

2016

Robbing the Cradle: The Use of Mediation in Parental Rights Termination with Evidence of Drug Abuse by the Mother

M. Katherine Kerbs

Follow this and additional works at: <http://scholarship.law.missouri.edu/jdr>

 Part of the [Dispute Resolution and Arbitration Commons](#)

Recommended Citation

M. Katherine Kerbs, *Robbing the Cradle: The Use of Mediation in Parental Rights Termination with Evidence of Drug Abuse by the Mother*, 2016 J. Disp. Resol. (2016)

Available at: <http://scholarship.law.missouri.edu/jdr/vol2016/iss1/14>

This Comment is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Journal of Dispute Resolution by an authorized administrator of University of Missouri School of Law Scholarship Repository.

Robbing the Cradle: The Use of Mediation in Parental Rights Termination with Evidence of Drug Abuse by the Mother

M. KATHERINE KERBS*

I. INTRODUCTION

Drug abuse is one of the most prevalent epidemics in our country. Drug use among mothers creates the possibility that they will find themselves defending their parental rights in front of a judge. In one study, 8.3 percent of women between 15 and 44 had used illegal drugs.¹ This percentage nearly doubled to 15.1 percent in women between the ages of 15 and 17.² The court system can be intimidating for people encountering it for the first time and is too formulaic for the intricate problems caused by drug abuse. Mediation, an alternative dispute resolution method, is more informal than court proceedings, provides the right balance of court authority, and solves problems creatively to create conditions in which mothers can overcome drug addictions and be reunited with their children.

This Comment will explore the use of mediation in termination of parental rights proceedings where there is evidence of drug abuse by the parents. First, this Comment will give an overview of termination proceedings and examine a specific statute's guidelines for termination. Then, this Comment will provide an overview of mediation and its uses in family law. Finally, this Comment will argue for increased use of mediation in termination of parental rights cases where there is evidence of drug abuse by the mother.

II. TERMINATION OF PARENTAL RIGHTS: AN OVERVIEW

Terminating parental rights is one of the most extreme punishment proceedings, "leav[ing] the parent with no right to visit or communicate with the child, to participate in, or even to know about, any important decision affecting the child's

* A.A., Cotley College 2012; B.A., William Jewell College 2014; J.D., University of Missouri 2017. I would like to thank the editorial staff of the *Journal of Dispute Resolution* for the time spent editing this comment. I would also like to thank the many professors who have shaped my education and contributed to my development as a writer. Above all, I would like to thank my parents and brother for their unwavering love and support.

1. Katherine Sikich, *Peeling Back the Layers of Substance Abuse During Pregnancy*, 8 DEPAUL J. HEALTH CARE L. 369, 372 (2005).

2. *Id.*

religious, educational, emotional, or physical development.”³ Termination of parental rights did not exist at common law and is a statutory construction.⁴ State statutes outline factors, such as abandonment, parental unfitness, and abuse or neglect, which are considered grounds for termination.⁵ In Missouri, for example, termination requires proof of at least one of the statutory factors⁶ by “clear, cogent, and convincing evidence.”⁷ The state must show by a preponderance of the evidence the best interests of the child.⁸ Termination proceedings require treading the line between parental freedom and child safety.⁹

There are three types of termination cases: termination by consent, contested termination by mandatory filing, and discretionary-contested termination.¹⁰ Termination by consent occurs most frequently when the child is put up for adoption shortly after birth.¹¹ Contested termination by mandatory filing requires a state’s juvenile office or children’s division to file for termination in the presence of certain factors.¹² Discretionary-contested termination involves the presence of factors that allow, but do not require, the juvenile office or children’s division to file for termination.¹³ Discretionary-contested termination proceedings may also be initiated by individuals, such as the child’s relatives or foster parents.¹⁴

The juvenile office or children’s division may, at its discretion, file for termination if the statutory factors for discretionary-contested termination exist.¹⁵ These factors include situations where the parent has left the child without support; where the parent has left the child and has not made efforts to contact the child despite being able to do so; where the child has been physically, sexually, or emotionally abused or neglected; where the parent has a mental condition or chemical dependency that prevents him or her from being able to provide consistent care for the child; and where the parent has failed to provide food, shelter, clothing, and education for the child despite being able to do so.¹⁶

When termination proceedings begin, either by mandatory or discretionary filing, the court must consider additional factors in judging the parent’s conduct, including, (1) the effect the parent’s actions had on the child; (2) whether those actions were sufficient to be classified as abuse or neglect; and (3) the likelihood of future

3. Elizabeth Mills Viney, *The Right To Counsel In Parental-Rights Termination Cases: How A Clear And Consistent Legal Standard Would Better Protect Indigent Families*, 63 SMU L. REV. 1403, 1407 (2010). Voluntary terminations for the purposes of adoption can include post-adoption contact agreements, in which the adoptive and natural parents agree on the level of involvement the natural parents will have with the child after the adoption is final and the rights are terminated.

4. Shawn R. McCarver, *Termination of Parental Rights In Missouri – Part 2 Recent Court Decisions Arguably Mark Terminations More Difficult*, 62 J. MO. B. 138, 138 (2006).

5. See generally ALA. CODE § 12-15-319 (1975); DEL. CODE ANN. tit. 13 § 1103 (2009); MINN. STAT. § 260C.301 (2013); N.C. GEN. STAT. § 7B-1111 (2013); WIS. STAT. § 48.415 (2015).

6. See MO. REV. STAT. § 211.447.5 (2014) (an example of statutory factors).

7. McCarver, *supra* note 4, at 138.

8. *Id.*

9. Viney, *supra* note 3, at 1409.

10. McCarver, *supra* note 4, at 138.

11. *Id.* at 138-39.

12. *Id.* at 139. The juvenile office or children’s division is the state office responsible for the welfare of children in its jurisdiction and is the government entity required to make termination filings. In Missouri, the powers and duties of the juvenile office are enumerated in MO. REV. STAT. § 211.401.

13. MO. REV. STAT. § 211.447.4 (2014).

14. MO. REV. STAT. § 211.447.6 (2014).

15. MO. REV. STAT. § 211.447.4 (2014).

16. *Id.* at 5(1)-(2).

harm to the child.¹⁷ Proving these factors becomes a surprisingly high bar for the state because neither mere questionable behavior and poor character nor just any criminal act committed by a parent is sufficient for termination.¹⁸

The United States Supreme Court in *M.L.B. v. S.L.J.* found that states have such a high bar to make a successful case for termination because the rights of parents to raise their children in the manner they choose is a strongly held value protected by the Fourteenth Amendment.¹⁹ Justice Ginsberg, writing for the majority, noted that termination cases have a great risk of error and that an improper decision to terminate could have permanent effects on family relationships.²⁰

State courts have also recognized the constitutionally protected rights of parents to raise their children in the manner they see fit.²¹ Thus, precise adherence to statutory language in finding factors sufficient for termination and making termination decisions is required for a termination to be successful.²² Such care by both attorneys and judges is important in termination cases because they result in the permanent severing of families.²³

Not only do terminations have a great risk of error, but they are also difficult to contest. Appellate procedures are increasingly cost prohibitive for indigent parents.²⁴ Additionally, the standard of review for terminations is generally a difficult one. For example, in Missouri, the standard of review is abuse of discretion, which requires the trial court decision to be unreasonable or otherwise untenable.²⁵

Administration through the juvenile office is not the only way to file for termination of parental rights, however. The Missouri statute provides that private individuals, usually the child's other parent or other relatives, can file a petition for termination on the following grounds: parent's mental disease or defect; chemical dependency; single or recurring events of physical, mental, emotional, and psychological abuse; and the continued failure of the parent to provide for the child's needs, despite being financially and physically capable of doing so.²⁶

Missouri's termination statute provides a model for terminating parental rights by outlining the conduct required for termination cases when the petition is filed by the juvenile office or by an individual.²⁷ The Missouri juvenile office must file a petition for termination when any of the following conditions exist: (1) the child has been in foster care for 15 of the last 22 months; (2) a court has determined a child under one year old is abandoned; (3) a court has determined that a parent has committed murder or voluntary manslaughter, or has aided or abetted, attempted, conspired, or solicited the murder of another one of his or her children; (4) or a court has determined that a parent committed a felony assault that caused serious bodily injury to one of his or her children.²⁸

17. McCarver, *supra* note 4, at 139 (citing *In re K.A.W.*, 138 S.W.3d 1, 12 (Mo. 2004) (en banc)).

18. *Id.* at 139.

19. Jennifer Wriggins, *Parental Rights Termination Jurisprudence: Questioning the Framework*, 52 S.C. L. REV. 241, 248 (citing *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996)). Justice Ginsberg's opinion is noted for its emotional language.

20. *Id.* at 251.

21. McCarver, *supra* note 4, at 146.

22. *Id.*

23. Viney, *supra* note 3, at 1407.

24. See *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996).

25. *In re B.J.H. Jr.*, 356 S.W.3d 816, 824 (Mo. Ct. App. W.D. 2012).

26. MO. REV. STAT. § 211.447.5 (2014).

27. *Id.* at 1.

28. *Id.* at 2.

The Missouri statute also provides exceptions to filing a termination proceeding. For example, when the child is living with another relative or when another compelling reason exists for termination not being in the child's best interest, and if the juvenile office finds termination is unnecessary for those reasons, then the office is relieved of its duty to file a petition for termination.²⁹

Judges have discretion to weigh the termination factors as they please.³⁰ Only one factor is necessary to enforce termination.³¹ Once grounds for termination are established and a petition is filed, the court makes findings of fact, including, (1) emotional ties to the birth parent; (2) the amount of contact the parent has had with the child; and (3) the extent to which the parent has provided financially for the child when able to do so, even when the child was not in the parent's care.³²

III. MEDIATION

A. General Uses and Benefits of Mediation

Mediation is an alternative dispute resolution process where a neutral mediator helps the

parties reach a mutually acceptable agreement.³³ Mediation is perhaps the most popular alternative dispute resolution method and is one of the oldest.³⁴ Mediation has many advantages over traditional dispute resolution methodology,³⁵ including privacy, management of emotional cases, preservation of relationships of parties, balancing control and power of relatively unequal parties, flexibility, and efficiency.³⁶

The mediation process follows a basic framework and goes through the following stages: selecting a mediator and a location for mediation; defining the goals and purposes of the mediation; examining the positions of each side; identifying where it will be possible to reach an agreement easily and the issues where the parties differ the most; preliminary agreements; final bargaining; confirming the outcome, perhaps in a written agreement; and implementing the agreement.³⁷

29. *Id.* at 4.

30. *Id.* at 1.

31. *Id.* at 5.

32. MO. REV. STAT. § 211.447.7 (2014). Additional factors include: whether additional services from the juvenile office would help the parent regain permanent custody of the child; the parent's lack of interest in the child; the fact that the parent has committed a felony and will not be able to provide a stable home for the child for several years (although incarceration itself is not grounds for termination); and deliberate acts by the parents or others that put the child in danger. *Id.*

33. Mary F. Radford, *Advantages and Disadvantages of Mediation in Probate, Trust, and Guardianship Matter*, 1 PEPP. DISP. RESOL. L.J. 241, 241 (2001).

34. *Id.*

35. *Id.*

36. *Id.*

37. Von J. Christiansen, *Ritual and Resolution: The Role of Reconciliation in the Mediation Process*, 52 J. DISP. RESOL. 66, 70 (1997).

Mediation also usually involves a cessation of litigation and thereby allows the parties to reach an agreement.³⁸ Alleviating the tensions between parties encourages the parties to be open and honest with each other.³⁹ Because litigation is on hiatus and mediation sessions are usually highly confidential, in most cases nothing said during mediation can later be used in litigation if the parties fail to reach an agreement.⁴⁰ Formal court procedures such as rules of evidence are abandoned, and the mediator makes no binding decisions.⁴¹ The informality of mediation and facilitation by a neutral party allows the parties to be more capable of reaching an agreement.⁴²

Mediation should be viewed as a process of both conciliation and reconciliation.⁴³ Mediation encourages parties to listen carefully to the concerns of each other.⁴⁴ The parties meet together and then adjourn to caucuses with the mediator in which the mediator helps the parties identify the points on which they agree and disagree, determine what their interests are, find possible resolutions, and accept compromise without binding them to a settlement offer.⁴⁵ The mediator often plays the role of devil's advocate, helping parties to realize the weaknesses in their own cases and encouraging them to see the dispute from the perspective of the other side.⁴⁶ Reconciliation is achieved in this attempt to understand the other party and to recognize one's own shortcomings.⁴⁷ This reconciliation does not just produce an effective and agreeable solution, it makes the parties more understanding of the motivations of the other side, less harmfully aggressive about their own interests, and gives both sides a better attitude toward the conflict as a whole.⁴⁸

B. Mediation in Family Law Cases

The benefits of mediation are especially important in family law cases. The privacy and confidentiality of mediation allows family members to openly express their concerns without worrying about family secrets becoming part of the public record.⁴⁹ Additionally, the parties will likely continue to associate with each other after mediation, and privacy allows them to solve their problems inconspicuously.⁵⁰ Family law cases are usually filled with emotional issues that result in clouded thinking and an inability to be reasonable.⁵¹ This makes family law cases well

38. *Mediation Defined*, JAMS, <http://www.jamsadr.com/mediation-defined/> (last visited Mar. 12, 2016).

39. *Id.*

40. *Id.*

41. *Mediation Guide, A Guide to the Mediation Process for Lawyers and Their Clients*, JAMS, <http://www.jamsadr.com/mediation-guide/> (last visited Mar. 12, 2016).

42. *Id.*

43. Christiansen, *supra* note 37, at 70.

44. *Id.* at 72.

45. *Id.* at 73 (quoting Nancy H. Rogers & Craig A. McEwen, *Mediation, Law, Policy, Practice* 8 (1989)).

46. *Id.* at 72.

47. *Id.* at 74.

48. *Id.* at 76.

49. Radford, *supra* note 33, at 242.

50. *Id.*

51. *Id.*

sued for mediation.⁵² Mediation allows parties to express their emotions confidentially and utilizes a third party to help parties think logically and clearly.⁵³

Preserving relationships is essential in family cases.⁵⁴ Litigation is lengthy and facilitates feelings of animosity, whereas mediation can reach agreements in a much shorter period of time⁵⁵ and can reduce conflict.⁵⁶ Because the parties have a hand in creating the agreement, they are more likely to ensure its success.⁵⁷ Mediation is also more flexible than litigation.⁵⁸ In litigation, only one party is successful, and the outcomes often produce losing results for both sides.⁵⁹ Mediation allows parties to create solutions that will work best in their situation and to compromise in order to reach a mutually agreeable result.⁶⁰ Additionally, mediation's efficiency allows cases to move more quickly and eliminates court costs.⁶¹ Finally, mediation is not limited to business hours and judges' schedules. Instead, it can be arranged to occur at a time and place that meets the needs of all parties.⁶²

Mediation has become commonplace in divorce proceedings.⁶³ There is some concern that mandatory mediation without lawyer involvement reinforces the power imbalance between parties.⁶⁴ However, proponents of divorce mediation advocate for close regulation of mediation to ensure fairness and argue that mediation's informal characteristics lead to more creative solutions to complicated problems.⁶⁵ Family law procedures are often used in place of self-determination, whereas mediation enhances self-determination in an area of law that is integral to people's everyday lives.⁶⁶ Mediation is also a preferred method for privacy in dealing with sensitive family and financial matters that arise in divorce.⁶⁷ The great success of mediation in divorce cases stems from the highly personal nature of the issues at stake, issues that are so important to people they want to decide them for themselves whenever possible.⁶⁸

Mediation has also been used in termination of parental rights cases to help determine when termination is really in the best interests of the children and the parents. In a 15-year study of child abuse and neglect cases across jurisdictions,⁶⁹

52. See Sophie B. Mashburn, "Throwing the Baby Out With the Bathwater": Parenting Coordination and Pennsylvania's Decisions to Eliminate its Use, 2015 J. DISP. RESOL. 194.

53. Radford, *supra* note 33, at 242.

54. *Id.* at 244.

55. *Id.* at 245.

56. Mashburn, *supra* note 52, at 194.

57. Radford, *supra* note 33, at 245.

58. *Id.* at 247-49.

59. *Id.* at 247.

60. *Id.*

61. *Id.* at 249.

62. *Id.* at 250.

63. Solangel Maldonado, *Cultivating Forgiveness: Reducing Hostility and Conflict After Divorce*, 43 WAKE FOREST L. REV. 441, 468-69 (2008).

64. Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1319-20 (1995).

65. *Id.* at 1320.

66. *Id.* at 1324.

67. Anthony F. Cottone, *Questions and Answers About Divorce Mediation*, 43 R.I. B.J. 7, 11 (1995).

68. *Id.*

69. Nancy Thoennes, *What We Know Now: Findings from Dependency Mediation Research*, 47 FAM. CT. REV. 21, 21-22 (2009). States participating in the study included Alaska, Arizona, Arkansas, California, Colorado, Connecticut, District of Columbia, Iowa, Louisiana, Michigan, New Jersey, New York, Ohio, and Virginia. This article is the compilation of data obtained from those studies between 1990 and 2005.

60 to 80 percent of mediation cases resolved every issue that would have been before the court.⁷⁰ Another 10 to 20 percent of cases resolved at least some of the issues before the court.⁷¹ Only 10 percent of the cases in the 15-year study did not reach any sort of agreement in mediation.⁷² Mediation is especially helpful in termination cases because it allows for a full explanation of what termination means long term for parents, children, and other family members.⁷³ The study also found that mediated and non-mediated cases with comparable fact patterns reached similar conclusions.⁷⁴ These parallel results contribute to the legitimacy of conflict resolution through mediation.⁷⁵ However, the mediated agreements tended to be “more specific and often more generous”⁷⁶ in terms of child support, visitation, and other issues.⁷⁷

The study also found that mediation increased parental involvement in cases because it gave them a sense of agency.⁷⁸ Because parents were invited to the table to voice their positions and concerns, parents felt like they had more input in the result.⁷⁹ Mediation is preferable to litigation for these parents because the mediation session moves at their pace, not according to the depth of the judge’s docket.⁸⁰ Parties also have a deeper sense of trust in a neutral mediator, especially for parents who are not represented by attorneys.⁸¹ In the study, 90 percent of parents said that mediation gave them the opportunity to share their concerns, and 80 percent felt listened to and understood.⁸²

Another benefit of mediation over traditional litigation is that it allows the extended family to become a part of the discussion in termination of parental rights cases. In court proceedings, the extended family has a definite interest in the outcome but lacks standing to become a part of the case.⁸³ Extended family may play a crucial role in the “creation and completion” of the plan developed in either court or mediation, so it is important to allow them to be part of the process.⁸⁴

The study indicates that the model of reaching mediated agreements before adjudicating the issues in court appears to be working.⁸⁵ In the cases studied in San Francisco, only 11 percent had a contested review hearing in the two years after the mediation plan was developed.⁸⁶ Statewide, 40 percent of the California cases’ court files were marked “complete” six months following mediation.⁸⁷ Only seven percent of the Washington, D.C., cases had new filings where there had been a mediated agreement.⁸⁸

70. *Id.* at 29.

71. *Id.*

72. *Id.*

73. *Id.* at 30.

74. *Id.*

75. Thoennes, *supra* note 69, at 30.

76. *Id.*

77. *Id.* at 30-31.

78. *Id.* at 32.

79. *Id.*

80. *Id.* at 33.

81. Thoennes, *supra* note 69, at 32.

82. *Id.*

83. *Id.* at 33.

84. *Id.*

85. *Id.* at 30.

86. *Id.* at 34.

87. Thoennes, *supra* note 69, at 35.

88. *Id.*

However, mediation is not without its drawbacks. Mandatory mediation programs have been criticized as creating needless roadblocks in divorce proceedings.⁸⁹ Mediation is disliked by some lawyers because it leaves their already vulnerable clients without representation and increases the powerlessness of the weaker party.⁹⁰ Lawyers who represent women, who are frequently the more exploited party, are especially concerned about this.⁹¹ Many critics believe that mediation is fundamentally less fair than litigation.⁹² They believe that the court proceedings equalize the parties and produce fairer results.⁹³ Ultimately, a good mediator will ensure that a fair agreement is reached and encourage the parties to consult with their attorneys before signing.⁹⁴

Mediation is a helpful tool for lawyers to minimize some of the stresses of litigation, especially in cases that are already full of stressors.⁹⁵ Family law cases, especially, benefit from many aspects of mediation; privacy, flexibility, opportunity for creative solutions, and cost effectiveness are some of the most apparent.⁹⁶ When it comes to termination of parental rights proceedings, these benefits are even more pronounced because mediation allows unique opportunities for parents to be heard and for the inclusion of multiple parties to help facilitate the reaching of end goals.

IV. TERMINATION OF PARENTAL RIGHTS AND MEDIATION WITH EVIDENCE OF DRUG ABUSE

The most prevalent potential harm to a child due to drug use comes before the child is even born. Pregnant mothers may turn to drugs for any number of reasons, including “abusive partners, poverty, poor health care, and racism.”⁹⁷ States can address drug use by pregnant women with punitive or non-punitive measures.⁹⁸ Advocates of punitive measures say they serve to deter other pregnant women from drug use, while proponents of non-punitive measures say that rehabilitation, not punishment, should be the goal.⁹⁹ Supporters of non-punitive measures point out that the United States Supreme Court and health care professionals recognize drug addiction as a treatable illness.¹⁰⁰

The possible complications that arise from drug use during pregnancy are long-recognized in the health community.¹⁰¹ Marijuana use has been linked to low birth weight and preterm labor.¹⁰² Opiates pose health risks that include placental abruption, eclampsia, still birth, and preterm labor.¹⁰³ An even greater risk comes from

89. McEwen et al., *supra* note 64, at 1319.

90. *Id.*

91. *Id.*

92. *Id.* at 1323.

93. *Id.* at 1327.

94. *Id.* at 1332.

95. *See supra* notes 41-50 and accompanying text.

96. *See supra* notes 43-59 and accompanying text.

97. Sikich, *supra* note 1, at 369-70.

98. *Id.* at 370.

99. *Id.*

100. *Id.*

101. *Id.* at 371.

102. *Id.* at 373.

103. Sikich, *supra* note 1, at 373.

the mother sharing needles, which facilitates the transmission of HIV/AIDS, hepatitis, and MRSA.¹⁰⁴ Crack cocaine has significant health risks for the mother, including placental abruption, low birth weight, and early delivery.¹⁰⁵ However, the use of alcohol during pregnancy is more harmful to the fetus than other controlled substances, and tobacco use, which results in unhealthy pregnancies, is the most preventable risk because the mother can quit smoking to prevent exposing the fetus to tobacco.¹⁰⁶

Many solutions to maternal drug use have been created in civil and criminal law, including child welfare laws, protective incarceration, criminalization of substance abuse during pregnancy, and criminal prosecution.¹⁰⁷ Drug use during pregnancy violates child welfare laws and leads to the termination of the mother's parental rights.¹⁰⁸ This is a "drastic punitive measure"¹⁰⁹ because termination of parental rights is "severe and irreversible."¹¹⁰

Several states have adopted termination of parental rights statutes that include drug use as a ground for termination.¹¹¹ As discussed above, there are many conditions that lead to drug abuse, and drug abuse "does not, ipso facto, make someone unfit to care for a child."¹¹² Drug abuse during pregnancy also does not guarantee harm to the fetus;¹¹³ and overstating the danger of such abuse leads to severe and unhelpful responses to the issue.¹¹⁴ Perhaps the greatest concern is that the termination proceedings can be completed before the mother has an opportunity to overcome her addiction.¹¹⁵

The Adoption and Safe Families Act of 1997 allows termination of parental rights proceedings to be expedited and reduces the states' burden to provide reunification services before seeking termination.¹¹⁶ These expedited cases make the period before filing for termination very short: nine to 15 months in most cases.¹¹⁷ Substance abuse programs shorter than 90 days are generally ineffective.¹¹⁸ In fact, the suggested length of treatment is nine to 12 months.¹¹⁹ Women with economic challenges in addition to their drug problems face extensive waiting periods to get into free treatment programs.¹²⁰ A woman who only has nine to 15 months to get clean in order to save her parental rights is in a difficult position when it will take her at least that long to obtain and complete the treatment she needs.¹²¹

104. *Id.*

105. *Id.* at 374. Though highly publicized, the predicted negative effects of crack cocaine on fetuses are, in reality, not as prevalent as reported. *Id.* at 373-74.

106. Ian Vandewalker, *Taking the Baby Before It's Born: Termination of the Parental Rights of Women Who Use Illegal Drugs While Pregnant*, 32 N.Y.U. REV. L. & SOC. CHANGE 423, 448 (2008).

107. Sikich, *supra* note 1, at 377.

108. *Id.* at 378.

109. *Id.*

110. *Id.* (citing *Santosky v. Kramer*, 455 U.S. 745, 759 (1982)).

111. Vandewalker, *supra* note 106, at 448.

112. *Id.* at 423, 439.

113. *Id.* at 424.

114. *Id.*

115. *Id.* at 428.

116. *Id.* at 441.

117. Vandewalker, *supra* note 106, at 441.

118. *Id.*

119. *Id.* at 441-42.

120. *Id.* at 442.

121. *Id.*

Additionally, the costs produced by termination (legal fees, court costs, foster care, etc.) are exorbitant in comparison to the costs of treatment.¹²² A government study in Minnesota found that the savings to the health care and criminal justice systems by allowing treatment before seeking termination of parental rights covered the costs of treatment.¹²³ Statutes that support termination due to prenatal drug use do not work, disrupt family life, disproportionately affect the poor, and should be avoided by judges.¹²⁴

The Connecticut Supreme Court contemplated parental rights termination in *In re Valerie D.*¹²⁵ The court terminated the mother's parental rights because of her use of intravenous cocaine while pregnant and because of her failure to develop and maintain a relationship with the child.¹²⁶ The mother's appeal alleged, *inter alia*, that (1) the statute did not authorize termination for prenatal conduct and (2) that the reason for the lack of relationship with the child was due to the state's actions, not her own failings.¹²⁷ The court did not set out to evaluate the morality of the mother or condemn her for submitting to the demands of her addiction.¹²⁸ Instead, the court considered whether or not the legislature intended to include prenatal conduct in determinations of whether to terminate parental rights.¹²⁹ The court concluded that the legislature had no such intention.¹³⁰

In the mother's second claim, the Connecticut Supreme Court concluded that the lack of parent-child relationship was not the mother's fault.¹³¹ She was unable to be near the child until she was cured of her communicable disease, did not have reliable transportation, and was trying to commit to her treatment and rehabilitation.¹³² However, the mother had extensive contact with the infant while both of them remained in the hospital.¹³³ The infant was discharged into the state's care and later placed with a foster parent.¹³⁴ While the infant was in the care of the foster parent, the mother arranged for and made repeated visits to the child as she was able.¹³⁵ The mother entered and failed to complete a short-term drug treatment program and, at a meeting with a psychologist, estimated that she would need a year to get completely clean and be capable of caring for the child.¹³⁶ The same psychologist found there was no significant parent-child relationship, despite evidence to the contrary.¹³⁷ The court found termination on the basis of a lack of parent-child relationship was unfair in the circumstances of this case, where the child was incapable of forming "memories or feelings for the natural parent."¹³⁸

122. *Id.* at 452.

123. Vandewalker, *supra* note 106, at 452.

124. *Id.* at 462.

125. *In re Valerie D.*, 223 Conn. 492 (Conn. 1992).

126. *Id.* at 497-98.

127. *Id.* at 498-99.

128. *Id.* at 511-12.

129. *Id.* at 512.

130. *Id.* at 513.

131. *Valerie D.*, 223 Conn. at 532.

132. *Id.* at 528-32, n. 28.

133. *Id.* at 528.

134. *Id.*

135. *Id.*

136. *Id.* at 529.

137. *Valerie D.*, 223 Conn. at 529.

138. *Id.* at 531-32. In a previous case, the court held that the forming of "memories or feelings" was the ultimate question in termination cases where the petition was based on lack of a parent-child relationship. *In re Jessica M.* 217 Conn. 459, 467-68 (1991).

On the other hand, sometimes termination is the best or only option. In *R.W. v. Ind. Dep't of Child Servs. (J.W.)*, an Indiana state appellate court upheld a state trial court's termination of the father's parental rights.¹³⁹ The child was born with drugs in his system, and the mother tested positive for drugs at the time of the birth.¹⁴⁰ The Department of Child Services (DCS) took custody of the child shortly after birth because, in addition to the drugs in the child's system, the parents engaged in domestic violence at the hospital and seemed unable or uninterested in caring for the child.¹⁴¹ The state trial court approved taking the child into custody and required the parents to cooperate with DCS, to remain in contact with DCS, to follow the visitation schedule, to refrain from using drugs and alcohol, to attend regular drug screenings, to obtain employment, and to complete a drug treatment program.¹⁴² At periodic case reviews in the following six months, the father failed to pass drug tests, did not comply with DCS, and failed to maintain visitation.¹⁴³ Just after the child's first birthday, the court held another case review and found that the father was still noncompliant.¹⁴⁴

After continued noncompliance by both parents and at the recommendation of DCS, the court terminated the parents' rights when the child was approximately 18 months old.¹⁴⁵ In this case, the court was flexible and understanding of the parents' needs, but the parents were unwilling or unable to complete the reunification plan. When parents are unable to provide a safe, drug-free home for their children after repeated attempts, termination of parental rights is in the best interests of the child.¹⁴⁶

Even though drugs are a major harm to a fetus and invite a presumption of parental unfitness,¹⁴⁷ not all prenatal exposure to drugs causes damage to the fetus.¹⁴⁸ Proponents of speedy termination argue that drug users are ill-suited to rational thought and need the structure that the court system provides.¹⁴⁹ However, the court system moves quickly in termination proceedings, which does not allow the mother time to obtain treatment for her addiction.¹⁵⁰ Mothers have strong incentive to attempt to get clean immediately following the birth of a child.¹⁵¹ The prospect of losing a new baby is an excellent motivator for a mother to attend and complete rehabilitation and treatment programs.¹⁵² Because these programs require nine to 12 months to be successful,¹⁵³ it is essential that termination does not occur before the woman has a chance to complete treatment.

139. *R.W. v. Ind. Dep't of Child. Servs. (J.W.)*, 35 N.E.3d 317 (Ind. Ct. App. 2015).

140. *Id.* at 1.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 5.

145. *R.W.*, 35 N.E.3d at 7.

146. *Id.*

147. Vandewalker, *supra* note 106, at 426-27. Many states find that evidence of drug abuse is relevant even without statutory mandate. *Id.*

148. *Id.* at 424.

149. Sarah Clark Bowers, *Alternative Dispute Resolution In Alabama: Dependency Cases: Litigate Or Mediate?*, 70 ALA. LAW. 428, 432-433 (2009).

150. Vandewalker, *supra* note 106, at 428.

151. *Id.* at 455.

152. *Id.*

153. *Id.* at 441-42 (2008).

Because termination of parental rights is the ultimate punishment for a woman with drug abuse problems, mediation is a better choice than formal court proceedings.¹⁵⁴ Drug addiction is an illness that requires treatment.¹⁵⁵ Mediation allows creative solutions for complex problems and flexibility that formal court proceedings do not enjoy.¹⁵⁶

Mediation allows all interested parties, their lawyers, and the courts, to create a flexible plan. It allows visitation to be liberally awarded, giving the mother a chance to bond with her baby¹⁵⁷ while still focusing on her treatment. The mediation agreement can be changed as the mother progresses through her treatment and can include provisions in case she is unsuccessful. Ultimately, mediation allows for the reunification of mother and child.

There is a strong statutory preference for reunification. Of course, children also benefit from permanency and stability. Whenever possible, courts display a strong preference for keeping a mother and child together. The constitutional right to parent makes courts cautious about permanent separation of parents and children.¹⁵⁸ Additionally, the need for children to have stability makes courts wary of placing children in a foster care system where they may bounce from home to home.¹⁵⁹

A negotiated agreement that allows a mother to pursue treatment without worrying about losing her child fulfills the goal of reunification. This is not to say that the court will not become more involved if the mother does not complete her treatment. The goal is for the child to be placed back with his or her mother in a safe, drug-free environment. If the mother is unwilling or unable to provide such an environment, termination proceedings should be pursued. The preference for reunification can be better achieved through mediation.

V. CONCLUSION

Terminating parental rights is a conclusive and extreme action that is irreparable in most cases. Though the need for stability and security for children should always be paramount, the strong preference for reunification in statutory law indicates that courts should be cautious in adjudicating such a serious matter. Mediation is a useful tool to determine the course of parental rights proceedings. Mediation gives the parents a chance to be heard and creates time for treatment to be obtained and for a real chance at reunification. It also allows for creative solutions that are not typically available in formal court settings, giving the whole family a chance to heal.

154. *Id.* at 428.

155. David C. Brody & Heidee McMillin, *Combating Fetal Substance Abuse and Governmental Foolhardiness Through Collaborative Linkages*, *Therapeutic Jurisprudence and Common Sense: Helping Women Help Themselves*, 12 HASTINGS WOMEN'S L.J. 243, 246 (2001).

156. Mashburn, *supra* note 52, at 196.

157. *See supra* notes 56-57.

158. Jeanne M. Kaiser, *Finding A Reasonable Way to Enforce the Reasonable Efforts Requirement in Child Protection Cases*, 7 RUTGERS J.L. & PUB. POL'Y 100, 106-07 (2009).

159. *Id.* at 107.