period</u>

Idaho Code §16-1622(2)(g) imposes a requirement on the Department, not on the magistrate court. Specifically, the statute requires the Department to file a petition to terminate parental rights if a child has been in custody for 15 of the most recent 22 months without reunification occurring. *In the Interest of Doe (2019-16)*, Idaho Docket No. 47130 (2019).

Idaho Code §16-1622(2)(g)(i) serves as an exception to that rule, relieving the Department of the requirement if the child has been placed with a relative. In other words, the exception gives the Department the option of declining to file a petition to terminate parental rights under certain circumstances. It does not have any bearing on any decision made by the magistrate court. *In the Interest of Doe (2019-16)*, Idaho Docket No. 47130 (2019).

Idaho Code §16-2002(3)(b) does not require the children to have been in the custody of the Department for 15 months at the time of trial, rather, it requires that the children be in the custody of the Department for 15 of the most recent 22 months at the time parental rights are

terminated. *Matter of Doe Children*, 164 Idaho 486, 491, 432 P.3d 35, 40 (2018) (holding that a magistrate court's finding of neglect under Idaho Code section 16-2002(3)(b) was supported by substantial, competent evidence when the children had been in the custody of the Department for 15 of the most recent 22 months at the time that the magistrate court ordered termination of parental rights). *In re Doe (2019-17),* Idaho Docket 47132 (2019).

2. Early Permanency Permitted Due to Lack of Case Plan Progress

Magistrate court did not err by granting early permanency before Mother had a full year to comply with her case plan because of her incarceration and Oregon residency. Mother had not complied with any prescribed treatment, she had obtained multiple new criminal charges, and when she was not in the State's custody she had not done anything to establish she would be in a place to safely parent the children. There is no requirement that Mother should have been provided a year to comply with her case plan. Instead, Idaho law requires permanency hearings be held *no later than* a year from the date the child is removed from the home or the court's order taking jurisdiction. I.C. § 16-1622(2)(b)). The court did not err in granting early permanency after finding Mother failed to make any significant changes in her circumstances in eight months. *In Interest of Doe,* 164 Idaho 143, 426 P.3d 1243, 1246–47 (2018). *See also In the Interest of Doe (2019-16)*, Idaho Docket No. 47130 (2019).

3. 15-Month Time Period Does Not Apply to Neglect Under I.C. §16-2002(3)(A)

The magistrate court could properly find that Mother lacked proper parental care and control, or subsistence, medical or other care or control necessary for Child's well-being because of the conduct or omission of Mother in failing to complete drug treatment. I.C. § 16-1602(31)(a). Mother's argument that there was no completion date set out in the case plan for substance abuse treatment is not applicable to a finding of neglect under Idaho Code section 16-1602(31). Section 16-1602(31) only requires a finding that a child was without proper parental care or control, or subsistence, medical or other care or control necessary for her well-being due to the conduct or omission of her parent. There is no statutory requirement in section 16-1602(31) of a finding that a parent has "fail[ed] to comply with a case plan" as there is with the other statutory bases for a finding of neglect under section 16-2002(3)(B). *Matter of Doe I*, 164 Idaho 849, 436 P.3d 670, 676 (2019).

Idaho Code section 16–2002(3)(a) and (b) are written in the disjunctive and there is no requirement that a magistrate court consider the statutory time frame of fifteen months in

custody when it makes a finding of neglect based on subsection (a) alone. *In re Doe*, 151 Idaho 356, 363–64, 256 P.3d 764 771–72 (2011); *In Matter of Doe,* 161 Idaho 398, 405, 387 P.3d 66, 73 (2016).

4. Timing of TPR Petition Filing

The Department may file a petition for termination any time after an adjudicatory hearing finding that the child comes within the purview of the Child Protective Act. A court is not required to enter a permanency order before a petition for termination can be filed. *In Matter of Doe*, 161 Idaho 398, 404, 387 P.3d 66, 72 (2016). *See also I.J.R. 48(a)* (petition may be filed at any time after entry of decree finding child within jurisdiction of CPA).

E. PROCEDURAL & EVIDENTIARY ISSUES

1. Applicable Rules

Idaho Juvenile Rules, Parts III-V, apply to Child Protection Act cases. *I.J.R. 1.* Idaho Rules of Civil Procedure apply to the extent they are not inconsistent with the Idaho Juvenile Rules, Idaho statutes or the law. *I.J.R. 29.* Idaho Rules of Evidence generally apply. *I.J.R. 48(b).* The I.R.E. do not apply to shelter care hearings or to the disposition portion of the adjudicatory hearing, except those rules related to privilege. I.J.R. 39(e), 41(c). The Idaho Rules of Family Law Procedure do not apply. *I.R.F.L.P. 101.*

2. Amendment of TPR Petition - Notice

The Idaho Rules of Civil Procedure Apply to the extent they are not inconsistent with the Juvenile Rules, statutes or the law. I.R.C.P. 29. Idaho Rule of Civil Procedure 15 applies to TPR trials.

In *Interest of Doe I (2019-39)*, 166 Idaho 546, 462 P.3d 74 (2020), the TPR Petition did not seek termination based on failure to comply with the court-ordered case plan. The State sought amendment at the close of its evidence based on the testimony presented. The Supreme Court first reiterated that the purpose of Rule 15(b) is to allow cases to be decided on the merits, rather than upon technical pleading requirements. *Interest of Doe I (2019-39)*, 462 P.3d at 83–84 (2020). It rejected Father's argument that an amendment to the petition should only be permitted if the amendment were associated with a theory that had been originally pleaded. *Id.* The Court also noted that Father had not shown any prejudice caused by the amendment:

It follows that the evidence Father could have presented to challenge the second basis

> for parental termination (neglect through failure to follow the case plan) would have been the same as evidence that Father presented to challenge the first basis (inability to discharge parental responsibilities). Father had every opportunity to participate in and craft the case plan, and Father's counsel had every opportunity to cross-examine Social Worker to establish whether Father had complied with it. In essence, Father's position is that the magistrate court should somehow blind itself to Father's lack of engagement in this process. To reject the amendment would not result in a decision on the merits. *See* I.R.C.P. 15(b)(1).

Id.

3. Appeal – Finality

Magistrate court entered a judgment that did not indicate the resolution of what the mother described as her "[R]ule 12(b)(6) claim of insufficient factual notice." In response to the mother's motion to correct the judgment, the magistrate court filed a second judgment that noted the resolution of the mother's issue. The mother then filed a notice of appeal that was timely based on the second judgment, but which was not timely based on the first judgment. Pursuant to I.R.C.P. 54(a)(1), a "judgment is final if . . . judgment has been entered on all claims for relief." The Idaho Supreme Court held that the first judgment was not a final, appealable judgment because the mother "had raised her claim of insufficient pleadings" and the first judgment did not resolve this "claim." It appears that the Idaho Supreme Court implicitly held that "claims for relief" under I.R.C.P. 54(a)(1) include legal defenses to claims and that, if any such defense is not resolved in a judgment, then the judgment is not final. *Doe v. Doe (2020-49)*, 169 Idaho 170, 492 P.3d 1129 (2021).

4. Continuance of TPR Trial

The court did not abuse its discretion in denying a second motion for continuance, after trial court had continued trial two weeks to allow for trial preparation. *Interest of Doe I (2019-39)*, 166 Idaho 546, 462 P.3d 74, 85 (2020). The court properly addressed Father's due process arguments, citing the relevant factors identified in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), before concluding that due process did not require a continuance. *Id.* Father refused to communicate with the Department, failed to appear at the various hearings, and offered no reasons for a continuance.

"Due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or

substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See, e. g., Goldberg v. Kelly, supra, 397 U.S., at 263-271, 90 S.Ct., at 1018-1022. *Mathews v. Eldridge,* 424 U.S. 319, 334–35, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18 (1976)." *Interest of Doe I (2019-39)*, 166 Idaho 546, 462 P.3d 74, 85 n. 1 (2020).

Mother requested a trial continuance due to her incarceration in Georgia; Mother did not know if she would be able to post bail and travel to Idaho for the trial. On appeal, Mother clarified that she sought an indefinite continuance "until Mother could return to Idaho." The Court affirmed the denial of a continuance because: (1) Mother failed to assert any cogent argument challenging the denial of her motion; (2) did not articulate any abuse of discretion; (3) did not identify any factors weighing in favor of continuing the termination hearing indefinitely or otherwise (4) did not assert a due process violation; and (5) did not identify any prejudice resulting from the denial of the motion. *Interest of Doe (2020-33),* 168 Idaho 105, 480 P.3d 143, 147 (Ct.App.2020).

Because Mother stipulated to proceeding with testimony by video, in lieu of continuing the termination hearing, the invited error doctrine precludes her from challenging the magistrate court's denial of her motion for a continuance. *Interest of Doe (2020-33),* 168 Idaho 105, 480 P.3d 143, 147 (Ct.App.2020).

Doe claimed the initial two-week TPR trial continuance was inadequate. Doe did not object to the length of the continuance in the trial court or explain why two weeks would be inadequate. As to the denial of the second request for a continuance, the Court held that the record before the magistrate court, Doe's refusal to communicate with IDHW, his failure to appear at the various hearings, and the unsupported reasons provided for a continuance, foreclosed Doe's claim that the magistrate court abused its discretion. *Dep't of Health & Welfare v. Doe*, *(2019-39)*, 166 Idaho 546, 462 P.3d 74 (Ct.App.2020).

5. Court's Alleged Over-Emphasis of Future Substance Abuse

Record also belies Doe's contention that the magistrate, by emphasizing Doe's substance abuse issues, sought a guarantee of future sobriety. To the contrary, Doe's case plan and the magistrate's findings contemplated instances where Doe may relapse. Specifically, the case plan required Doe to complete a parenting safety plan for her children identifying how she would provide for their safety and stability in the event she had a substance abuse relapse. Rather than seeking a guarantee of sobriety, the magistrate stated that it regarded Doe's failure to prepare such a relapse safety plan significant and

relevant to its decision.

Idaho Dep't of Health & Welfare v. Doe, 161 Idaho 745, 751–52, 390 P.3d 866, 872–73 (Ct. App. 2017).

6. Court's Recitation of Facts

When making findings of fact and conclusions of law, a trial judge is not required to recite every piece of evidence it considered or relied upon in reaching its decision. The magistrate made clear in his opinion that he considered Jane's progress while incarcerated, noting "she is to be commended for that." Although the magistrate might not have specifically written each accomplishment that Jane suggests is relevant, it is nevertheless clear that the magistrate considered all relevant evidence in reaching its decision. *Matter of Doe Children*, 162 Idaho 69, 394 P.3d 112, 120 (Ct. App. 2017).

7. Evidence of Incidents Involving Substance Abuse

Court did not abuse its discretion by allowing admission at the termination hearing of a police video depicting an interaction between Father and law enforcement. The video showed law enforcement's discovery of "bath salts" and other drug paraphernalia on Father's person and in his residence during a search for weapons. Court determined the video was relevant about Father's lack of progress in substance abuse treatment. Father claimed that because the drug charges were subsequently dismissed, the video was overly prejudicial and its admission was an abuse of the court's discretion. A lower court's determination of whether the probative value of evidence admitted at a hearing outweighs its prejudicial effect is reviewed for an abuse of discretion. Father has failed to demonstrate, or even attempt to demonstrate, that an abuse of discretion occurred under any part of the four-part standard applied by this Court. *Matter of Doe I,* 437 P.3d 33, 44 (Idaho 2019).

Where a case plan was developed, in part, to address Doe's significant substance abuse issues, testimony concerned Doe's intoxication and unruly behavior during an unrelated incident (and not the resulting criminal charges), given the timing of the incident, was relevant to the termination proceedings for that purpose. *Idaho Dep't of Health & Welfare v. Doe*, 161 Idaho 745, 749, 390 P.3d 866, 870 (Ct. App. 2017).

8. Exclusive Jurisdiction

The magistrate court lost jurisdiction to enter a judgment terminating Doe's parental

rights when CP case was filed in another county before the original TPR proceeding became final. When the CP case court found jurisdiction of the children under the CPA, that court had exclusive jurisdiction to terminate parental rights under I.C. § 16-2003. *Matter of Doe II (2020-14),* 167 Idaho 313, 469 P.3d 641, 642 (Ct.App. 2020).

9. Hearsay

"The general rule is that where hearsay evidence is admitted without objection, it may properly be considered in determining the facts; the important question being the weight to be given such evidence." The majority view is that hearsay evidence admitted without objection "is as strong as any other legally competent evidence." *Matter of Doe (2017-6)*, 162 Idaho 280, 283, 396 P.3d 1162, 1165 (2017)(citations omitted).

Although the petition is filed in the underlying CPA case, no part of the CPA case record may be used to meet the burden of proof at the TPR trial unless: (a) the part offered is admissible under the I.R.E., or (b) the parties stipulate to admission. *I.J.R. 48(b); compare I.C. §16-2009* (relevant and material information of any nature, including that contained in reports, studies or examinations, may be admitted and relied upon to the extent of its probative value, subject to right to cross-examination).

(a) Letter From Child to Judge

Admission of letter from child to the judge was not error on grounds of relevance and hearsay. The thoughts and fears of a child who is the subject of an action under the Child Protective Act are clearly relevant. Although the magistrate did not specifically address the hearsay objection, the evidence was admissible as an exception to the hearsay rule under I.R.E. 803(3). Idaho Rule of Evidence 803(3) allows evidence, which might normally be excluded as hearsay, to be admitted if it is "a statement of the declarant's then existing state of mind, emotion, sensation, or physical condition...." The letter in this case was to show the child's state of mind, *i.e.*, her fears regarding return to the parent and her current concerns. *In Interest of S.W.,* 127 Idaho 513, 519, 903 P.2d 102, 108 (Ct. App. 1995).

(b) Department/GAL Reports

Without a proper hearsay exception, the Department report is inadmissible hearsay. *In re Doe (2019-12),* Idaho Docket No. 47007 (Ct.App.2019). To the extent I.C. §16-2009 allows impermissible hearsay evidence it is not valid and should not be relied on for that purpose over a valid objection. *Id. See also Interest of Doe I (2019-47)*, 166 Idaho 788, 464 P.3d 1, 4 (Ct. App.

2020).

The magistrate court abused its discretion by admitting the entire Department Narrative Report based on the limited foundation the prosecutor offered to establish the document as a business record under Rule 803(6). Although some entries may arguably qualify as business records, many entries do not meet the rule's foundational requirements. Examples of entries which are not admissible under Rule 803(6) include: (1) entries describing negative information about Mother provided to the Department by unidentified individuals who may not have a duty to the Department to provide accurate information; (2) entries containing double hearsay, namely information an unidentified person conveyed to another who in turn conveyed that information to the Department; and (3) entries failing to identify the Department employee entering the information in the Narrative Report. *Interest of Doe I (2019-47)*, 166 Idaho 788, 464 P.3d 1, 4 (Ct. App. 2020).

When entries in a report are admitted because they are not offered for the truth of the matter (non-hearsay), the court must limits its reliance on the report simply to the fact that the Department received information regarding Mother. *Interest of Doe I (2019-47)*, 166 Idaho 788, 464 P.3d 1, 6 (Ct. App. 2020).

Idaho Code § 16–1631 requires the guardian ad litem to investigate the facts of the petition and to prepare a report for the court. In addition to the report being hearsay, many portions of the report relate to statements made by third persons either to the guardian ad litem or to others. It was error for the magistrate to admit the guardian ad litem report into evidence in its entirety. However, Father does not contend that the report was misleading or surprising, and acknowledges that none of the magistrate's findings appear to be based solely on information from this report. Even if the report had been excluded, the magistrate's decision would have been the same. The magistrate's failure to sustain the objection to the report is harmless error. *In Interest of S.W.*, 127 Idaho 513, 519–20, 903 P.2d 102, 108–09 (Ct. App. 1995).

<u>10. Parent Incarcerated in Another State – Due Process</u>

Due process did not require father incarcerated in another state to be transported, at state expense, to hearing on petition to terminate his parental rights, where attorney was appointed to represent father and father's testimony was available by deposition. *In Interest of Baby Doe,* 130 Idaho 47, 50-51, 936 P.2d 690, 693-694 (Ct. App. 1997).

11. Placement Not a Necessary Factor in Determining Best Interests

The court did not need to consider where the child was placed in order to properly terminate Mother's parental rights. Once the Department has legal custody of a child under the CPA, the Department and not the court has the authority to determine where the child should live." *Matter of Doe (2017-16)*, 163 Idaho 565, 570, 416 P.3d 937, 942 (2018) (citing *In re Doe*, 134 Idaho 760, 767, 9 P.3d 1226, 1233 (2000)).

Even if the Department's decisions were relevant to the termination of parental rights, those decisions are only subject to approval by the magistrate court. I.C. § 16-1629(8) ("The department, having been granted legal custody of a child, shall have the right to determine where and with whom the child shall live ... all other determinations relating to where and with whom the child shall live shall be subject to judicial review by the court and, when contested by any party, judicial approval."). This review is for the "limited purposes outlined in the statute." *Matter of Doe*, 163 Idaho at 570, 416 P.3d at 942 (citing *In re Doe*, 134 Idaho at 767, 9 P.3d at 1233 (listing purposes)). *Matter of Doe I,* 164 Idaho 883, 436 P.3d 1232, 1238 (2019).

12. Remoteness of Evidence

Doe argued that evidence of his inability to discharge parental duties was too stale to be sufficient to terminate his parental rights. The Court first noted it defers to a magistrate court's decision about what evidence is "too remote" and that remoteness refers to weight, not admissibility. Second, the Court recited the principle that substantial and competent evidence is such evidence as a reasonable mind might accept as adequate to support a conclusion and noted that a reasonable mind would accept the available evidence to support the conclusion that Doe's rapid decline over a three-month period showed his inability to discharge his parental responsibilities. Third, the Court stated that the bare minimum for discharging parental responsibilities is presence in a child's life. There was substantial and competent evidence that Do failed to satisfy this bare minimum because he effectively removed himself from the child's life and did not appear for a year's worth of hearings, demonstrating that the child's best interest was not a main priority. Moreover, Doe did not stay in contact with his counsel over long stretches of time. *Dep't of Health & Welfare v. Doe*, *(2019-39)*, 166 Idaho 546, 462 P.3d 74 (2020)

13. Testimony by Video or Phone—Constitutional Right to Be Present

I.C. §16-2009 merely states that TPR proceedings shall be heard by the court without a

jury, may be conducted in an informal manner, and may be adjourned from time to time. The Idaho Rules of Civil Procedure apply to CPA proceedings to the extent they are not inconsistent with the Idaho Juvenile Rules, statutes or the law. *I.J.R. 29.* Regarding evidentiary/motion hearings, I.R.C.P. 7.2 allows a court to hold hearings telephonically or by video conference for "any evidentiary hearing, when no oral testimony is to be introduced at the hearing, except the court may allow testimony by video teleconference if the parties stipulate." Regarding trials, I.R.C.P. 43(a) requires live testimony in open court, unless a statute or rule provides otherwise. Rule 43(a) allows, "for good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location."

Doe was initially present by means of a telephonic connection to the online videoconference, but ultimately did not have an opportunity to testify because her connection terminated shortly after the hearing began. Consequently, Doe did not have a meaningful opportunity to be heard. Court erred in finding a waiver of trial attendance. Although the record does not reveal why Doe did not reconnect, the record is also insufficient to support the conclusion that her failure to do so was a voluntary choice to waive any of her rights. *In the Matter of Jane Doe II (2020-54)*, 169 Idaho 82, 491 .3d 644 (Ct.App.2021). In light of the presumption against waiver of a constitutional right and the lack of evidence in the record to support a finding that Doe voluntarily absented herself from the hearing, the appellate court vacated the judgment terminating Doe's parental rights and remanded for further proceedings. *Id.*

"Although the Idaho Supreme Court's emergency orders for public safety and to mitigate the spread of COVID-19 provide that termination trials are to be held in person, Rule 7.2 of the Idaho Rules of Civil Procedure still remains in effect. As the magistrate court noted in its order denying Mother's motion for a continuance, Rule 7.2(a)(2) provides that a court may allow testimony by video if the parties so stipulate." *Interest of Doe (2020-33),* 168 Idaho 105, 480 P.3d 143, 147 (Ct.App.2020).

Providing for Mother's testimony and her presence at the termination hearing remotely versus delaying the hearing indefinitely until Mother was released from incarceration in Georgia and returned to Idaho was neither an abuse of discretion nor a violation of Mother's procedural due process rights. *State, Dep't of Health & Welfare v. John Doe*, 130 Idaho 47, 52, 936 P.2d 690,

695 (Ct. App. 1997) (noting "'convict does not have a constitutional right to personally appear in a civil suit where he has been permitted to appear through counsel and by deposition, if appropriate'"; adopting balancing test to determine whether incarcerated parent had right to appear personally at termination hearing; and concluding court did not abuse discretion by affording alternate means of presenting parent's testimony). *Interest of Doe (2020-33),* 168 Idaho 105, 480 P.3d 143, 147 (Ct.App.2020).

14. TPR Petition Defects

The petition to terminate parental rights cited to statutory grounds for termination, but did not allege any facts that could support termination. Because the petition failed to allege facts supporting termination, the mother's due process rights were violated, requiring the petition to be dismissed without prejudice. *Doe v. Doe (2020-49)*, 169 Idaho 170, 492 P.3d 1129 (2021).

Department admits the second "citation was off by a digit" in the TPR Petition and should have been a citation to Idaho Code § 16-2002(3)(b) in its claim for lack of case plan compliance. The parent asserted that the typographical error violated I.R.C.P. 8(a)(2),5 which requires pleadings to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." The Court founds that a petition for termination of parental rights need not specify "precisely which of the six subsections of I.C. § 16-2005 under which [the Department] was proceeding." *Interest of Doe (2020-37),* 168 Idaho 74, 479 P.3d 467, 473-474 (Ct.App.2021). The Department was also not required to specify which statutory definition of neglect forms the basis for a particular allegation. *Id.* The petition asserted sufficient facts to put the parent on notice that the Department would seek to establish neglect as defined in I.C. § 16-2002(3)(b). *Id.* The court did not address whether I.R.C.P. 15(b) applied because this argument was raised for the first time in the appellant's reply brief. *Id.*

Guardians' Verified Petition contained no *factual* allegations regarding either Mother's or Father's conduct giving rise to the grounds for TPR alleged. The Court concluded that the Petition for Termination violated Mother's due process rights because it failed to assert any factual allegations against either natural parent. *John Doe I and Jane Doe I v. John Doe (2020-52)*, Idaho Supreme Court Docket Nos. 48479 & 48499 (April 2021).

15. Transcript Deficiencies

Although the microphone malfunctioned, resulting in poor or no audio recording of some

of the termination hearing, a more than sufficient transcript of the hearing was created. Under Idaho Code section 16-2009, a hearing for termination of a parent-child relationship requires "[s]tenographic notes *or* mechanical recording of the hearing." I.C. § 16-2009 (emphasis added). Since an official transcript was created by a court reporter, this requirement was achieved and Mother's due process rights were not violated because of the recording malfunction. *Matter of Doe I,* 165 Idaho 33, 437 P.3d 33, 39 (2019).

16. UCCJEA Applies

Because the Child Protection Act (CPA) does not address out-of-state custody orders, and the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) is the more specific statute, the UCCJEA governs jurisdiction over a child in a CPA case when there is an out-of-state custody order regarding the child.

Under the UCCJEA, a court may take temporary emergency jurisdiction if the child is present in the state and the child has been abandoned, abused, or threatened with abuse. The court must also "immediately communicate" with the out-of-state court "to resolve the emergency" and "determine a period of duration of the temporary order." The magistrate court in this case satisfied this requirement by communicating via email with the court clerk of the out-of-state court. The out-of-state court, by not responding to the Idaho magistrate court's assertion of jurisdiction, implicitly declined jurisdiction. Although this was sufficient, the Idaho Supreme Court recommended obtaining an order from the out-of-state court relinquishing jurisdiction. *Dep't of Health & Welfare v. Doe (2021-14)*, 169 Idaho 328, 495 P.3d 1016 (2021).

XIII. INDIAN CHILD WELFARE ACT CASES

A. APPLICABLE CODE SECTIONS AND RULES

1. I.J.R. 58

In any child custody proceeding where the court or any party knows or has reason to know that a child who is the subject of the proceedings is a member of, or is eligible for membership in an Indian tribe, notice of the proceedings shall be provided to the child's parent(s) or Indian custodian and to the appropriate Indian tribe. If the child is an Indian child as defined by the Indian Child Welfare Act, then the provisions of the ICWA, 25 U.S.C. § 1901, et seq., and 25 C.F.R. § 23.11 shall apply.

"If the child is an Indian child as defined by the Indian Child Welfare Act (ICWA), then ICWA applies. ICWA is discussed in detail in Chapter [XI] of the Idaho Child Protection Manual. Failure to comply with ICWA could substantially compromise the finality of any proceeding under the Child Protective Act, the termination of parental rights statute and/or the adoption statute." *Comment of the Child Protection Committee to I.J.R. 58 (2006).*

2. ICWA, 25 U.S.C. §§1901-1922

(a) Applicability

For the purposes of this chapter, except as may be specifically provided otherwise, the term—

(1) "child custody proceeding" shall mean and include--
(i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;
(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;
(iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and
(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

25 U.S.C.A. §1903(1).

(b) Beyond a Reasonable Doubt Standard

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony

> of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

25 U.S.C.A. § 1912(f). Any Indian child who is the subject of any action for termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title. 25 U.S.C.A. § 1914.

B. IDAHO CASE LAW

1. "Indian Child" Determination

Court may have to make the determination is the tribe has not determined the matter at trial:

> If a state court does not have a conclusive determination from the tribe or the BIA regarding a child's eligibility for tribal membership, the trial court must make its own determination regarding the child's eligibility for tribal membership. The party asserting the applicability of ICWA has the burden of producing the necessary evidence for the trial court to make this determination.
>
> In this case, the evidence presented to the trial court established the applicability of ICWA. The evidence contained the tribe's requirements for "enrollment." Although enrollment and membership are not synonymous, eligibility for enrollment is evidence that the requirements for membership are met. 44 Fed.Reg. 67,584, 67,586 (enrollment is a common but not exclusive evidentiary means of determining membership in a tribe). Enrollment is an administrative function. The core of the inquiry underICWA is eligibility for membership in the parent's tribe. The affidavit of the enrollment director explains the only reason the tribe could not make a conclusive determination regarding the child's eligibility for enrollment was because the application was missing documentary evidence regarding paternity in the form of a birth certificate or paternity affidavit. The trial court, however, found that the father is one of the child's parents. This finding, together with the father's ownership of land on the reservation, establishes the child's eligibility for membership in the tribe. The other requirements for enrollment go to the administrative aspect of enrollment and are not requirements of eligibility for tribal membership.

Matter of Baby Boy Doe, 123 Idaho 464, 470, 849 P.2d 925, 931 (1993).

There is no exception for Indian children who live with or are removed from a non-Indian parent:

> We also reject application of an Indian family requirement because the provisions of ICWA do not contain any limitation based on where the child is located. Limiting ICWA to situations in which an Indian child is being removed from an existing Indian family is,

> therefore, a judicially created exception to ICWA. Congress passed ICWA to limit state court power by creating mandatory protective procedures and minimum evidentiary standards that must be applied in child custody proceedings concerning Indian children. In light of the structure and nature of ICWA, it is inappropriate to use a judicially created exception to circumvent the mandates of ICWA.

Matter of Baby Boy Doe, 123 Idaho 464, 471, 849 P.2d 925, 932 (1993).

<u>2. Active Efforts to Prevent Breakup of the Indian Family</u>

(a) Standard of Proof

The magistrate court was not required by statute or ICWA to find by clear and convincing evidence that DHW made active efforts to prevent the breakup of the family. *In re Doe,* 157 Idaho 920, 342 P.3d 632, 636 (2015)(25 U.S.C. §1912(d) requires that a party seeking termination of parental rights with respect to an Indian child "shall satisfy" the court that active efforts to prevent the breakup of the family have been made, not that the party show by clear and convincing evidence that such efforts have been made).

(b) Active Efforts Finding

The term active efforts, by definition, implies heightened responsibility compared to passive efforts. Beyond simply developing a plan for the parent to follow, active efforts require that the state actually help the parent develop the skills required to keep custody of the children. Court found substantial and competent evidence to support the magistrate court's finding that DHW made active efforts to prevent the breakup of the family. *In re Doe,* 157 Idaho 920, 342 P.3d 632, 637 (2015). *See also Idaho Dep't of Health & Welfare v. Doe,* 152 Idaho 797, 805, 275 P.3d 23, 31 (Ct.App.2012). Active efforts included:

> The State arranged for weekly supervised visits with TSD that would give the parents the opportunity for feedback with regard to the challenges they faced in caring for him, but Doe discontinued participation in the visitation sessions. TSD was enrolled in a form of individual counseling specifically designed to strengthen his relationship with his parents and Doe was encouraged to participate, but attended only a handful of times. TSD was scheduled for regular medical and therapeutic appointments for the purpose of understanding and addressing his developmental delays, but Doe never attended more than a few. DHW arranged for Doe to take parenting classes, but she dropped out and did not return. Finally, DHW arranged for Doe to participate in multiple drug and alcohol treatment programs and, though Doe completed one such program, she eventually dropped out of another and resumed her regular abuse of alcohol.

Courts must consider whether the State made active efforts to provide remedial services over the course of the proceeding as a whole, despite one or more alleged failings during particular

periods. Given the extensive efforts identified by the magistrate court over the proceeding as a whole, there is substantial and competent evidence to support its finding of active efforts even if DHW erred in the ways alleged by Doe. *In re Doe,* 157 Idaho 920, 342 P.3d 632, 639 (2015).

"Absent Doe's lengthy incarceration, we would conclude that, by not providing Doe with any information about how to complete a substance abuse assessment or mental health evaluation and failing to respond to Doe's correspondence, the Department failed to make active efforts with respect to Doe to meet the requirement of 25 U.S.C.A. §1912(d). However, we are persuaded by the reasoning of the Alaska Supreme Court that a parent's incarceration significantly affects the scope of the active efforts that the state must make to satisfy the statutory requirement. *A.A.,* 982 P.2d at 261. Further, we agree that the length of incarceration is an appropriate factor to consider in evaluating the state's efforts. *id.*" *Idaho Dep't of Health & Welfare v. Doe,* 152 Idaho 797, 806–07, 275 P.3d 23, 32–33 (Ct. App. 2012).

(c) 2016 BIA Guidelines

Idaho's appellate courts have referenced BIA Guidelines published by the U.S. Secretary of the Interior in the 1995 *Matter of Doe* opinions. Section E of the updated 2016 BIA Guidelines for Implementing the ICWA contains multiple, detailed examples of what Indian Tribes deem to be "active efforts." Many of those described efforts are regularly employed by IDHW in Idaho.

3. Consent to TPR

Court held that 25 U.S.C. §1913(a) applied to non-Indian parent, because it offers greater protection to parents of Indian children. The federal statute requires judicial certification that the terms and consequences of the consent were fully explained:

> Where any parent or Indian custodian voluntarily consents ... to termination of parental rights, *such consent shall not be valid unless* executed in writing and recorded before a judge of a court of competent jurisdiction and *accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent* or Indian custodian....

25 U.S.C. § 1913(a) (emphasis added). Because mother's consent to termination of parental rights did not contain the required judicial certification, the consents were deemed invalid. *Matter of Baby Boy Doe,* 127 Idaho 452, 456, 902 P.2d 477, 481 (1995).

4. Correct Application of ICWA Is Question of Law

Whether the trial court correctly applied ICWA to the facts of this case is a question of law and is subject to free review by the appellate court. *Doe v. Doe,* 158 Idaho 614, 616, 349

P.3d 1205, 1207 (2015); *In re Doe,* 157 Idaho 920, 342 P.3d 632, 635 (2015); *Matter of Baby Boy Doe,* 127 Idaho 452, 456, 902 P.2d 477, 481 (1995).

5. Due Process and Procedural Safeguards

The term "good cause" was intended to give the trial court flexibility in placing children under the ICWA. The trial court's determination of good cause would not be overturned absent an abuse of discretion. In re Doe, No. 40786, 2013 WL 6009213, at *7 (Idaho Ct. App. July 26, 2013)(unpublished), *citing In re Doe,* 127 Idaho 452, 902 P.2d 477 (1995).

6. ICWA Notices: Hearsay

Under ICWA, if IDHW has reason to believe that a child is an Indian child, then it must notify tribes who may either assert jurisdiction or join the state case. 25 U.S.C. § 1912. Mother's counsel objected to the admission the tribe's written responses to IDHW's ICWA notices. The magistrate court overruled all of these objections. The Supreme Court affirmed the magistrate court. *In re Doe (2015-21)*, 160 Idaho 154, 163, 369 P.3d 932, 941 (2016)(because Mother has not demonstrated a substantial affect to her rights based on admission of the notices, we affirm the magistrate court's ruling without evaluating its exercise of discretion).

7. Qualified Expert Witness (QEW)

> The tribe has tacitly admitted that Mr. Floyd Wyasket, a Ute Indian and expert called by the adoptive parents, was a qualified expert witness under ICWA. Our review of Wyasket's trial testimony leads us to conclude that the trial court did not err in determining that Wyasket was a qualified expert witness. Among other things, Wyasket has an MSW degree from Utah State University, and was pursuing his PhD degree at Utah State. At the time of trial he was the Chief Appellate Judge for the Ute Indian Tribe; has been personally involved in several ICWA appeals; has worked as a counselor in foster and adoption cases on his reservation; he has placed Indian children outside their homes where the respective children were abused, neglected, and abandoned; he actually lived on Baby Boy Doe's father's reservation for a time; and he interviewed the child in this case and observed the bonding with the adoptive parents. Wyasket concluded in his professional opinion that permanent removal of the child from the adoptive home would likely result in serious emotional harm. Mr. Wyasket alone seems to satisfy the expert witness criterion under ICWA.

Matter of Baby Boy Doe, 127 Idaho 452, 459, 902 P.2d 477, 484 (1995).

8. State Courts Have Concurrent Jurisdiction

Tribes do not have exclusive jurisdiction over children who reside within reservation boundaries. Public Law 280 and the State's assumption of jurisdiction under it constitute an

exception to ICWA's exclusive jurisdiction provision for private TPR with adoption proceedings. *Doe v. Doe,* 158 Idaho 614, 620, 349 P.3d 1205, 1211 (2015).