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Emma VanderWeyst
University of Washington School of Law

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CREATING AND MAINTAINING CONSISTENT STANDARDS REGARDING THE ROLE OF PARENTAL SUBSTANCE ABUSE AT SHELTER CARE HEARINGS IN WASHINGTON STATE

Emma VanderWeyst*

Abstract: When Child Protective Services (CPS) removes children from their home in Washington State, the State must hold a shelter care hearing within seventy-two hours to determine where the children should be placed while the investigation and dependency hearing proceed. RCW 13.34.065 requires the State to return a child to their parent’s care if there is a parent capable of caring for the child and there is no “serious threat of substantial harm” to the child. However, in July 2023, the Washington State Legislature will update RCW 13.34.065 to reflect a recently passed bill. This bill heightens the previous burden and requires children to be returned home unless there is an “imminent threat of physical harm to the child.” The new version of RCW 13.34.065 also prohibits the State from using a parent’s substance abuse as the sole reason to keep a child out of their parent’s care. This new language in RCW 13.34.065 directly conflicts with RCW 26.44.195, which instructs CPS to give parental substance abuse great weight in determining whether a child has been abused or neglected.

Parental substance abuse on its own should not be part of the judge’s determination in whether a child has been abused or neglected or whether they should remain in their parent’s care during the adjudication of a dependency proceeding. State law should require CPS to meet the definition of child abuse or neglect and prove that the child will be at imminent risk of physical harm to remove a child and place them with relatives or in foster care against the parent’s wishes. Parents have a fundamental right to the care and custody of their children. Fear and social stigma surrounding substance abuse are not compelling government interests that justify breaking families apart. To avoid the erroneous and harmful removal of children from their parent’s care, the Washington State Legislature must revise RCW 26.44.195 to remove the language about giving substance abuse great weight in findings of child abuse and neglect.

INTRODUCTION

It is difficult to balance a child’s right to a safe and secure home with a parent’s right to the custody and control of their children. This problem has been recurrent in the public policy and legal fields dealing with child welfare and family advocacy. Washington State recognizes that the parent-child relationship is of “paramount importance.”¹ However, the

* J.D. Candidate, University of Washington School of Law, Class of 2023. Thank you to my incredible *Washington Law Review* colleagues for their thoughtful edits and insights and to Professor Lisa Kelly for sharing her passion for child advocacy and for her invaluable guidance in developing this Comment. Thank you also to my parents and husband for their unwavering support.

1. See WASH. REV. CODE § 26.44.010 (2012).

health and safety interests of children must prevail when children are in dangerous situations due to parental abuse or neglect.² The purpose of the child welfare system is to ensure the safety of children and investigate instances of child abuse and neglect.³ However, parents sometimes find themselves involved in the child welfare system and facing separation from their children due to factors that do not meet the statutory definition of child abuse and neglect.⁴ Factors that lead to the disproportionate representation of certain families in the child welfare system include parental substance abuse, homelessness, poverty, and other factors.⁵ In particular, substance abuse is an overrepresented commonality in families facing child welfare involvement—research suggests that between one-third and two-third of child maltreatment cases involve parental substance abuse.⁶

In 2021, the Washington State Legislature passed a bill to prevent the State from removing children from their parent’s custody solely due to substance abuse by the parent.⁷ This law will go into effect in July 2023.⁸ However, another Washington law requires that Child Protective Services (CPS) investigators give parental substance use “great weight” when they determine whether child abuse or neglect has occurred.⁹ These competing statutes provide two different interpretations of how courts should consider parental substance abuse in the child removal and shelter care hearing process. To reconcile these two statutes, the Legislature must change the language to consistently address parental substance abuse and outline the role that it plays in the child dependency process. The Legislature should repeal the section of RCW 26.44.195(2) that requires the courts to give parental substance abuse “great weight” in findings of child abuse or neglect to ensure that families receive fair and consistent treatment in the child removal and dependency process.

2. WASH. REV. CODE § 26.44.010 (2012).

3. WASH. REV. CODE § 74.13.010 (2018).

4. *See, e.g., In re Dependency of A.W.*, 24 Wash. App. 2d 76, 81, 519 P.3d 262, 265 (2022) (where a parent who struggled with substance abuse had an infant child removed from her custody due to being “apathetic” toward her baby, falling asleep often, and not having a long-term housing plan).

5. MARN A MILLER, WASH. INST. FOR PUB. POL’Y, DOC. NO. 08-06-3901, RACIAL DISPROPORTIONALITY IN WASHINGTON STATE’S CHILD WELFARE SYSTEM 1 (2008), https://www.wsipp.wa.gov/ReportFile/1018/Wsipp_Racial-Disproportionality-in-Washington-States-Child-Welfare-System_Full-Report.pdf [<https://perma.cc/FBQ4-J8KC>].

6. CHILD WELFARE INFO. GATEWAY, SUBSTANCE ABUSE AND CHILD MALTREATMENT (2003), <https://www.childwelfare.gov/pubPDFs/subabusechildmal.pdf> [<https://perma.cc/A6BB-KEGE>] [hereinafter SUBSTANCE ABUSE AND CHILD MALTREATMENT].

7. H.B. 1227, 67th Leg., Reg. Sess. (Wash. 2021).

8. *Id.*

9. WASH. REV. CODE § 26.44.195(2) (2005).

Part I provides background information on federal and Washington State cases that have established a fundamental right to parent and created due process protections for parents who are at risk of having their children removed. Part II discusses the process for removing children from the home in Washington State and the standards that the State must meet to justify removal. Part III demonstrates the impact that substance abuse has on a parent's ability to care for their children. Part IV examines the of removal from the home on children, especially children from marginalized communities. Part V discusses why courts should not use substance abuse as a reason to remove children from their parent's care. Part V also proposes that courts should treat parental substance abuse similarly to parental mental illness or cognitive impairment, and that the Legislature should require the State to prove child abuse or neglect without using the parent's substance abuse. Lastly, Part VI concludes that the Washington State Legislature must amend RCW 26.44.195 to remove substance abuse as a significant factor in these determinations.

I. THE FUNDAMENTAL RIGHT TO PARENT

Courts have consistently upheld the right to the custody and control of one's children as a fundamental right that is protected under multiple provisions of the U.S. Constitution.¹⁰ When this right is infringed, the government must demonstrate a powerful countervailing interest to justify interfering in a parent's control and care of their children.¹¹ CPS and the courts have treated substance abuse by parents as a powerful countervailing interest that justifies removing children from the care of their parents.¹² This section discusses case law that established the right of parents to the custody and care of their children and the constitutional standard for removing a child from parental custody. Next, this section transitions to focus on Washington State and the process for removing children from the home in Washington.

A. *Federal Law Has Consistently Recognized a Right to Parent*

The U.S. Supreme Court and other federal courts have consistently recognized that parents have a right to the care, custody, and control of their children. In 1923, the Court ruled on the first formal challenge to a

10. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

11. *Id.*

12. Kristen Seay, *How Many Families in Child Welfare Services Are Affected by Parental Substance Use Disorders? A Common Question that Remains Unanswered*, 94 CHILD WELFARE 19 (2015).

parent's right to make decisions about the care of their children in *Meyer v. Nebraska*.¹³ In this case, a teacher challenged a state law that prohibited teaching children foreign languages until they passed the eighth grade, even if the child's parents consented to the teaching.¹⁴ The Court recognized the State's power to regulate education and identified a strong state interest in regulating school instruction, such as by compelling attendance at school. However, the court ruled that the law prohibiting teaching language to children interfered with the "power of parents to control the education of their own."¹⁵ *Meyer* established a parent's unique right to make decisions about their children's education and built the foundation for a fundamental right to raise one's children.¹⁶ In 1925, *Pierce v. Society of the Sisters*¹⁷ recognized the impact that these decisions have on a child's worldview.¹⁸ The Court declared that "[t]he child is not the mere creature of the State" and that the parents who "nurture . . . and direct" a child's destiny have a specific right and duty to prepare them for the world.¹⁹

In 1944, the U.S. Supreme Court in *Prince v. Massachusetts*²⁰ acknowledged the balance between a parent's right to raise their children in the way they choose and the State's interest in protecting children.²¹ For example, the State has the right to require children to attend school, prohibit child labor, and take other measures to protect children, even if their parents do not agree.²² In *Prince*, the Court held that the law can treat children differently than adults to advance the state interest of protecting children.²³ The Court held that a statute that prohibited children from distributing newspapers in the street also applied to children distributing religious literature, even if the children were encouraged by their parents to distribute the newspapers to promote their family's religion.²⁴

In 1972, the U.S. Supreme Court decided two significant cases in family and parental rights law. First, *Stanley v. Illinois*²⁵ reinforced the

13. 262 U.S. 390 (1923).

14. *Id.* at 396–96.

15. *Id.* at 401.

16. *Id.* at 390.

17. 268 U.S. 510 (1925).

18. *Id.* at 535.

19. *Id.*

20. 321 U.S. 158 (1944).

21. *Id.* at 165.

22. *Id.* at 166.

23. *See generally Prince*, 321 U.S. 158.

24. *Id.* at 172.

25. 405 U.S. 645 (1972).

right of a parent to raise their children.²⁶ In this case, the State denied a father the right to raise his children after the death of the children's mother because the parents were unmarried at the time of the mother's death.²⁷ The Court upheld the right "to conceive and to raise one's children" as essential and "far more precious than . . . property rights."²⁸ The Court in *Stanley* held that the private interest "of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection."²⁹

In the second case, *Wisconsin v. Yoder*,³⁰ the Supreme Court decided that the Fourteenth Amendment protected Amish parents' desire to have their children participate in alternative development and informal schooling through the Amish community instead of attending traditional high school.³¹ Additionally, the Court in *Yoder* held that that the State did not have a compelling countervailing interest to justify intruding into the parents' right.³² In this case, the State argued that the religious practice and parental rights of the Amish community "must give way" to the State's compelling interest in the system of compulsory education.³³ The Supreme Court rejected this argument and held that the Court cannot accept "such a sweeping claim" when fundamental freedoms are at stake.³⁴ In *Yoder*, the Court left open the question of whether the right to the care and control of one's children is a fundamental liberty interest on its own or if it must be intertwined with another interest such as free exercise of religion. The *Yoder* Court "recognized that, where nothing more than the general interest of the parent in the nurture and education of his children is involved, it is beyond dispute that the State acts 'reasonably' and constitutionally in requiring education to age 16."³⁵ However, in *Yoder*, the combination of the violation of the Free Exercise Clause and freedom to parent sufficed to make the challenged law unconstitutional.³⁶

In addition to parental rights to direct the education and care of their children, the U.S. Supreme Court has also found a fundamental liberty

26. *Id.*

27. *Id.* at 646.

28. *Id.* at 651.

29. *Id.*

30. 406 U.S. 205 (1972).

31. *Id.* at 221.

32. *Id.* at 219.

33. *Id.* at 221.

34. *Id.*

35. *Id.* at 233.

36. *Id.* at 234–35.

interest in the right to privacy within a family and the interest of parents in the care, custody, and management of their children.³⁷ The Court found this right not in state law, but in intrinsic human rights and respect for the nation's traditions.³⁸ The Court found that this interest was based on the history and traditions of parental rights in the United States.³⁹ In *Smith v. Organization of Foster Families*,⁴⁰ the Court wrote that “[t]he statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition.”⁴¹ The fundamental liberty interest of parents in the care, custody, and management of their child does not disappear when parents are imperfect or when the State removes a child from the home. Parents may still assert their interest in the care and custody of their children up until the formal termination of their parental rights.⁴² Even when parents need support or resources to overcome parenting challenges, such as lacking childcare skills or inadequately supervising children, parents retain possession of a fundamental liberty interest in keeping their family intact and raising their children how they see fit.⁴³

The Due Process Clause of the Fourteenth Amendment protects parents' fundamental right in the care and custody of their children and the unity of their family.⁴⁴ Courts have interpreted the Due Process Clause to contain both substantive and procedural due process rights.⁴⁵ Substantive due process rights are triggered when the government infringes on an interest that courts have interpreted as a fundamental liberty interest.⁴⁶ The Court found that the government can violate the Due Process Clause if the government deprives someone of money, property, or non-tangible interests such as the right to marry, the right to freedom of speech, the right to freedom of religion, the right to procreate, and others.⁴⁷ The Supreme Court formally “held that, in addition to the specific freedoms protected by the Bill of Rights, the ‘liberty’ specially

37. *Smith v. Org. of Foster Families*, 431 U.S. 816 (1977).

38. *Id.*

39. *Id.*

40. 431 U.S. 816 (1977).

41. *Parham v. J.R.*, 442 U.S. 584, 603 (1979).

42. *Santosky v. Kramer*, 455 U.S. 745, 758–59 (1982).

43. *Id.* at 745.

44. *See Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *see also Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (stating that having children is fundamental to humanity's survival); *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring) (describing family relationships as “a relation as old and as fundamental as our entire civilization”).

45. *Washington v. Glucksburg*, 521 U.S. 702, 720 (1997).

46. *Id.* at 720–21.

47. *Id.* at 720.

protected by the Due Process Clause includes the rights . . . to direct the education and upbringing of one's children."⁴⁸ The Fourteenth Amendment prohibits the government from infringing on a fundamental liberty interest unless the infringement meets the strict scrutiny test.⁴⁹ To satisfy the strict scrutiny test, the government's action must be narrowly tailored to serve a compelling state interest.⁵⁰

B. Washington State Recognizes the Fundamental Right of Parents to Raise Their Children in the Way They See Fit

Washington State recognizes a delicate conflict between the rights of parents to raise their children as they desire and the State's interest in the protection of the welfare of people under eighteen through statutes and case law.⁵¹ In *Troxel v. Granville*,⁵² the U.S. Supreme Court addressed a Washington statute that used the best interest standard to determine whether the court would grant court-ordered visitation to a third party over a fit parent's objection.⁵³ The Court held that the statute violated a parent's fundamental right to raise their children in the way they choose.⁵⁴ In this case, the paternal grandparents of two children petitioned the court for visitation after the biological mother of the children denied them visitation following the death of the children's father.⁵⁵ The Washington State Supreme Court held that the third-party visitation statute violated a parent's fundamental right to determine what was best for their children, even if the visitation was in the child's best interest.⁵⁶ The Court found that the custodial parent, the mother of the children in question, was a fit parent in this case.⁵⁷ When the case went to the U.S. Supreme Court, the Court held that "[t]he liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."⁵⁸ Therefore, the U.S. Supreme Court and the Washington State Supreme Court have consistently held that parents have a fundamental liberty

48. *Id.*

49. *Id.*

50. *Id.*

51. *See Prince v. Massachusetts*, 321 U.S. 158 (1944).

52. 530 U.S. 57 (2000).

53. *Id.* at 72.

54. *Id.*

55. *Id.* at 60–61.

56. *Id.* at 62–63.

57. *Id.* at 57–58.

58. *Id.* at 65.

interest in the care and welfare of their minor children, but also that the State has an interest in intervening to correct substantial parenting deficiencies.⁵⁹

Additionally, Washington has codified its significant dedication to the sanctity of the family unit.⁶⁰ RCW 13.34.020 contains a legislative declaration of Washington's recognition of the family unit. The chapter reads:

The legislature declares that the family unit is a fundamental resource of American life which should be nurtured. Toward the continuance of this principle, the legislature declares that the family unit should remain intact unless a child's right to conditions of basic nurture, health, or safety is jeopardized. When the rights of basic nurture, physical and mental health, and safety of the child and the legal rights of the parents are in conflict, the rights and safety of the child should prevail. In making reasonable efforts under this chapter, the child's health and safety shall be the paramount concern. The right of a child to basic nurturing includes the right to a safe, stable, and permanent home and a speedy resolution of any proceeding under this chapter.⁶¹

Washington's judicial and legislative branches have demonstrated their commitment to both parental control over the upbringing of one's children and keeping families together unless a significant barrier would disrupt the safety and welfare of the children. In RCW 13.34, the chapter governing dependency proceedings, the Legislature specifically sought to recognize the importance of the family unit. The removal of a child from their parent's custody at a shelter care hearing is one way that the State could infringe on parental rights.⁶²

II. SHELTER CARE HEARINGS IN WASHINGTON STATE

State laws around the United States vary on who can remove a child from the home and what legal standard must be met for a removal to occur.⁶³ This Part focuses on the procedure and legal standard for removal in Washington State, and how the legal standard for removal will change in July 2023 with the implementation of House Bill 1227, which raises

59. See *In re Dependency of Schermer*, 161 Wash. 2d 927, 941, 169 P.3d 452 (2007); *Lee v. Wash. Dep't of Soc. & Health Servs.*, 189 Wash. App. 381, 396, 357 P.3d 68 (2015).

60. WASH. REV. CODE § 13.34.020 (1998) (governing the parent and child relationship, including dependency and termination of parental rights proceedings).

61. *Id.*

62. WASH. REV. CODE § 13.34.065(1)(a) (2021).

63. Vivek Sankaran, Christopher Church & Monique Mitchell, *A Cure Worse Than the Disease? The Impact of Removal on Children and Their Families*, 102 MARQ. L. REV. 1161, 1171–72 (2019).

the legal standard for removing children from their home and placing them into foster care.

A. Child Protective Services and Child Removal in Washington State

In Washington State, Child Protective Services (CPS) is the state agency primarily responsible for child welfare.⁶⁴ CPS investigates reports of child abuse and neglect.⁶⁵ Mandatory reporters make over two-thirds of these reports.⁶⁶ Mandatory reporters who have close contact with children in Washington include school personnel, childcare providers, law enforcement officers, and other professionals and government employees.⁶⁷

When CPS receives a report of child abuse or neglect, CPS staff members determine whether the report includes an allegation that meets the minimum standard for child abuse or neglect.⁶⁸ RCW Chapter 26.44 governs the process by which CPS investigates and determines whether a child has been abused, and subsequently handles that finding of abuse.⁶⁹ In Washington State, child abuse is the “injury, sexual abuse, or sexual exploitation of a child by any person under circumstances which indicate that the child’s health, welfare, or safety is harmed, or the negligent treatment or maltreatment of a child by a person responsible for or providing care to the child.”⁷⁰

If CPS determines that the report meets the requirements for child abuse or neglect, a law enforcement officer, probation counselor, or CPS

64. *Child Protective Services*, WASH. STATE DEP’T OF CHILD., YOUTH, & FAMILIES, <https://www.dcyf.wa.gov/services/child-welfare-system/cps> [<https://perma.cc/4M2L-BZHJ>] (last updated Apr. 12, 2023).

65. *Id.*

66. CHILD WELFARE INFO. GATEWAY, CHILD MALTREATMENT 2019: SUMMARY OF KEY FINDINGS (2021), <https://www.childwelfare.gov/pubPDFs/canstats.pdf/> [<https://perma.cc/U3LD-T422>].

67. Other mandatory reporters in Washington include medical practitioners, nurses, dentists, social service counselors, psychologists, medical examiners, pharmacists, juvenile probation officers, corrections employees, Department of Social and Health Services and Department of Children, Youth, and Families employees, placement and liaison specialists, the state family and children’s ombudsman and any volunteers in the ombudsman’s office, staff of various contracted facilities, and any adults residing with a child suspected to have been severely abused. *Report Child Abuse or Neglect*, <https://www.dcyf.wa.gov/safety/mandated-reporter> [<https://perma.cc/44V8-LCUZ>] (last updated Apr. 12, 2023).

68. *What Happens Once Abuse & Neglect is Reported?*, WASH. STATE DEP’T OF CHILD., YOUTH, & FAMILIES, <https://dcyf.wa.gov/safety/what-happens-abuse-reported> [<https://perma.cc/C987-DL27>] (last updated Apr. 12, 2023).

69. WASH. REV. CODE § 26.44.010 (2012); WASH. ADMIN. CODE § 110-30. The Washington Administrative Code is a compilation of administrative rules created by state agencies.

70. WASH. ADMIN. CODE § 110-30-0030 (2018).

official can remove children from the home.⁷¹ To lawfully remove a child, the State must have a reasonable belief that the child is in “imminent harm.”⁷² Before removing the child, the State must attempt to serve the removal notice on the parent, but the petition is still valid even if CPS could not locate and notify the parent of the removal.⁷³ After removal, the next step in Washington’s child removal process is a shelter care hearing.⁷⁴

B. The Washington Shelter Care Hearing Process

In Washington, the State must hold a shelter care hearing within seventy-two hours of the child being removed from the home, not including weekends and holidays.⁷⁵ A shelter care hearing determines whether a child can be returned home while a hearing to determine whether a parent is available and capable of caring for the child (called a “dependency hearing”) is pending.⁷⁶ This hearing can be held up to five days after the removal if there is a weekend between when the child is removed and when the shelter care hearing is scheduled, resulting in a child being separated from their family for almost a week.⁷⁷ At the shelter care hearing, the court must consider a wide span of factors when deciding whether the State should return a child to their parents or guardians.⁷⁸ These factors include whether the State gave proper notice to the parents or guardians, whether the State provided services to the family to prevent the need for removal, and whether the State made efforts to place the child with a relative, among others.⁷⁹ The shelter care statute gives the judge discretion to weigh these different factors as they see fit in each case along with any additional factors that may be relevant to the particular case.⁸⁰

The court must return the child to the parent’s care while the dependency hearing proceeds unless two conditions are met.⁸¹ First, the court must find that the State has made reasonable efforts or active efforts to avoid removing the child from the home, depending on whether the

71. WASH. REV. CODE § 13.34.050(1) (2005).

72. *Id.* § 13.34.050(1)(b).

73. *Id.* § 13.34.050(3).

74. WASH. REV. CODE § 13.34.065(1)(a) (2021).

75. *Id.*

76. *Id.*

77. Sankaran, *supra* note 63, at 1171–72.

78. WASH. REV. CODE §§ 13.34.065(4)(a)–(k) (2021).

79. *Id.*

80. *Id.*

81. *Id.* § 13.34.065(5)(a).

child is an Indian child under the Washington Indian Child Welfare Act (ICWA).⁸² If the child is defined by ICWA as an Indian child, the State must make active efforts to avoid removing the child from the home.⁸³ For a child not covered under the statute, the State must make reasonable efforts, which is a lower burden.⁸⁴ For example, “if the dependency petition or other information before the court alleges that experiencing homelessness or the lack of suitable housing was a significant factor contributing to the removal of the child, the court” will consider whether the State provided assistance in rent and/or finding housing to the family “to prevent or eliminate the need for removal of the child” under a reasonable efforts analysis.⁸⁵ Second, one of the following requirements must be met: (1) the child has no parent, guardian, or legal custodian capable of caring for the child; (2) the release of the child would present a serious threat of substantial harm to the child; or (3) the person to whom the child would be released has committed custodial interference in violation of RCW 9A.40.060 or RCW 9A.40.070.⁸⁶

At the conclusion of the shelter care hearing, the judge determines where the child should be placed pending the adjudication of the dependency petition.⁸⁷ Considerations and balancing tests for judges are largely guided by state statutes such as RCW 13.34.065, but there are some nationwide guidelines and professional standards as well. For example, a guide for child welfare judges and attorneys produced by the American Bar Association says that “[t]he real question is: will an in- or out-of-home safety plan, or some combination, be the least intrusive approach to keep the child safe and still be sufficient?”⁸⁸

Throughout the proceedings, the statute requires the child’s health, safety, and welfare to be the paramount consideration.⁸⁹ This paramount consideration will not change in 2023, but the

82. *Id.* § 13.34.065(5)(a)(i); WASH. REV. CODE § 13.38.040(1) (2019); *id.* § 13.38.040(7) (“‘Indian child’ means an unmarried and unemancipated Indian person who is under eighteen years of age and is either: (a) A member of an Indian tribe; or (b) eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.”).

83. WASH. REV. CODE § 13.38.040(1) (2019).

84. WASH. REV. CODE § 13.34.065(a)(i) (2021).

85. *Id.* § 13.34.065(4)(d).

86. *Id.* §§ 13.34.065(5)(a)(ii)(A)–(C).

87. *See generally id.* § 13.34.065.

88. Theresa Roe Lund & Jennifer Renne, *Child Safety: A Guide for Judges and Attorneys*, AM. BAR ASS’N 25 (2009), https://www.wacita.org/wp-content/uploads/2019/08/ABA_Child_Safety_Manual_june32009-1.pdf [<https://perma.cc/UQ5X-KB7M>].

89. WASH. REV. CODE § 13.34.065(4) (2021).

Keeping Families Together Act, H.B. 1227,⁹⁰ will heighten the legal standard for keeping a child away from their parents during the dependency proceeding.⁹¹

C. *How Updates to RCW 13.34.065 Will Change the Standard for Shelter Care Hearings in 2023*

In July of 2021, the Washington State Legislature passed the Keeping Families Together Act, which heightened the statutory requirements for the State to remove children from their home and place them into state custody during the adjudication of a dependency proceeding.⁹² This amendment to RCW 13.34.065 will go into effect in July 2023.⁹³ The current version of RCW 13.34.065 requires a child to be returned home following a shelter care hearing unless there is “a serious threat of substantial harm to the child.”⁹⁴ The new version of RCW 13.34.065 will require the court to release the child back to the care, custody, and control of their parent or legal guardian unless the child’s removal was necessary to “prevent imminent physical harm due to child abuse or neglect, including that which results from sexual abuse, sexual exploitation, or a pattern of severe neglect . . . [t]he evidence must show a causal relationship between the particular conditions in the home and imminent physical harm to the child.”⁹⁵ Additionally, the revised statute specifies that “community or family poverty, isolation, single parenthood, age of the parent, crowded or inadequate housing, substance abuse, prenatal drug or alcohol exposure, mental illness, disability or special needs of the parent or child, or nonconforming social behavior” are not sufficient to establish imminent physical harm.⁹⁶

These changes mean that the State must demonstrate that there is a threat of imminent physical harm to the child in the home in order to remove that child from their parents and place them into foster care or kinship care during the dependency hearing.⁹⁷ Additionally, the State must demonstrate that there is a relationship between the conditions of the

90. Keeping Families Together Act, H.B. 1227, 67th Leg. (Wash. 2021).

91. *See id.*

92. *Id.*

93. *Id.*

94. WASH. REV. CODE § 13.34.065(5)(a)(ii)(B) (2021).

95. WASH. REV. CODE § 13.34.065(5)(a)(ii)(B)(I) (effective July 1, 2023).

96. *Id.* Additionally, the revised statute requires that the court offers parents services at the time of the hearing in order to avoid continued removal. *Id.* § 13.34.065(5)(b)(i) (effective July 1, 2023).

97. *Id.* § 13.34.065(5)(a)(ii)(B)(I) (effective July 1, 2023).

home and the threat of harm.⁹⁸ This departs from the previous standard, which did not require this demonstration of causation.⁹⁹ Lastly, the updated version of RCW 13.34.065 defines specific characteristics and actions of parents that cannot on their own establish that there is imminent physical harm to the child.¹⁰⁰ These characteristics and actions include nontraditional or nonconforming beliefs or behavior; identity elements of the parent such as age, income level, or disability; and community or family poverty.¹⁰¹ The new version of the statute increases the burden on the State to demonstrate why CPS should not allow the child to return home.

D. RCW 26.44.195 Requires Substance Abuse to Be Considered in Findings of Child Abuse or Neglect

Chapter 26.44 of the RCW sets forth the procedures and standards CPS should use when investigating whether a child has been abused.¹⁰² RCW 26.44.195, a subsection of the chapter, sets out the process for determining whether a child has been abused or neglected and outlines what steps the State must take during and after making that determination.¹⁰³ RCW 26.44.195(2) provides that “when evaluating whether the child has been subject to negligent treatment or maltreatment, evidence of a parent’s substance abuse as a contributing factor to a parent’s failure to provide for a child’s basic health, welfare, or safety shall be given great weight.”¹⁰⁴ RCW 26.44.195(4) further details that the State may initiate a dependency proceeding where the department has offered “appropriate and reasonable services” and the parents or guardians of the child refused to accept the services, failed to obtain available and appropriate services, or were unable or unwilling to participate in the services identified by the department.¹⁰⁵ In these cases, the statute allows for negligent treatment or maltreatment by the parent to constitute neglect.¹⁰⁶ When the State is deciding whether to initiate a dependency proceeding based on the parents’ unwillingness to complete services, RCW 26.44.195(4) requires that “a parent’s substance abuse as a

98. *Id.*

99. *Id.* § 13.34.065(5)(a)(ii)(B) (2021).

100. WASH. REV. CODE § 13.34.065(5)(a)(ii)(B)(I) (effective July 1, 2023).

101. *Id.*

102. WASH. REV. CODE § 26.44.010 (2012).

103. WASH. REV. CODE § 26.44.195 (2005).

104. *Id.* § 26.44.195(2).

105. *Id.* § 26.44.195(4).

106. *Id.*

contributing factor to the negligent treatment or maltreatment shall be given great weight.”¹⁰⁷

RCW 26.44.195 and RCW 13.34.065, the statutes that will be altered by H.B. 1227 in July 2023, do not exist in completely different spheres of statutory authority. The definition of abuse or neglect from RCW 26.44.195 is incorporated by reference into the very definition of a “dependent child” under RCW 13.34.030(6).¹⁰⁸ Therefore, the definition of abuse or neglect under RCW 26.44.195—which requires that substance abuse is given great weight in a determination of child abuse or neglect—guides the agency case worker in determining whether to initiate a dependency petition. The same statute will ultimately guide the judge in determining whether to grant the dependency. When case workers give substance abuse this heavy weight when deciding whether a child should remain with their parents, practitioners should understand the historical and social significance of the relationship between substance abuse and child protective services.

III. SUBSTANCE ABUSE AND CHILD PROTECTIVE SERVICES INVOLVEMENT

Families struggling with substance abuse are much more likely to be involved with the child welfare system.¹⁰⁹ An estimated nine percent of children in the United States live with parents struggling with a substance abuse disorder.¹¹⁰ For parents, substance abuse leads to both a greater likelihood of child neglect and a higher chance of having children removed from the home.¹¹¹ In 2019, 38.9% of child removal cases in the United States listed substance abuse as a factor in the decision to remove the child.¹¹²

Unfortunately, it is extremely difficult to determine how many families are affected by parental substance abuse in conjunction with the child welfare system.¹¹³ One explanation for this is that some local child welfare

107. *Id.*; see also WASH. ADMIN. CODE § 110-30-0030(5)(a) (2018) (“When considering whether a clear and present danger exists, evidence of a parent’s substance abuse as a contributing factor must be given great weight.”).

108. WASH. REV. CODE § 13.34.030(6) (2021) (“‘Dependent child’ means any child who . . . is abused or neglected as defined in chapter 26.44 . . .”).

109. *Child Welfare and Alcohol and Drug Use Statistics*, NAT’L CTR. ON SUBSTANCE ABUSE & CHILD WELFARE [hereinafter *Child Welfare Statistics*], <https://ncsacw.samhsa.gov/research/child-welfare-and-treatment-statistics.aspx> [<https://perma.cc/7Q2E-G4K3>].

110. SUBSTANCE ABUSE AND CHILD MALTREATMENT, *supra* note 6, at 1.

111. *Id.* at 1–2.

112. *Child Welfare Statistics*, *supra* note 109.

113. Seay, *supra* note 12, at 20–21.

agencies may cite multiple conditions for removal, but only the primary condition for removal is reported to federal systems.¹¹⁴ In Washington, over sixty percent of removals of children under the age of one listed parental alcohol or drug use as a condition of removal.¹¹⁵ For children aged one or older, about thirty-one to forty percent of removals in Washington listed alcohol or drug use as a reason for removal.¹¹⁶ Research suggests that between one-third and two-third of child maltreatment cases nationwide involve parental substance abuse.¹¹⁷ One study found that abused or neglected children from substance-abusing families are more likely to be placed in foster care than maltreated children from non-substance abusing families.¹¹⁸ In Washington, the law requires that CPS strongly consider substance abuse as a reason for removing children from their parent's care.¹¹⁹

In deciding whether parents with substance abuse disorders should be allowed to retain custody of their children, the Washington Court of Appeals has considered whether the State can require parents to complete substance abuse treatment as a condition of retaining custody.¹²⁰ In *In re Dependency of I.R.M.*,¹²¹ the Washington Court of Appeals held that CPS cannot require parents to correct deficiencies that are not directly parenting deficiencies—such as substance abuse disorder—in order to have their children returned to them.¹²² In this case, the trial court required the parents of two minor children to undergo random urine analysis and substance abuse treatment plans after CPS removed the children from the home and placed them with a third party due to unsanitary living conditions in the home.¹²³ Other CPS reports did not allege substance abuse by the parents.¹²⁴ The Court determined that the trial court did not have authority to order the parents to perform services to remedy their substance abuse issues when substance abuse was not considered to be a reason for the children's removal from the home.¹²⁵

When the evidence is insufficient to determine that parental substance

114. *Child Welfare Statistics*, *supra* note 109.

115. *Id.*

116. *Id.*

117. SUBSTANCE ABUSE AND CHILD MALTREATMENT, *supra* note 6, at 2.

118. *Id.*

119. WASH. REV. CODE § 26.44.195 (2005).

120. *See In re Dependency of I.R.M.*, 20 Wash. App. 2d 1010, __ P.3d __ (2021).

121. 20 Wash. App. 2d 1010, __ P.3d __ (2021).

122. *Id.* at *7.

123. *Id.* at *6.

124. *Id.*

125. *Id.* at *7.

abuse led to the removal of the child, the courts cannot order substance abuse treatment as a condition for returning the children to the home.¹²⁶ *In re Dependency of I.R.M* is an example of Washington courts not treating substance abuse on its own as a parental deficiency without a connection to parental abuse or neglect of the children.¹²⁷ However, when children are removed from the home for any reason, including parental substance abuse, the effects on children are detrimental.¹²⁸

IV. IMPACTS OF THE CHILD WELFARE SYSTEM ON YOUTH

When the State removes children from the home based on a CPS report or other finding, they may be placed with a relative or in foster care.¹²⁹ Though children may remain in foster care for a short time period—such as the seventy-two hours in which the law requires the State to hold a shelter care hearing—short-term placement can lead to long-term effects for children and families.¹³⁰ This Part discusses the physical, psychological, and social impacts of removal and foster care. Next, this Part looks at the racial disparity in foster care and impact of child removal on historically oppressed groups.

A. *Physical, Psychological, and Social Impacts of Removal and Foster Care*

While in foster care, children have rights to safety, wellness, placement in a family-like setting, maintaining connections with family, receiving support and services necessary to heal from early childhood experiences, and to return home if possible.¹³¹ However, 11.5% of children in foster care reside in a group home instead of a family-like setting.¹³² Placement in a family setting is important to a child accessing the other rights listed above, such as safety, wellness, and support.¹³³ Additionally, the State

126. *Id.* at *6–7.

127. *See id.*; *see also* WASH. REV. CODE § 13.35.065(5)(a)(ii)(B) (2021) (requiring that there be a “serious threat of substantial harm” present to justify keeping a child out of their parent's care at the shelter care hearing).

128. *See infra* Part IV.

129. Children’s Bureau, *How the Child Welfare System Works*, CHILD WELFARE INFO. GATEWAY (Oct. 2020), <https://www.childwelfare.gov/pubpdfs/epswork.pdf> [<https://perma.cc/TJC6-Z5YV>].

130. *See infra* section IV.A.

131. Vivek Sankaran & Christopher Church, *Rethinking Foster Care*, 73 SMU L. REV. F. 123, 131 (2020).

132. *Id.* at 132.

133. *Id.*

often does not return children home even if it is safely achievable.¹³⁴ The percentage of foster children returned to their homes has not changed over the last decade, but termination of parental rights cases have increased each year, resulting in a larger percentage of children remaining in the foster care system.¹³⁵ In 2018, there were 17,000 more children awaiting a permanent home than in 2010.¹³⁶

Negative effects of foster care can occur when a child is in foster care for a significant period of time.¹³⁷ Removing a child from their home has a detrimental and traumatic effect on the child's quality of life and overall development.¹³⁸ Research demonstrates that these negative effects occur even if the child is in foster care for thirty days or less (as they often are in removals followed by a shelter care hearing).¹³⁹ Children in foster care have worse outcomes during and following their placement in foster care.¹⁴⁰ For example, children who have been in foster care are between 2.7 and 4.5 times more likely to experience psychopathology and require psychotropic medication than those who have never been in foster care.¹⁴¹ Additionally, children placed in foster care have more behavioral problems, greater risk of abuse or neglect, higher teen birth rates, higher rates of homelessness, and lower career earning potential than their non-foster peers.¹⁴²

In a study done on foster youth between the ages of five and fifteen, researchers found detrimental effects on children in foster care in situations where there was controversy over where the child should be placed.¹⁴³ In other words, the study only included situations where judges or investigators could reasonably rule either way on a case and did not include situations where every investigator or judge would recommend removing the child from the home and placing them in foster care or situations where every investigator and judge would recommend sending

134. *Id.* at 133.

135. *Id.*

136. *Id.*

137. Vivek Sankaran & Christopher Church, *Easy Come, Easy Go: The Plight of Children Who Spend Less than 30 Days in Foster Care*, 19 U. PA. J.L. & SOC. CHANGE 207, 211 (2016).

138. *Id.*

139. *Id.* at 211–12.

140. Emma S. Ketteringham, Sarah Cremer & Caitlin Becker, *Healthy Mothers, Healthy Babies: A Reproductive Justice Response to the "Womb-to-Foster-Care Pipeline"*, 20 CUNY L. REV. 77, 98 (2016).

141. *Id.*

142. *Id.* at 98–99.

143. Joseph J. Doyle Jr., *Causal Effects of Foster Care: An Instrumental-Variables Approach*, 35 CHILD. & YOUTH SERV. REV. 1143, 1149 (2013).

the child home.¹⁴⁴ Placing children in this category in foster care increased their likelihood of requiring emergency healthcare in the short term and of becoming a delinquent during adolescence.¹⁴⁵ Though these problems can arise in any youth in foster care, many of the negative impacts of the foster care system disproportionately affect children of color based on their unequal representation in the child welfare system.¹⁴⁶

B. Racial Disproportionality in Foster Care

Children of color have been historically overrepresented in the child welfare system.¹⁴⁷ The first state organizations that made up the child welfare system in the United States focused on “rescuing” children from abusive parents to give them a better life, often identifying “better” homes as those with more financial resources.¹⁴⁸ Though the government largely left children of color out of these first child welfare systems, it simultaneously forcibly removed Native American children from their families and “assimilat[ed]” them into white settler culture starting around 1880.¹⁴⁹ The government often removed Native American children from their parents and communities for years at a time.¹⁵⁰ The implementation of the Indian Adoption Project in 1959 resulted in the government removing many Native American children from their families and placing them with white families.¹⁵¹ Surveys from 1969 to 1974 demonstrate that the government placed between twenty-five and thirty-five percent of Native American youth in foster or adoptive homes during these years.¹⁵²

The demographics of children in foster care in the 2000s further exemplify these racial disparities in the child welfare system, both nationally and in Washington State. In Washington, children of color are more likely to be referred to CPS and to remain in foster care for longer than white children.¹⁵³ In 2008, Native American children were three times as likely to be referred to CPS; Black children were nearly twice as likely to be referred to CPS; and Hispanic children were 1.3 times as likely

144. *Id.*

145. *Id.* at 1147–49.

146. *See infra* section IV.B.

147. Elisa Minoff, *Entangled Roots: The Role of Race in Policies that Separate Families*, CTR. FOR STUDY SOC. POL’Y 17 (Oct. 2018), <https://cssp.org/resource/entangled-roots> [<https://perma.cc/4ZFK-PYQV>].

148. *Id.*

149. *Id.* at 17–18.

150. *Id.* at 18.

151. *Id.*

152. *Id.*

153. MILLER, *supra* note 5.

to be referred to CPS.¹⁵⁴ After receiving a CPS referral, Native American children were 1.6 times as likely to be removed from home and twice as likely to remain in foster care for over two years.¹⁵⁵ Black children were 1.2 times more likely to be removed from home and 1.5 times more likely to remain in care for over two years.¹⁵⁶ The Indian Child Welfare Act, or ICWA, was one attempt by the federal government and subsequently Washington State to remedy this disproportionality in the foster care system by establishing a higher standard for removal when the child is a Native American child.¹⁵⁷

The increased awareness and punishment of substance abuse in communities of color may increase the association between communities of color and substance use.¹⁵⁸ Communities of color do not use substances at a higher rate than white communities, but law enforcement notices and punishes substance abuse more often in communities of color.¹⁵⁹ When CPS and courts use substance abuse as a reason to remove children from their homes, it is possible that the same communities accused of and incarcerated for higher rates of drug use may face a disproportionate number of child removals.

V. THE STATE SHOULD NOT REMOVE CHILDREN FROM PARENTAL CUSTODY SOLELY ON THE BASIS OF PARENTAL SUBSTANCE ABUSE

The Washington State Legislature should alter RCW 26.44.195 to remove substance abuse as a significant factor when considering whether the State should remove children from their homes. This change would protect against the erroneous removal of children from parental custody, uphold the fundamental rights of parents to care for their children, and help prevent the unequal removal of children based on race. First, the negative impacts of removing a child from the home are significant and the State should take care to avoid removing children unless there is evidence of abuse or neglect. Second, the statute allowing CPS to give great weight to substance abuse to determine when there has been child abuse or neglect allows the State to bypass the statutory requirements for

154. *Id.*

155. *Id.*

156. *Id.*

157. 25 U.S.C. §§ 1911–1923; WASH. REV. CODE § 13.38.030 (2011).

158. HUM. RTS. WATCH, PUNISHMENT AND PREJUDICE: RACIAL DISPARITIES IN THE WAR ON DRUGS: SUMMARY AND RECOMMENDATIONS (2000), <https://www.hrw.org/legacy/reports/2000/usa/Rcedrg00.html> [<https://perma.cc/AE7M-XEBS>].

159. *See id.*

keeping a child out of their parent's care. The courts should treat substance abuse more like parental mental illness or cognitive defect, and the State should be required to establish evidence of child abuse or neglect without relying on a parent's substance abuse. Lastly, this change would ensure that children are not disproportionately and erroneously removed from families of color and families living in poverty.

A. Removing Children from the Home Should Be Limited to Cases of Child Abuse or Neglect

Removing a child from their home can significantly impact the mental and emotional health of the child.¹⁶⁰ CPS should only remove children from the home and place them in foster care to prevent imminent physical harm to the child. The new standard set by the revised RCW 13.34.065, which requires an imminent threat of physical harm to keep children away from their parents at a shelter care hearing, demonstrates that the Legislature and courts recognize that the standard for keeping a child away from their parents should be difficult to meet.¹⁶¹

Children who spend even just a few days in foster care are more likely to face emotional, mental, and physical health issues throughout their lives.¹⁶² Maintaining a heightened standard of removal will decrease the number of children removed from parental custody and placed in foster care. The State has hugely expanded the number of children who can be removed from parental custody by allowing the State to remove a child from the home when there is substance abuse by parents. The standard to remove a child from parental custody should be consistent through all areas of Washington dependency law. Therefore, the Legislature needs to revise RCW 26.44.195 to eliminate substance abuse by parents as a significant factor for removal unless there is other evidence that independently constitutes imminent physical harm to the child.

The ability to remove children from parental care and place them in foster care for the extent of a dependency proceeding is necessary in specific circumstances to prevent abuse or neglect. Removing substance abuse as a stand-alone basis for removal would not prevent the State from protecting children in cases where children are being abused and neglected. The new standard in RCW 13.34.065 still requires removal if there is an imminent risk of physical harm to the child. Unfortunately, there are situations where removing the child is the only way to protect the child from imminent physical harm, such as physical or sexual abuse.

160. Sankaran & Church, *supra* note 137, at 211.

161. WASH. REV. CODE § 13.34.065(5) (effective July 1, 2023).

162. *See supra* section II.D.1.

For example, if a parent becomes physically abusive to the child when they are using substances or the child is neglected because the parent is using substances, the children will still be protected under other regulations such as WAC 110-30-0030.¹⁶³ However, without other signs of abuse or neglect, substance abuse alone would not be enough for removal.

On its own, substance abuse should not be a reason for removal because it does not meet the definition of child abuse in the Washington Administrative Code (WAC). The WAC defines child abuse as the “injury, sexual abuse, or sexual exploitation of a child by any person under circumstances which indicate that the child’s health, welfare, or safety is harmed, or the negligent treatment or maltreatment of a child by a person responsible for or providing care to the child.”¹⁶⁴ Substance use by parents does not meet this definition without additional abuse or neglect. However, WAC 110-30-0030(5)(a), the provision of the administrative code that defines substance abuse, still requires the court to consider parental substance abuse when they make findings of child maltreatment.¹⁶⁵ Under the new version of RCW 13.34.065, the judge must find that a child is at risk of imminent physical harm as a result of child abuse or neglect.¹⁶⁶ That new standard will not allow a judge to remove a child from the home based on parental substance abuse that does not meet the standard for abuse or neglect.

B. RCW 26.44.195 Allows Courts to Bypass Meeting the “Imminent Physical Harm” Standard

Substance abuse carries a social stigma and is often erroneously associated with communities of color.¹⁶⁷ RCW 26.44.195 primes judges to treat substance abuse as an imminent threat to children because it calls out substance abuse as an important consideration in child removal.¹⁶⁸

Courts should instead view parental substance abuse the same way Washington courts have considered parental mental illness or cognitive impairment. The Washington Court of Appeals acknowledged that assumptions about the parenting abilities of a person with a cognitive disability should not be grounds to remove a child from the parent’s

163. WASH. ADMIN. CODE § 110-30-0030(5)(a).

164. *Id.*

165. *Id.*

166. WASH. REV. CODE § 13.34.065(5)(a)(ii)(B) (effective July 1, 2023).

167. *See supra* section IV.B.

168. WASH. REV. CODE § 26.44.195(2) (2005).

custody unless the parent is currently unfit.¹⁶⁹ In cases where a parent struggles with mental illness or a cognitive impairment, the State cannot use evidence of parental mental illness or cognitive impairment alone to prove that the child is at risk of harm.¹⁷⁰ Instead, the State must demonstrate that the mental illness or cognitive impairment impacted the parent's ability to be a fit parent for their child.¹⁷¹ This safeguard prevents children from being removed from parents solely based on the parents' status as mentally ill or cognitively impaired.

The courts should apply this same standard to cases where parents use substances. Under the current law, courts can rely on the parent's substance abuse under RCW 26.44.195(2) to remove the child without finding an imminent threat of physical harm.¹⁷² However, mental illness and cognitive impairment are both similar to substance abuse because they describe the status of the parent, not any impact on the child. Washington courts have not allowed the State to bypass the "substantial risk of harm" standard and give great weight to mental illness or cognitive impairment without a finding of a current parental deficiency.¹⁷³ The Legislature and courts should hold parental substance abuse to the same standard.

General fear and social stigma around substance abuse do not justify removing children from their parents and denying their parents the fundamental right to custody of their children without demonstrating that the child has been abused or neglected. Data demonstrates unnecessarily placing children in foster care results in significant negative outcomes.¹⁷⁴ The Washington Court of Appeals has previously recognized that the mental or cognitive status of a parent is a concern that needs support and resources as an alternative to removing one's child from their care,¹⁷⁵ and this same standard should be applied to parents struggling with substance use.

C. *RCW 26.44.195 Must Be Revised to Eliminate Substance Abuse as a Factor in Determining Whether a Child Has Been Abused*

Washington must amend RCW 26.44.195 to remove the language

169. *In re Welfare of A.B.*, 181 Wash. App. 45, 64–65, 323 P.3d 1062, 1073 (2014).

170. *Id.*

171. *Id.* at 61, 323 P.3d at 1071.

172. WASH. REV. CODE § 26.44.195(2) (2005); WASH. REV. CODE § 13.34.065(5)(a)(ii)(B) (2021).

173. *Welfare of A.B.*, 181 Wash. App. at 64–65, 323 P.3d at 1073.

174. *See supra* section IV.A.

175. *See, e.g., Welfare of A.B.*, 181 Wash. App. at 65, 323 P.3d at 1073 (explaining that services may be offered to support a parent with cognitive challenges or mental illness in remedying underlying causes of parenting deficiencies).

about giving substance abuse “great weight”¹⁷⁶ and instead require the court to find that returning the child home would subject the child to “imminent physical harm” if the State wants to keep the child out of parental custody at the shelter care hearing as per the amended RCW 13.34.065.¹⁷⁷ The new version of RCW 13.34.065 will heighten the standard for removal by requiring that the child be at risk of imminent physical harm at home in order to remove the child from their parents’ care.¹⁷⁸ The current version of RCW 26.44.195 renders the new version of RCW 13.34.065 useless by allowing courts to bypass this standard and remove children from parental custody based on parental substance abuse without a finding of imminent physical harm. In every Washington shelter care hearing, the State should be required to prove that the child is at imminent risk of physical harm in order to remove the child from their parents. Any statute that allows for an exception to this standard has the potential to create confusion in the courts and unequal outcomes for families.

Removal from parents and placement in foster care significantly impacts youth.¹⁷⁹ The Washington State Legislature, CPS, and courts should prioritize keeping families together whenever possible. Washington case law and statutes consistently demonstrate that Washington is committed to keeping families together and supporting positive outcomes for parents and children. By limiting shelter care hearing removals to cases where the child is at risk of imminent physical harm and eliminating substance abuse as a factor that is given “great weight” in removal, families in Washington can be kept together whenever possible, leading to better outcomes for children and families.

CONCLUSION

The Washington State Legislature should revise RCW 26.44.195 to remove the language about giving substance abuse “great weight” in determinations of child abuse and neglect. The law should treat substance abuse in child dependency law the same way as parental mental illness or cognitive defect. State law should require CPS to demonstrate that the parent’s substance abuse caused abuse or maltreatment of the child in order to keep the child out of the home at the shelter care hearing. Courts would still treat child health and safety as the prevailing interest in these proceedings. However, using parental substance abuse as the sole reason

176. WASH. REV. CODE § 26.44.195(2) (2005).

177. WASH. REV. CODE § 13.34.065(5)(a)(ii)(B) (effective July 1, 2023).

178. *Id.*

179. *See supra* section II.D.1.

to find that a child has been abused or neglected leads to the erroneous removal of children from the home. To achieve the best possible outcomes for children, families should be kept together whenever possible. Additionally, parents should be able to retain their fundamental interest in the care and custody of their children unless there is a finding of child abuse or neglect. Substance abuse on its own does not meet the established Washington Administrative Code definition of child abuse or neglect, and therefore investigators should not use it as a significant factor in determining whether a child has been abused or neglected. Additionally, further destigmatizing substance abuse and strengthening resources for families struggling with substance abuse issues would support healthy families and communities in Washington State.