

# **TERMINATION OF PARENTAL RIGHTS**

by  
The Honorable Howard Smyser  
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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 of my notes, 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.

Whether one uses Rule 10.2.1 of the Blue Book or ALWD, both instruct that the correct cite for many of the parental rights termination cases in this outline is "*In re Doe*". However, using the same case name for so many different cases is confusing. For the reader's convenience, full case cites are used throughout this research.

A full outline on terminating parental rights can be found on the Bench Guide, located online at: <https://km.idcourts.us/km/PLDefault.aspx>. Information on the termination of parental rights proceeding can be found in the Idaho Supreme Court's Child Protection Manual, located at: <http://www.isc.idaho.gov/childprotection/main.htm>

## 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. See *In re Doe*, \_\_\_ Idaho \_\_\_, \_\_\_, 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 \_\_\_\_\_, \_\_\_\_\_, 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 \_\_\_\_, \_\_\_\_, 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 adoptive father, the biological father of a child conceived or born during the father’s marriage to the 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 \_\_\_\_, \_\_\_\_, 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...shall not preclude a determination that the father failed to meet the requirements of a subsection. *In re Doe*, \_\_ Idaho \_\_\_\_, \_\_\_\_, 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*, \_\_ Idaho \_\_\_\_, \_\_\_\_, 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*, \_\_\_ Idaho \_\_\_, \_\_\_, 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*, \_\_\_ Idaho \_\_\_, \_\_\_, 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*, \_\_\_ Idaho \_\_\_, \_\_\_, 244 P.3d 232, 235 (2010).

**3. 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*, \_\_\_ Idaho \_\_\_, \_\_\_, 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*, \_\_\_ Idaho \_\_\_, \_\_\_, 244 P.3d 232, 235 (2010).

**4. 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 \_\_\_\_, \_\_\_\_, 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 (8<sup>th</sup> ed. 2004); *In re Doe*, 2010 WL 5176851 (Idaho 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* 2010 WL 5176851 (Idaho 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. See *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). See *In re Doe*, \_\_\_ Idaho \_\_\_\_, \_\_\_\_, 244 P.3d 1226, 1228 (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. See *In re Doe*, \_\_\_ Idaho \_\_\_, \_\_\_, 244 P.3d 232, 236-37 (2010).

## 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. See *In re Doe*, \_\_\_ Idaho \_\_\_, \_\_\_, 244 P.3d 180, 186 (2010).

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 fullest extent 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 Efforts.** 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 reasonable efforts 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”. See *In re Doe*, 2010 WL 1194462 (Idaho App. 2010)(J. Gutierrez dissenting).

**4. Reasonable Efforts Under Idaho Code §16-1629(9).** The time standards under Idaho Code § 16-1629(9) 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.” I.C. § 16-1629(9). Such a presumption may be rebutted if the court finds that filing a petition to terminate parental rights would not be in the best interest of the child or the Department has not made reasonable efforts to reunify the child with his or her family. *Id.* See *In re Doe*, \_\_\_ Idaho \_\_\_\_, \_\_\_\_, 244 P.3d 180, 186 (2010). (Emphasis added.)

## **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 lodged 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.

**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 is not holding that an affirmative defense must be filed.*

### **C. CASE LAW DESCRIPTION OF REASONABLE EFFORTS.**

**1. In re Doe, 2010 WL 1194462.** The testimony presented at trial demonstrated that the Department attempted to hold weekly meetings with Doe to help her comply with her case plan and discuss any issues. Furthermore, Doe was provided with weekly visitation with J.D. which was subsequently increased to twice a week. However, because of Doe's actions, the visits were later decreased to once a week. Doe was advised of appointments and attempts were made to contact Doe to involve her in the process, but she did not respond. By her own testimony, Doe disagreed with much of the Department's efforts. However, there is substantial and competent evidence to support the magistrate's conclusion that reasonable efforts were made by the Department to reunite Doe and J.D. *In re Doe*, 2010 WL 1194462 (Idaho App. 2010).

**2. 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).

**3. *In re Doe*, 244 P.3d 180 (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. See *In re Doe*, \_\_\_ Idaho \_\_\_, \_\_\_, 244 P.3d 180, 186 (2010).

**4. In re Doe, 149 Idaho 564.** Jane and John contended that the Department did not make reasonable efforts at reunification because it did not provide greater financial assistance for the couple to go to counseling and complete the other requirements of their case plan. Their argument is without merit. There was substantial and competent evidence presented at the termination hearing that the Department made reasonable efforts to reunify the parents with their children. The children were allowed to stay in the custody of Jane and John until their own noncompliance forced the Department to seek a custody order. The Department repeatedly tracked Jane and John down after they moved without notice or permission. The Department then coordinated a cooperative effort with officials in Wyoming after Jane and John relocated the children there. The testimony presented at the termination hearing reveals numerous visits and encouragement to comply with the case plan requirements. Jane and John were allowed frequent visitation with their children and could speak to their children as often as they desired over the phone. However, Jane and John failed to take advantage of those opportunities. The magistrate did not err by finding that the Department had made reasonable reunification efforts. See *In re Doe*, 149 Idaho 564, \_\_\_\_, 237 P. 3d 661, 666 (Ct. App. 2010).

**5. Judge Gutierrez's Dissenting Opinion.** In a dissenting opinion, J. Gutierrez found that Doe was making substantial progress towards her recovery, was participating in and complying with her drug court requirements, and that only six months had passed from the time that Doe's case plan was approved until the magistrate ordered the Department to prepare a permanency plan which led to the recommendation to terminate Doe's parental rights. J. Gutierrez felt six months was not enough time to

make reasonable efforts at meaningful reunification between Doe and J.D. See 2010 WL 1194462 (Idaho App. 2010)(J. Gutierrez dissenting).

### 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, stating:

(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:

(a) The parent has abandoned the child.

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

2002(5) defines “abandoned”, stating:

(5) “Abandoned” means the parent has willfully failed to maintain a normal parental relationship including, but not limited to, reasonable support or regular personal contact. 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; provided, however, where termination is sought by a grandparent seeking to adopt the child, the willful failure of the parent to maintain a normal parental relationship as provided herein without just cause for six (6) months shall constitute prima facie evidence of abandonment.

##### **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 re 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).

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. *See 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 And/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. Wilful 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).

## **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. See *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.** 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 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).

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).

**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.** 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 Children.** 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. See *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*, \_\_\_ Idaho \_\_, \_\_, 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.** 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).

#### **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).

**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*, \_\_\_\_\_ Idaho \_\_\_\_\_, \_\_\_\_\_, 244 P.3d 190, 194 (2010).

**4. Idaho Cases Interpreting 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).

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 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*, \_\_\_\_ Idaho \_\_\_\_, \_\_\_\_, 244 P.3d 190 (2010).

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).

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*, \_\_\_Idaho\_\_\_, \_\_\_\_, 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*, \_\_\_Idaho\_\_\_, \_\_\_\_, 244 P.3d 190, 196 (2010).

#### IV.

### **NEGLECT BY CONDUCT OF THE PARENT**

#### **A. APPLICABLE CODE SECTIONS.**

**1. Idaho Code § 16-2005(1)(b).** *Idaho Code* §16-2005(1)(b) 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:

\* \* \*

(b) The parent has neglected or abused the child.” (Emphasis added.)

**2. Idaho Code § 16-2002(3).** *Idaho Code* § 16-2002(3)(a) defines “neglected”

as follows:

“(3) “Neglected” means:

(a) conduct as defined in section 16-1602(25), Idaho Code;...” (Emphasis added.)

**3. Neglect As Defined By Idaho Code §16-1602(25): Conduct.** *Idaho Code* § 16-2002(3)(a) says “neglected” means conduct as defined by *Idaho Code* § 16-1602(25) of the *Child Protective Act*. *Idaho Code* § 16-1602(25) 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 because 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.

**(a) Idaho Case Law Recognizing I.C. § 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(25)(a) and (b) as a child:

- (a) Who is without proper parental care and control, or subsistence, medical or other care 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.

**1. Abdicating Parental Role.** 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).

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).

**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. Alcohol And Drugs.** 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. 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. See *In re Doe*, 133 Idaho 805, 809, 992 P.2d 1205 (1999).

**(b) History Of Substance Abuse.** 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).

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).

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).

**(c) Ability To Care For Child.** 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).

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).

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).

**(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).

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).

**4. 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).

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

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 anytime 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).

**6. Case Plan.** In deciding neglect under *Idaho Code* § 16-1602(25), 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.** 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.** 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).

**7. Cleanliness Of The Home.** 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).

**8. 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).

**9. Counseling.** 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). 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).

**10. 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. See *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 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).

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)

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).

**(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).

**11. Developmental Delays.** 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).

**12. 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).

**13. 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).

**14. Employment.** Idaho case law allowed 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).

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).

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).

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

**16. Foster Care Improvement.** 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).

**17. Harm To The Child.** 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); "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).

**18. 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).

**19. 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).

**20. 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).

**21. Housing.** 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).

**22. 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).

**23. 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.** 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. See *In re Doe*, 137 Idaho 758, 761-62, 53 P.3d 341 (2002).

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).

**24. 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).

**25. Mental Health.** 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.)

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).

EDITOR'S NOTE: *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."

**26. Moves.** 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).

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

**28. 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 Can Not 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).

**29. Parenting Classes.** 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).

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, 731 (2010).

**30. Past Conduct Of The Parent.** 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).

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.** 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).

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).

**33. 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).

**34. 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).

**35. 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).

**36. 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).

**37. 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).

**38. 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.** 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). 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).

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). 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). 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). 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).

**(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).

**39. Unsupervised Child.** 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 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 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).

**40. Visits.** 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) 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:

\* \* \*

(b) The parent has neglected or abused the child.” (Emphasis added.)

##### **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 in a child protective case or the case plan and reunification of the child with his or her parent(s) has not occurred within the time standards set forth in section 16-1629(9), *Idaho Code*.”

**3. Time Standards Of Idaho Code § 16-1629(9).** In relevant part, *Idaho Code* § 16-1629(9) reads “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 care, the department shall initiate a petition for termination of parental rights.”

## **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).

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. See 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.** Idaho Code § 16-2002(3)(b)

defines “neglected” as “[t]he parent has failed to comply with the court’s orders in a child protective act case or the case plan, and reunification of the child with his or her parent(s) has not occurred within the time standards set forth in section 16-1629(9), Idaho Code”. Idaho Code § 16-1629(0) states:

There 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. The presumption may be rebutted by a finding of the court that the filing of a petition for termination of parental rights would not be in the best interest of the child or reasonable efforts have not been provided to reunite the child with his family, or the child is placed permanently with a relative.

This statute “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, 731 (2010).

## **C. COURT MUST ANALYZE THE CASE PLAN IN DETAIL.**

**1. Parent Knew Of Case Plan.** The court pointed out that Doe had signed the case plan, knew of its terms, and had simply been unwilling to comply. *In re Doe*, \_\_\_ Idaho \_\_\_\_, \_\_\_\_, 244 P.3d 180, 187 (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. *In re Doe*, \_\_\_ Idaho \_\_\_\_, \_\_\_\_, 244 P.3d 180, 186 (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. *In re Doe*, \_\_ Idaho \_\_\_\_, \_\_\_\_, 244 P.2d 180, 187 (2010).

#### **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. 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, 732 (2010).

**3. Excuses By The Parent.** 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. *In re Doe*, \_\_ Idaho \_\_\_\_, \_\_\_\_, 244 P.3d 180, 186 (2010).

**4. 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. *In re Doe*, \_\_\_ Idaho \_\_\_, \_\_\_, 244 P.3d 180, 186 (2010).

**5. 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. See *In re Doe*, 148 Idaho 832, 837, 230 P.3d 442 (Ct. App. 2010).

**6. 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. *In re Doe*, \_\_\_ Idaho \_\_\_, \_\_\_, 244 P.3d 180, 186-87 (2010).

**7. 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. See *In re Doe*, 149 Idaho 627, \_\_\_\_, 238 P.3d 724, 728-29 (Ct. App. 2010).

**8. 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).

**9. Psychological Evaluations.** 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).

**10. 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. See *In re Doe III*, 149 Idaho 409, \_\_\_\_, 234 P.3d 733, 737 (2010).

**11. 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. *In re Doe*, \_\_\_\_ Idaho \_\_\_\_, \_\_\_\_, 244 P.3d 180, 187 (2010).

**12. 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).

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).

**13. Time Standards.** 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). *In re Doe*, \_\_\_\_ *Idaho* \_\_\_\_, \_\_\_\_, 244 P.3d 180, 186 (2010).

## VI.

### **ABUSED.**

#### **A. APPLICABLE STATUTES.**

**1. Idaho Code § 16-2005(1)(b).** *Idaho Code* § 16-2005(1)(b) 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:

\* \* \*

(b) 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, or other similar forms of sexual exploitation harming or threatening the child's health or welfare or mental injury to the child.

## VII.

### **BEST INTERESTS OF PARENT AND CHILD**

#### **A. APPLICABLE CODE SECTIONS.**

**1. Idaho Code §16-2005(3).** *Idaho Code* §16-2005(3) states:

(3) 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.** 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. *See 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. See *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).

**5. Support.** 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. See *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).

**6. Quantity Of Children.** 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.** 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 Parent.** 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.** 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).

## 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.

**IX.**

**INCARCERATION**

**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.

**X.**

**BEST INTERESTS OF THE CHILD**

**A. APPLICABLE LAW.**

**1. The Two-Part Test For Termination.** Idaho courts employ a two-part test in determining whether to terminate a parent-child relationship. The first part of this test holds that the parent-child relationship may only be terminated if one or more statutory grounds for termination listed in *Idaho Code* § 16-2005(1) are found to exist. *See Idaho Code* § 16-2005; *In re Doe*, 123 Idaho 502, 503-04, 859 P.2d 963 (Ct. App. 1993).

If the threshold question is answered in the affirmative, the second prong of the test instructs the court to determine whether the best interest of the child would be served by the termination of parental rights. *Idaho Code* § 16-2005; *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); *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 interests 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. Caregiver's Effect On Child.** 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).

The father was unpredictable, threatening and irrational; the stepfather was respectful, committed, and loving. *In re Doe*, 149 Idaho 392, \_\_\_\_\_, 234 P.3d 716, 721 (2010).

**2. 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).

**3. 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. See *In re Doe*, 133 Idaho 805, 809, 992 P.2d 1205 (1999).

**4. Criminal Behavior.** 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).

**5. Drug Usage.** 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).

**6. Harm To Child.** Actual injury is not required to find terminating parental rights is in the best interests of the children. See *In re Doe*, \_\_\_\_ Idaho \_\_\_\_, \_\_\_\_, 244 P.3d 180 189 (2010).

**7. Improvement In Child When Away From Parent.** 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 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).

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 foster parent testified to improvements in the children's behavior while in her care. See *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).

**8. Incarceration.** 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. See *In re Doe*, 148 Idaho 832, 840, 230 P.3d 442 (Ct. App. 2010).

**9. Long Recovery Period.** “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.ed 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).

**10. Parent’s Shortcomings.** 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).

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).

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. See *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).

**11. Passage Of Time.** 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).

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

**13. Professional Opinions.** 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 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).

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 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).

**14. Relapses.** The child protection case progressed for over two years. During this time, the mother and father enjoyed periods of progress that were repeatedly followed by desistence and relapse. Rather than promoting stability, the ongoing pattern created even greater uncertainty in the lives of their children.

**15. 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).

**16. Stability and Permanency.** 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, noting 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. *In re Doe*, \_\_\_ Idaho \_\_\_, \_\_\_, 244 P.3d 180, 189 (2010).

The interest in affording the child a stable home life and stable parental relationship(s) is significant. *In re Doe*, 149 Idaho 392, \_\_\_, 234 P.3d 716, 722 (2010).

**17. 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. *In re Doe*, \_\_\_ Idaho \_\_\_, \_\_\_, 244 P.3d 180, 188 (2010).

**18. Grounds To Terminate Parental Rights Are Not Minimal.** In finding that the termination of parental rights was in the best interest of the children, the magistrate stated:

The court finds that the grounds for termination in this case are not minimal. Simply stated, [Jane Doe] has continually disregarded the physical, emotional and educational needs of the children; she has repeatedly failed to undertake and discharge her parental obligations toward the care and control of the children; and she has failed to provide for their subsistence, education, medical or other care necessary for their well-being. Her drug addiction and domestic violence constitute a danger to the children. *In re Doe*, 145 Idaho 662, 665, 182 P.3d 1186 (2008).

## XI.

### **DISABILITY OF A PARENT.**

#### **A. IDAHO STATUTES.**

**1. Defining Disability.** *Idaho Code* § 16-2002(17) reads as follows:

(17) "Disability" means, with respect to an individual, any mental or physical impairment which substantially limits one (1) or more major life activities of the individual including, but not limited to, self-care, manual tasks, walking, seeing, hearing, speaking, learning, or working, or a record of such an impairment, or being regarded as having such an impairment. Disability shall not include transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, other sexual behavior disorders, or substance use disorders, compulsive gambling, kleptomania, or pyromania. Sexual preference or orientation is not considered an impairment or disability. Whether an impairment substantially limits a major life activity shall be determined without consideration of the effect of corrective or mitigating measures used to reduce the effects of the impairment.

**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).** Idaho Code § 16-2005(1)(d) provides that a court may terminate parental rights if it finds “that termination of parental rights is in the best interests of the child and that... [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”. Subsection (6) of the statute states, “If the parent has a disability...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.” *In re Doe*, 149 Idaho 207, 233 P.3d 138, 141 (2010).

Doe contends the magistrate failed to appreciate that she is disabled and had access to supportive services. Idaho Code § 16-2005(6) states:

“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...” *In re Doe*, 149 Idaho 626, \_\_\_, 238 P.3d 724, 729 (Ct. App. 2010).

**2. Parent’s Burden Of Persuasion On Supportive Services.** 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).