

**PRACTICE ADVISORY | 4/26/2025 | D'Adre Cunningham**  
**Family Defense Session 2: Defending So-Called Bad Parents**

**Introduction.** What should defenders do when parents have a history of an incident of bad parenting behavior or bad parenting decision? What if the parent simply has criminal history or a history of being incarcerated even though the crimes are not related to their child, parenting, or maybe even happened before they had children? Dependency court cases must be decided on wrongful parenting behavior (or inaction) towards the child subject to the petition and that resulted in actual harm to that same child.<sup>1</sup>

**Expressly “Bad Parent” v. Impliedly “Bad Parent.”** Washington has always required “clearly bad parent” finding for intervention or termination.<sup>2</sup> We don’t take children from their families because the parents are ill-tempered or choose an unsavory lifestyle.<sup>3</sup> Washington law only follows the “clearly bad parent” approach, which permits the state to intervene or destroy a family (the parent-child relationship) if a parent by their own deed has harmed the specific child in question: a “clearly bad parent” approach.<sup>4</sup> “Approximately twenty states have adopted a ‘clearly bad parent’ approach to parental termination. These states permit the termination of parental rights only when parents are incarcerated as a result of particular ‘bad acts’ that directly affect the ability to parent safely and effectively.”<sup>5</sup> In these states, parents “who commit ‘bad acts’ such as abuse of a child or co-parent, or other violent crimes that endanger their children are at risk of losing their parental rights.”<sup>6</sup> “More than twenty states permit parental rights to be terminated absent proof of parental wrongdoing that places the child in danger. These states have adopted an impliedly bad parent approach, which regards parents as unfit as a result of factors primarily related to their imprisonment as opposed to behavior or conduct directly related to parenting.”<sup>7</sup>

**Federal and state due process clauses protect parent against arbitrary, potentially lifelong stigmatization.** The federal procedural due process clause sets the floor of whatever fairness is due to individuals combatting the government’s interference in their fundamental privacy interests. *Santosky v. Kramer*, 455 U.S. 745, 755, 102 S. Ct. 1388, 1396, 71 L. Ed. 2d 599 (1982); *Vitek v. Jones*, 445 U.S. 480, 491, 100 S.Ct. 1254, 1262, 63 L.Ed.2d 552 (1980)(even people in prison have fundamental rights that survive incarceration, and due process protects them against being stigmatized). Intermediate burden of proof is required when the government seeks to destroy a family forever. *In re Welfare of A.B.*, 168 Wn.2d 908, 919, 232 P.3d 1104, 1110 (2010), *as amended* (Sept. 16, 2010); *Santosky v. Kramer*, 455 U.S. 745, 756, 102 S. Ct. 1388, 1396, 71 L. Ed. 2d 599 (1982); *Addington v. Texas*, 441 U.S. 418, 423, 99 S. Ct. 1804, 1808, 60 L. Ed. 2d 323 (1979). Defenders should always consider raising constitutional challenges under the state constitution.<sup>8</sup>

**Combatting “bad parent” evidence.** Combatting “bad parent” evidence requires thorough investigation and assessment, and usually also requires expert testimony. Any “stain” of parental unfitness that may exist can be removed before a dependency or termination trial. Current parental unfitness is a constitutionally required element of termination that must be proved by clear, cogent, and convincing evidence.<sup>9</sup> Washington courts have long required that adequate proof of *current* parental unfitness<sup>10</sup> be submitted to a court of competent jurisdiction to obtain an order restraining parents from exercising their own rights and relationship.<sup>11</sup> Finally, to destroy a family, Washington law requires a court order be entered and the order on its face must intentionally abrogate parenting rights, not the operation of another order, such as an order of confinement.<sup>12</sup>

**Assigning status of “bad parent” requires a heightened finding by clear and convincing evidence.** A preponderance of evidence standard is inappropriate for findings that assign stigma, or status of “bad parent,” such as “parentally unfit,” “child abuser,” or “domestic abuser.”<sup>13</sup> Defenders should also note these stigmatized labels or findings result in placement of the parent on both state and federal registries as well. The intermediate standard of proof—clear and convincing evidence—applies when the interests at stake are both particularly important and more substantial than mere loss of money.<sup>14</sup> “Notwithstanding the state’s civil labels and good intentions, the Court has deemed this level of certainty necessary to preserve fundamental fairness *in a variety of government-initiated proceedings that threaten the individual involved with a significant deprivation of liberty or stigma.*”<sup>15</sup>

Are noncustodial parents or incarcerated parents unfit as a matter of law? Noncustodial parents retain cognizable parenting rights. *Brittain v. Hansen*, 451 F.3d 982, 992 (9th Cir. 2006) (where noncustodial mother had court ordered visitation); *Murguia v. Langdon*, 61 F.4th 1096, 1119 (9th Cir. 2023), *cert. denied sub nom. Tulare v. Murguia*, 144 S. Ct. 553, 217 L. Ed. 2d 295 (2024) (where father coparented and lived in same home with his children and partner; holding joint custody rights). In Washington, the answer is no. *In re Sego*, 82 Wn.2d 736, 739, 513 P.2d 831, 833 (1973); *In re Pawling*, 101 Wn.2d 392, 398, 679 P.2d 916 (1984). Can emotional nurture and psychological support alone establish fitness and protect constitutionally recognized rights? The order of imprisonment alone has no legal effect on an incarcerated person’s parenting rights. *State v. LaCaze*, 95 Wn.2d 760, 763–64, 630 P.2d 436, 438 (1981). There is a specific procedure for the State of Washington to seek to destroy a family based on a parent’s criminal conviction or wrongful criminal acts. See RCW 13.34.132. Unless the agency successfully seeks termination through RCW 13.34.132, the State must make reasonable efforts to reunify the family. *Matter of Dependency of L.C.S.*, 200 Wn.2d 91, 102, 514 P.3d 644, 650 (2022) (“there is no exception to the reasonable efforts requirement.”).

**What is parental unfitness?** The inquiry of present parental unfitness “requires consideration of the specific parent-child *relationship*, rather than just the parent’s

deficiencies.”<sup>16</sup> The other prerequisite to termination at issue in this case is the nonstatutory prerequisite of parental unfitness.<sup>17</sup> Long before federal jurisprudence establishing parents’ privacy interests in childrearing<sup>18</sup> was enunciated in *Meyer v. Nebraska*,<sup>19</sup> Washington law required a showing of proof of parental competence in court before that court could withhold a child from their parents having legal right to custody.<sup>20</sup> Parental fitness is presumed until rebutted. In Washington, parental fitness<sup>21</sup> is presumed but not constitutionally or statutorily defined.<sup>22</sup> There are cases that outline characteristics and behaviors that do constitute unfitness.<sup>23</sup> Even now, “the State may not unilaterally decide that an otherwise fit parent lacks the requisite lifestyle or personality traits to benefit from necessary services.”<sup>24</sup> The “best interest of the child” legal standard cannot be used to overcome the constitutional presumption of parental fitness.<sup>25</sup> Defenders should review prior court findings to confirm whether parental unfitness or parental deficiency findings have been previously entered.

**Advocating for Narrowly Tailored Definition for Parental Unfitness and Best Interest of the Child.** The Washington Legislature did not define parental fitness or unfitness by statute but rather outlined the elements for termination in two sperate laws: one that requires proof that the parent withholding consent to adoption “has failed to perform parental duties under circumstances showing a substantial lack of regard for his or her parental obligations”<sup>26</sup> and another that does not.<sup>27</sup> In order to apply narrowly tailored guidelines and definitions, the courts must look to accepted legal doctrine, such as constitutional doctrines, statutory construction, if applicable, court rules if any, and common law doctrines that are not inconsistent with state laws. Because due process requires strict guidelines for deciding whether a parent is fit or unfit is required, courts must not use ill-defined, vague legal standards, like best interest of the child, to rebut the presumption of parental fitness. Defenders should seek other more confined definitions of parental fitness through persuasive case law or statutes, where possible, from other states.<sup>28</sup> In Washington, as in most states, it is legislation and case law that defines the terms “child’s best interests” or “best interest of the child” standard.<sup>29</sup> The only Washington statute that attempts to define the term(s) is the Washington’s Domestic Relations Act, which governs child custody proceedings between parents.<sup>30</sup> Despite being used in other statutes, the phrase “best interests of the child” is only defined in a law applied in court actions between the child’s parents. In case law, the United States Supreme Court noted in dicta that fitness required adequate care of a child.<sup>31</sup>

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<sup>1</sup> *In re Welfare of C.S.*, 168 Wn.2d 51, 54, 225 P.3d 953, 954 (2010)(“A biological parent has fundamental liberty and privacy interests in raising his or her child, and the State can infringe upon those interests only when the parent is endangering the child's physical or emotional welfare.”).

<sup>2</sup> A finding that the parent is currently unfit at the time of termination is required for all terminations in Washington. *In re Welfare of A.B.*, 168 Wn.2d 908, 919, 232 P.3d 1104, 1110 (2010), *as amended* (Sept. 16, 2010) (state-initiated termination cases); *Matter of H.J.P.*, 114 Wn.2d 522, 531, 789 P.2d 96, 101 (1990)(in private stepparent adoption cases).

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<sup>3</sup> *Lovell v. Good Sheperd*, 9 Wn. 419, 421-22, 37 P. 660, 661 (1894).

<sup>4</sup> See Deseriee A. Kennedy, *Children, Parents & the State: The Construction of A New Family Ideology*, 26 BERKELEY J. GENDER L. & JUST. 78, 96 (2011). See also *In re Termination of C.L.*, 131 Wn. App. 274, 277, 126 P.3d 1285, 1286-87 (2006) (“Because [...] C.L. was not the child Mr. Eubanks was convicted of raping [ t]he court thus erred by using this aggravating circumstance to relieve the Department of the requirement to provide services.”); *In re Welfare of A.T.*, 109 Wn. App. 709, 717, 34 P.3d 1246, 1250 (2001), as amended (Feb. 8, 2002) (“Based on the plain language and legislative history of the statute, the aggravated circumstances finding the court entered below is incorrect. A finding of aggravated circumstances under subsection (x) can be made only when the sex offense results in the birth of the child that is the subject of the dependency.”).

<sup>5</sup> See Deseriee A. Kennedy, *Children, Parents & the State: The Construction of A New Family Ideology*, 26 BERKELEY J. GENDER L. & JUST. 78, 96 (2011).

<sup>6</sup> See Deseriee A. Kennedy, *Children, Parents & the State: The Construction of A New Family Ideology*, 26 BERKELEY J. GENDER L. & JUST. 78, 96-7 (2011).

<sup>7</sup> See Deseriee A. Kennedy, *Children, Parents & the State: The Construction of A New Family Ideology*, 26 Berkeley J. Gender L. & Just. 78, 98 & fns. 121-22 (2011)(emphasis added) (internal quotations omitted).

<sup>8</sup> The Fourteenth Amendment due process clause provides, at times, less protection from governmental intrusions than Washington’s due process clause at article I, section 3. *In re Moseley*, 34 Wash. App. 179, 185, 660 P.2d 315, 318 , *review denied*, 99 Wn.2d 1018 (1983). For example, the Fourteenth Amendment does not guarantee to parents defending against state-initiated termination cases an attorney at public expense. See *Lassiter v. Dep’t of Soc. Servs. of Durham Cnty., N. C.*, 452 U.S. 18, 25, 101 S. Ct. 2153, 2158, 68 L. Ed. 2d 640 (1981). But article I, section 3 of the Washington constitution does categorically provide that right. See *In re Luscier’s Welfare*, 84 Wn.2d 135, 138, 524 P.2d 906, 908 (1974).

<sup>9</sup> See *In re Sego*, 82 Wn.2d 736, 739, 513 P.2d 831, 833 (1973); *Matter of H.J.P.*, 114 Wn.2d 522, 532, 789 P.2d 96, 102 (1990); *In re Custody of B.M.H.*, 179 Wn.2d 224, 237, 315 P.3d 470, 476 (2013).

<sup>10</sup> *In re Brenner’s Guardianship*, 154 Wn. 400, 402, 282 P. 486, 486 (1929); *Morin v. Morin*, 66 Wn. 312, 316-17, 119 P. 745, 746-47 (1911).

<sup>11</sup> See e.g., *In re Kneeland’s Guardianship*, 160 Wn. 64, 66, 294 P. 562, 563 (1930); *State v. Bell*, 58 Wn. 575, 576-77, 109 P. 51, 51 (1910); *Carey v. Hertel*, 37 Wn. 27, 29, 79 P. 482, 482 (1905).

<sup>12</sup> See e.g., *State v. LaCaze*, 95 Wn.2d 760, 763-64, 630 P.2d 436, 438 (1981).

<sup>13</sup> See *Addington v. Texas*, 441 U.S. 418, 423, 99 S. Ct. 1804, 1808, 60 L. Ed. 2d 323 (1979) (“At one end of the spectrum is the typical civil case involving a monetary dispute between private parties. Since society has a minimal concern with the outcome of such private suits, plaintiff’s burden of proof is a mere preponderance of the evidence. The litigants thus share the risk of error in roughly equal fashion.”).

<sup>14</sup> See *Addington v. Texas*, 441 U.S. 418, 424, 99 S. Ct. 1804, 1808, 60 L. Ed. 2d 323 (1979).

<sup>15</sup> *Santosky v. Kramer*, 455 U.S. 745, 756, 102 S. Ct. 1388, 1396, 71 L. Ed. 2d 599 (1982) (emphasis added). See e.g., *In re Winship*, 397 U.S. 358, 367, 90 S. Ct. 1068, 1074, 25 L. Ed. 2d 368 (1970) (“But that intervention cannot take the form of subjecting the child to the stigma of a finding that he violated a criminal law and to the possibility of institutional confinement on proof

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insufficient to convict him were he an adult.”); *Vitek v. Jones*, 445 U.S. 480, 493–94, 100 S. Ct. 1254, 1264, 63 L. Ed. 2d 552 (1980)(“A criminal conviction and sentence of imprisonment extinguish an individual’s right to freedom from confinement for the term of his sentence, but they do not authorize the State to classify him as mentally ill and to subject him to involuntary psychiatric treatment without affording him additional due process protections.”); *Matter of McLaughlin*, 100 Wn.2d 832, 843, 676 P.2d 444, 451 (1984)(adopting *Addington* due process requires that 90-day involuntary civil commitment must be supported by a minimum burden of proof of clear, cogent, and convincing evidence).

<sup>16</sup> *Matter of K.M.M.*, 186 Wn.2d 466, 491, 379 P.3d 75, 89 (2016) (emphasis in original).

<sup>17</sup> *Matter of B.P. v. H.O.*, 186 Wn.2d 292, 312, 376 P.3d 350, 360 (2016).

<sup>18</sup> The “relationship of love and duty in a recognized family unit is an interest in liberty entitled to constitutional protection.” *Lehr v. Robertson*, 463 U.S. 248, 258, 103 S.Ct. 2985, 2991, 77 L.Ed.2d 614 (1983).

<sup>19</sup> 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923).

<sup>20</sup> See *Lovell v. House of the Good Shepherd*, 9 Wn. 419, 421-22, 37 P. 660, 661 (1894).

<sup>21</sup> Washington courts have long recognized that individuals not biologically nor legally related to the children whom they “parent” may nevertheless be considered a child’s “psychological parent.” *In re Parentage of L.B.*, 155 Wn.2d 679, 691, 122 P.3d 161, 167 (2005).

<sup>22</sup> Cite to states that define “parentally fit,” “parentally unfit,” or “parental fitness.”

<sup>23</sup> *Lovell v. Good Shepherd*, 9 Wn. 419, 421-22, 37 P. 660, 661 (1894).

<sup>24</sup> *Matter of B.P. v. H.O.*, 186 Wn.2d 292, 316, 376 P.3d 350, 362 (2016) (citing *In re Welfare of C.S.*, 168 Wn.2d 51, 55-56, 225 P.3d 953, 955 (2010)).

<sup>25</sup> See *In re Custody of Smith*, 137 Wn.2d 1, 20, 969 P.2d 21, 30 (1998), *aff’d sub nom. Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000).

<sup>26</sup> See RCW 13.34.190, <https://app.leg.wa.gov/rcw/default.aspx?cite=13.34.190>; RCW 13.34.180, <https://app.leg.wa.gov/rcw/default.aspx?cite=13.34.180>.

<sup>27</sup> See RCW 26.33.120, <https://app.leg.wa.gov/RCW/default.aspx?cite=26.33.120>.

<sup>28</sup> Illinois, Missouri, and Nevada have statutory definitions of parental unfitness. See e.g., 750 Ill. Comp. Stat. Ann 50/1; Mo. Ann. Stat. § 211.447; NV Rev. Stat. Ann. §128.018.

<sup>29</sup> See Susan Nauss Exon, *The Best Interest of the Child: Going Beyond Legalese to Empathize with A Client’s Leap of Faith*, 24 J. Juv. L. 1, 4 (2004). California, Michigan, and Montana also have statutes that define the “best interests of the child” in child custody cases. See e.g., Cal. Fam. Code § 3011; Mich. Comp. Laws Ann. § 722.23; Mont. Code Ann. § 40-4-212.

<sup>30</sup> The Washington Domestic Relations Act defines “best interest of the child” as:

The best interests of the child are served by a parenting arrangement that best maintains a child’s emotional growth, health and stability, and physical care. Further, the best interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm.

RCW 26.09.002.

<sup>31</sup> *Troxel v. Granville*, 530 U.S. 57, 68–69, 120 S. Ct. 2054, 2061, 147 L. Ed. 2d 49 (2000).