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Terminating Parental Rights: Mental Illness Disguised as Permanent Neglect, In re Hime Y

William F. Bogle Jr.

Terminating Parental Rights: Mental Illness Disguised as Permanent Neglect, *In re Hime Y.*

I. Introduction

The New York courts, in construing section 384-b of the New York Social Services Law,[1] continue to struggle with the termination of parental rights when the parent suffers from a mental illness.[2] When a mental illness creates a disturbance in the parent's behavior, feeling, thinking, or judgment, the child may have his physical, mental, or emotional health impaired due to his parent's failure to exercise a minimum degree of care.[3] To

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1. N.Y. Soc. Serv. Law § 384-b (McKinney Supp. 1981).

2. *Id.* Section 384-b defines "mental illness" as:

> an affliction with a mental disease or mental condition which is manifested by a disorder or disturbance in behavior, feeling, thinking or judgment to such an extent that if such child were placed in or returned to the custody of the parent, the child would be in danger of becoming a neglected child as defined in the family court act.

Id. § 384-b(6)(a).

The Family Court Act defines "neglected child" as:

> (f) "Neglected child" means a child less than eighteen years of age
> (i) whose physical, mental or emotional condition has been imparied or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care
> (A) in supplying the child with adequate food, clothing, shelter or education in accordance with the provisions of part one of article sixty-five of the education law, or medical, dental, optometrical or surgical care, though financially able to do so or offered financial or other reasonable means to do so; or
> (B) in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof, including the infliction of excessive corporal punishment; or by using a drug or drugs; or by using alcoholic beverages to the extent that he loses self-control of his actions; or by any other acts of a similarly serious nature requiring the aid of the court; or
> (ii) who has been abandoned by his parents or other person legally responsible for his care.

N.Y. Fam. Ct. Act § 1012(f) (McKinney 1975). *See* N.Y. Soc. Serv. Law § 371(4-a) (McKinney 1976) (substantially the same statutory definition).

3. N.Y. Soc. Serv. Law § 384-b (6)(a) (McKinney Supp. 1981); N.Y. Fam. Ct. Act § 1012(f) (McKinney 1975); N.Y. Soc. Serv. Law § 371(4-a) (McKinney 1976). *See supra* note 2.

terminate parental rights when the parent is mentally ill, the parent must be shown to be "presently and for the foreseeable future unable, by reason of [his] mental illness . . . to provide proper and adequate care for [his] child. . . ."[4] Few psychiatrists and psychologists will give unequivocal opinions that a mentally ill parent will remain mentally ill in the near future, given the complex nature of many mental illnesses and the advancement in their medical treatment.[5] Mentally ill parents may be proven unable currently to provide adequate care for their child; yet often such parents cannot be proven, as statutorially required, by clear and convincing evidence,[6] to be unable to pro-

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4. N.Y. Soc. Serv. Law § 384-b(4)(c) (McKinney Supp. 1981). The statute sets forth the grounds for commitment pursuant to a court order in cases where the parent is mentally ill as follows:

> (4) An order committing the guardianship and custody of a child pursuant to this section shall be granted only upon one or more of the following grounds:
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> . . . .
>
> (c) The parent or parents, whose consent to the adoption of the child would otherwise be required in accordance with section eleven of the domestic relations law, are presently and for the foreseeable future unable, by reason of mental illness or mental retardation, to provide proper and adequate care for a child who has been in the care of an authorized agency for the period of one year immediately prior to the date on which the petition is filed in the court.

Id.

Section 384-b(4)(c) was enacted by the legislature in 1976. 1976 N.Y. Laws 666, § 3. Its predecessor was section 384-(7)(a), which was enacted in 1973 and amended in 1975. 1973 N.Y. Laws 863, § 2, *as amended by* 1975 N.Y. Laws 706, § 1. In commenting on section 384(7)(a) the Temporary State Commission on Child Welfare said:

> it serves a salutory purpose in freeing children for adoption where they formerly would have remained in foster care throughout their minority because their mentally ill parents could not have been deemed to have abandoned them due to their mental condition. The Commission also observes that the abandonment ground for involuntary termination of parental rights continues to be troublesome. The courts in applying the statute have refused to make a finding of abandonment where the parents maintain even a very tenuous contact with their children through infrequent post cards, birthday greetings or other insubstantial gestures.

The Preliminary Report of the Temporary State Commission on Child Welfare, *reprinted in* The Children of the State I 44 (1975) [hereinafter cited as Children of the State I].

This note only applies to termination of parental rights on the ground of mental illness. For a discussion of mental retardation and termination of parental rights see Note, *The Constitutionality of New York's Parental Termination Statute as Applied to the Mentally Retarded Parent: Equal Protection and Due Process Objections*, 46 Alb. L. Rev. 271 (1981).

5. *See infra* notes 100-108 and accompanying text.

6. N.Y. Soc. Serv. Law § 384-b(3)(g) (McKinney Supp. 1981).

vide such care "for the foreseeable future."[7]

Such parents, after *In re Hime Y.*,[8] may have their parental rights terminated because of "permanent neglect."[9] In *In re Hime Y.*, the court of appeals construed[10] section 384-b of the Social Services Law, which defines permanent neglect as the failure of a parent for a period of more than one year to "maintain contact with or plan for the future of the child, although physically and financially able to do so,"[11] and found that mental illness will not be an excuse for planning if the parent can be found physically and financially able to plan.[12] By reading the words "physically and financially able" to plan literally, the court refused to include any element of mental capacity in the

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7. *Id.* § 384-b(4)(c). *See supra* note 4.

8. 52 N.Y.2d 242, 418 N.E.2d 1305, 437 N.Y.S.2d 286, *remanded*, 81 A.D.2d 313, 440 N.Y.S.2d 635 (1st Dep't), *aff'd per curiam*, 54 N.Y.2d 282, 429 N.E.2d 792, 445 N.Y.S.2d 114 (1981).

9. N.Y. Soc. Serv. Law § 384-b(4)(d) (McKinney Supp. 1981). One of the grounds for obtaining a court order committing the guardianship and custody of a child is that "[t]he child is a permanently neglected child." *Id.* Section 384-b(7)(a) defines a "permanently neglected child" as:

> a child who is in the care of an authorized agency and whose parent or custodian has failed for a period of more than one year following the date such child came into the care of an authorized agency substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so, notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship when such efforts will not be detrimental to the best interests of the child. In the event that the parent defaults after due notice of a proceeding to determine such neglect, such physical and financial ability of such parent may be presumed by the court.

Id. See N.Y. Fam. Ct. Act § 611 (McKinney 1975) (substantially same statutory definition).

The "plan for the future" must provide adequate care and a stable home, and be realistic and feasible. N.Y. Soc. Serv. Law § 384-b(7)(c) (McKinney Supp. 1981). Infrequent contacts will not, by themselves, preclude a finding of permanent neglect. *Id.* § 384-b(7)(b).

The permanent neglect provision was added in 1959, joining abandonment as grounds for terminating parental rights in New York. 1959 N.Y. Laws 450, § 2. The original statute required the parent to "maintain contact with *and* plan for the future of the child." *Id.* (emphasis added). In 1973, the legislature changed the test, requiring the parent to "maintain contact with *or* plan for the future of the child." 1973 N.Y. Laws 870, § 1 (emphasis added). *See infra* note 50 for the statutory definition of a "plan for the future of the child."

10. *In re* Hime Y., 52 N.Y.2d 242, 251, 418 N.E.2d 1305, 1308-09, 437 N.Y.S.2d 286, 289-90 (1981).

11. N.Y. Soc. Serv. Law § 384-b(7)(a) (McKinney Supp. 1981). *See supra* note 9.

12. *In re* Hime Y., 52 N.Y.2d at 251, 418 N.E.2d at 1309, 437 N.Y.S.2d at 290.

ability to plan for a child's future.[13] Thus, a parent may have his parental rights terminated due to the failure to plan for his child's future because of mental illness during the past year or more, even though the court might not be able to find sufficient proof of continuing mental illness in the near future to terminate his parental rights based on mental illness alone.

Part I of this note presents background information regarding termination of parental rights. Part II discusses the decisions in *In re Hime Y.*, and Part III analyzes their impact. In evaluating the court of appeals reasoning, this note concludes that the use of the permanent neglect provision instead of the mental illness provision circumvents the application of the statute as envisioned by the legislature. The court, by reading the permanent neglect statute literally, reaches a result where planning is reduced to a physical act with no element of mental capacity contained in it.

II. Background

The right of a natural parent to the care and custody of his child has been long recognized as a liberty interest protected by the United States Constitution.[14] The Supreme Court has stated, "It is cardinal with us that the custody, care, and nurture of the child reside first in the parents, whose primary function

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13. *Id.*

14. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390 (1923), where Justice McReynolds, writing for the majority, deemed liberty under the fourteenth amendment to include the right to "marry, establish a home and bring up children, . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Id.* at 399.

The Supreme Court has found that the protection of the institution of the family to have underpinnings in many areas of the Constitution. The Court once stated:

> [t]he Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," *Meyer v. Nebraska*, 262 U.S. 390, 393 (1923), "basic civil rights of man," *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), and "[r]ights far more precious . . . property rights," *May v. Anderson*, 345 U.S. 528, 533 (1953) . . . . The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, *Meyer v. Nebraska, supra*, at 399, the Equal Protection Clause of the Fourteenth Amendment, *Skinner v. Oklahoma, supra*, at 541, and the Ninth Amendment, *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring).

Stanley v. Illinois, 405 U.S. 645, 651 (1972). *See generally Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1161-97 (1980) [hereinafter cited as *Developments*].

and freedom include preparation for obligations the state can neither supply nor hinder."[15] The institution of the family is regarded as "deeply rooted in this Nation's history and tradition" and commands high constitutional protection.[16]

Despite the parent's strong interest in raising his child, the state has an interest in protecting that child when it is shown that the parent cannot or will not provide adequate care and custody for the child.[17] The state may act to protect a child whose parent grossly fails to provide for the child's physical or emotional needs.[18] The state, however, may not rupture the family relationship absent a finding of parental unfitness.[19] In New

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15. Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (citation omitted).

16. Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion) (footnote omitted). The Court once referred to the right of parents to raise their children as "basic in the structure of our society." Ginsberg v. New York, 390 U.S. 629, 639 (1968).

17. The state's power in protecting children subjected to inadequate care stems from two sources, the police power and the *parens patriae* power. The state, under its police power, may act to protect the general welfare of its citizens and shield them from harm. *See* Muggler v. Kansas, 123 U.S. 623, 664-67 (1887). Under the *parens patriae* power a state may act to promote the welfare of its citizens, such as infants, who lack the capacity to adequately protect their own best interests. *See* Mormon Church v. United States, 136 U.S. 1, 56-58 (1890). *See generally Developments, supra* note 14, at 1198-1248 (discussing state interests in the family and limitations on the power of the state).

The doctrine of *parens patriae* is based in equity, where the court acts to protect the child as a "wise, affectionate and careful parent" would. Finlay v. Finlay, 240 N.Y. 429, 433, 148 N.E. 624, 626 (1925) (Cardozo, J.) (quoting Queen v. Gyngall, [1893] 2 Q.B. 232, 241 (C.A.)).

The New York Court of Appeals has realized the primacy of the family relationship, stating: "[t]he filial bond is one of the strongest, yet most delicate, and most inviolable of all relationships, and in dealing with it we must realize that a child is not a mere creature of the State for distribution by it." Corey L. v. Martin L., 45 N.Y.2d 383, 392, 380 N.E.2d 266, 271, 408 N.Y.S.2d 439, 443 (1978) (citation omitted). For a general discussion of New York statutes which govern adoption, voluntary foster care, and neglect proceedings, see Note, *In the Child's Best Interests: Rights of Natural Parents in Child Placement Proceedings*, 51 N.Y.U. L. REV. 446 (1976).

18. N.Y. FAM. CT. ACT § 1031 (McKinney 1975).

19. *See*, Smith v. Organization of Foster Families for Equality & Reform (OFFER), 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring). Justice Stewart stated:

> [I]f a state were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest, I should have little doubt that the State would have intruded impermissibly on "the private realm of family life which the state cannot enter."

Id. (citation omitted) (cited as controlling, Quilloin v. Walcott, 434 U.S. 246, 255 (1978) (unanimous court)).

The "best interests" of the child is a concept which uses many factors in the parent-

York, parental unfitness has been defined by the legislature to be conduct such as abandonment of the child,[20] mental illness of the parent,[21] permanent neglect of the child,[22] or physical abuse of the child by the parent.[23]

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child relationship such as the parent's moral fitness, financial means and mental capacity; the duration and continuity of the relationship and its emotional ties; the child's age, wishes and health. *See generally* Note, *Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties*, 73 YALE L.J. 151, 153 (1963) (many factors of the vague "best interests" test examined). The "best interests" test is embodied in statutes, *see, e.g.*, N.Y. SOC. SERV. LAW § 384-b(1)(a), (b) (McKinney Supp. 1981) (it is desirable that the child remain with his natural parents unless his best interests would be endangered), and case law, *see, e.g.*, Nehra v. Uhlar, 43 N.Y.2d 242, 250, 372 N.E.2d 4, 8, 401 N.Y.S.2d 168, 172 (1977) ("the paramount concern in all custody matters [is] the best interest[s] of the child.").

A sequence of hearings is imposed by statute when parental rights are sought to be terminated on the ground of permanent neglect. N.Y. FAM. CT. ACT §§ 622-625 (McKinney 1975). Initially, there must be a fact-finding hearing to determine whether the child has been permanently neglected. *Id.* § 622. After the fact-finding hearing is completed, a dispositional hearing is held to determine whether the best interests of the child require termination of parental rights. *Id.* § 625.

In New York, courts may not examine the "best interests" of the child until statutory unfitness has been proven. The court of appeals has stated: "the department has repeatedly failed, . . . to prove the mother guilty of statutory abandonment or permanent neglect or to show that she is unfit. Absent such a finding the courts may not permanently sever all ties." *In re* Sanjivini K., 47 N.Y.2d 374, 381, 391 N.E.2d 1316, 1320, 418 N.Y.S.2d 339, 343 (1979) (citation omitted).

Prior to *In re Sanjivini K.*, the court of appeals permitted termination of parental rights on a showing of "extraordinary circumstances." Bennett v. Jeffreys, 40 N.Y.2d 543, 356 N.E.2d 277, 387 N.Y.S.2d 821 (1976). If the child was separated from his natural parents for an extended period of time and the child formed an attachment to his custodian, the court could examine the child's best interests in determining who would get custody absent any finding of fault, abandonment, neglect or unfitness of the natural parent. *See id. Accord* People *ex rel.* Gallinger v. Gallinger, 55 A.D.2d 1036, 391 N.Y.S.2d 248 (4th Dep't 1977) (mem.) (child lived with grandparents for over three years; held, extraordinary circumstances and the best interests of the child mandated termination of the natural parent's rights).

After frequent terminations on the doctrine of extraordinary circumstances, the court of appeals restricted its use, requiring a finding of statutory abandonment, neglect or unfitness. *In re* Sanjivini K., 47 N.Y.2d 374, 391 N.E.2d 1316, 418 N.Y.S.2d 339 (1979). The court distinguished *Bennett v. Jeffreys*, deeming it to have involved informal placement of a child and the resulting analysis proceeded from common law, not statutory grounds. *Id.* at 382, 391 N.E.2d at 1320, 418 N.Y.S.2d at 343-44. For a discussion of the *Bennett v. Jeffreys* "extraordinary circumstances" test, see Note, *The Fundamental Right to Family Integrity and its Role in New York Foster Care Adjudication*, 44 BROOKLYN L. REV. 63, 94-96 (1977).

20. N.Y. SOC. SERV. LAW § 384-b(4)(b) (McKinney Supp. 1981).

21. *Id.* § 384-b(4)(c). *See supra* note 4.

22. *Id.* § 384-b(4)(d). *See supra* note 9.

23. *Id.* § 384-b(4)(e).

A child, dependent upon his parent for his physical and emotional needs during his infancy and developmental years, has a need to have a strong and stable family relationship.[24] When the parent is unable to provide for the child's needs, other arrangements for the child's care and custody must be found to protect the child from harm. Foster care[25] is preferred over institutional placement because its family setting provides both for a child's physical needs and leads to healthy emotional development.[26] When the prospect for recovery of the unfit parent is bleak, the child should be able to remain with the foster parents permanently to not disrupt the growing developmental relationship that it has provided.[27]

New York has a well defined statutory scheme intended to:

> Provide procedures not only assuring that the rights of the natural parent are protected, but also, where positive nurturing parent-child relationships no longer exist, furthering the best interests, needs, and rights of the child by terminating parental rights and freeing the child for adoption.[28]

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24. J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 13 (1973) [hereinafter cited as BEYOND THE BEST INTERESTS]. *See* N.Y. SOC. SERV. LAW § 384-b(1)(a)(i) (McKinney Supp. 1981) (legislature finds that it is desirable for children to grow up with a normal family life in a permanent home and such circumstances offer the best opportunity for children to develop and thrive).

25. Foster care, as used in this note, means the arrangement where a child is placed with foster parents. A foster parent is one who, although not legally related to the child nor decreed a parent in formal adoption proceedings, assumes the role of the parent. *See* N.Y. SOC. SERV. LAW § 371(19) (McKinney 1976). *See generally* S. KATZ, WHEN PARENTS FAIL 90-106 (1971) (outlining the common-law background and present status of foster care).

26. *Cf.* S. KATZ, *supra* note 25, at 91. (foster care as an alternative to institutional care provides the child with the advantages of a family setting). The foster parent status may be elevated to that of a "psychological parent," a term promulgated by the authors in BEYOND THE BEST INTERESTS, *supra* note 24. The "psychological parent" is defined as:

> one who, on a continuing day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs. The psychological parent may be biological . . . , adoptive, foster, or common-law . . . parent, or any other person. There is no presumption in favor of any of these after the initial assignment at birth . . . .

Id. at 98.

27. For a discussion of the effects of uprooting a child at critical developmental stages, see BEYOND THE BEST INTERESTS, *supra* note 24, at 31-52.

28. N.Y. SOC. SERV. LAW § 384-b(1)(b) (McKinney Supp. 1981). Many children remain in foster care for extended periods of time since parents sometimes fail to recover from their problems. Section 384-b(1)(b) provides:

> many children who have been placed in foster care experience unnecessarily pro-

Termination of parental rights may be accomplished by a voluntary surrender of the child by the natural parent[29] or by a court order.[30] The first step in involuntary termination proceedings is to have the guardianship and custody of the child committed to an authorized agency[31] or to foster parents.[32] An authorized agency or the foster parents may petition the family court to obtain guardianship and custody of the child when the parent is allegedly unfit.[33] The court may only commit the

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tracted stays in such care without being adopted or returned to their parents or other custodians. Such unnecessary stays may deprive these children of positive, nurturing family relationships and have deleterious effects on their development into responsible, productive citizens. The legislature finds that provision of a timely procedure for the termination, in appropriate cases, of the rights of the natural parents could reduce such unnecessary stays.

Id.

As a child advances in age, the possibilities of adoption decrease. Through an early adoption, a young child may avoid the damaging effects of having a family relationship that is beyond repair, and may better adapt to a new home. The older child, however, may develop ties with the natural parents regardless of the status of the parental relationship or the parents' condition. *See* Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623, 688-700 (1976).

29. N.Y. Soc. SERV. LAW § 384 (McKinney 1976 & Supp. 1981).

30. *Id.* § 384-b. This note focuses only on involuntary terminations of parental rights.

31. An "authorized agency" means any agency, association, corporation, institution, society or other organization which is incorporated or organized under the laws of New York State, which either by corporate power or by law is empowered to care for, to "place out" or to "board out" children. Any court or public welfare official of New York is authorized by law to place out or to board out children. The Department of Social Services supervises such agencies and all acts in relation to the welfare of children pursuant to the Social Services Law. *See* N.Y. Soc. SERV. LAW § 371(10) (McKinney 1976 & Supp. 1981).

To "place out" means "to arrange for the free care of a child in a family other than that of the child's parent, step-parent, grandparent, brother, sister, uncle, or aunt or legal guardian, for the purpose of adoption or for the purpose of providing care." *Id.* § 371(12). To "board out" means "to arrange for the care of a child in a family, other than that of the child's parent, step-parent, or legal guardian, to whom payment is made or agreed to be made for care and maintenence." *Id.* § 371(14).

32. In New York, the legislature has defined "foster parent" as "any person with whom a child, in the care, custody or guardianship of an authorized agency, is placed for temporary or long-term care . . . ." N.Y. Soc. SERV. LAW § 371(19) (McKinney 1976). *See supra* note 25.

33. The authorized agency must petition the family court to review the foster care status of the child who has remained in foster care for a continuous period of eighteen months. The foster parents may petition the family court for review if the child has resided in their home for a continuous period of eighteen months. N.Y. Soc. SERV. LAW §

guardianship and custody of a child in accordance with the statutory grounds set forth by the legislature.[34]

A. *Termination by Mental Illness*

A mentally ill parent will have his parental rights terminated upon a showing, by clear and convincing evidence,[35] that he is currently and for the near future unable, by reason of a mental illness, to provide adequate care for his child who has been in foster care for over one year.[36] Such parent's mental illness is to be proven by the testimony of a court-appointed physician and certified psychiatrist or psychologist,[37] and by other competent, material, and relevant evidence submitted by the parent and the agency.[38] The legal sufficiency of the proof will not be determined until the judge has taken the testimony of the court-appointed physician and psychiatrist or psychologist.[39] If the parent is found to be mentally ill and unable to care for

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392(2) (McKinney Supp. 1981). A proceeding to terminate parental rights under section 384-b is originated by the serving of such petition on the child's natural parents and other persons as the judge or surrogate may, in his discretion, prescribe. *Id.* § 384-b(3).

34. *Id.* § 384-b(4). *See supra* notes 20-23 and accompanying text. *See also supra* note 19 (terminations of parental rights must have standards providing constitutional protection of the parent's rights).

35. N.Y. Soc. Serv. Law § 384-b(3)(g) (McKinney Supp. 1981).

36. *Id.* § 384-b(4)(c). *See supra* note 4.

37. *Id.* § 384-b(6)(e). Such appointments are done pursuant to N.Y. Jud. Law § 35 (McKinney Supp. 1981). N.Y. Soc. Serv. Law § 384-b(6)(e) (McKinney Supp. 1981). The parent may not prevent termination of parental rights by refusing to submit to the examination by the court-appointed experts. The statute states:

> [i]f the parent refuses to submit to such court-ordered examination, or if the parent renders himself unavailable therefor whether before or after the initiation of a proceeding under this section, by departing from the state or by concealing himself therein, the appointed physician, psychologist or psychiatrist, upon the basis of other available information, including, but not limited to, agency, hospital or clinic records, may testify without in examination of such parent, provided that such other information affords a reasonable basis for his opinion.

Id.

There is no privilege between physician and patient; psychologist or psychiatrist and client; or social worker and client, to exclude evidence that would otherwise be admissible. *Id.* § 384-b(3)(h). There is no privilege against self-incrimination in submitting to a psychiatric examination when actions are brought to terminate parental rights. *See, e.g., In re* Sloan, 84 Misc.2d 306, 310, 375 N.Y.S.2d 528, 532 (Fam. Ct. Bronx County 1975) (court balances the parent's privilege against the best interests of the child).

38. N.Y. Soc. Serv. Law § 384-b(6)(e) (McKinney Supp. 1981).

39. *Id.* § 384-b(6)(c).

his child,[40] the judge is not required to hold a dispositional hearing to examine the best interests of the child.[41]

The New York courts have consistently upheld section 384-b(4)(c), with its various requirements, to adequately protect the parent's constitutional right to raise a family.[42] The requirement of clear and convincing evidence of a mental illness affecting the parent's ability to care for the child gives assurance that the parental rights will not be terminated unless unfitness is sufficiently substantiated.[43] Parental rights are not to be terminated based soley on the parent's status as being mentally ill; some nexus between the parent's mental illness and his inability to care for his child must be shown.[44] Since the statute requires

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40. A finding that the parent is mentally ill and unable to care for his child does not constitute an adjudication of the legal status of the parent. *Id.* § 384-b(6)(d). *See supra* note 2 for the statutory definition of "mental illness."

41. *See, e.g., In re* Daniel A.D., 106 Misc.2d 370, 371, 431 N.Y.S.2d 936, 938 (Fam. Ct. N.Y. County 1980). *Contra In re* Gross, 102 Misc.2d 1073, 1081, 425 N.Y.S.2d 220, 224-25 (Fam. Ct. N.Y. County 1980) (not requiring a dispositional hearing when mental illness is alleged violates equal protection and due process when such a dispositional hearing is required for termination on the ground of permanent neglect). Many judges do grant dispositional hearings to examine the best interests of the child even though they are not required by law to do so. *See, e.g., In re* Daniel A.D., 106 Misc.2d 370, 371, 431 N.Y.S.2d 936, 938 (Fam. Ct. N.Y. County 1980). *See supra* note 19 for a discussion of the "best interests" of the child.

42. *See, e.g., In re* Sylvia M., 82 A.D.2d 217, 443 N.Y.S.2d 214 (1st Dep't 1981). There the court upheld the mental illness provision against due process, vagueness and equal protection claims, stating that while "sufficiently elastic to protect parental rights, [the statute] is not so indefinite as to deprive parents of fair notice of the behavior effected." *Id.* at 237, 443 N.Y.S.2d at 225. *See* Note, *Application of the Vagueness Doctrine to Statutes Terminating Parental Rights,* 1980 DUKE L. J. 336.

In New York, the statutory provision for terminating parental rights based on the parent's mental illness has existed since 1973 in basically the same form. *See supra* note 4. Courts have looked to the legislature's reenactment of the provision in 1976 as evidence of its acceptance and its constitutionality. *See, e.g., In re* Ursula P., 108 Misc.2d 181, 437 N.Y.S.2d 225 (Fam. Ct. Kings County 1981).

43. *In re* the N. Children, 107 Misc.2d 763, 768, 435 N.Y.S.2d 1018, 1022 (Fam. Ct. Kings County 1981); *see also In re* Marilyn H., 106 Misc.2d 972, 978, 436 N.Y.S.2d 814, 818 (Fam. Ct. N.Y. County 1981) (a parent's constitutional right "appears" to require the protection of a higher standard of proof in such a proceeding than that in the ordinary civil case).

44. The statute, in defining mental illness, requires that the parent's mental illness create a danger that the child will be permanently neglected. N.Y. SOC. SERV. LAW § 384-b(6)(a) (McKinney Supp. 1981). *See supra* note 2. *But cf. In re* Millar, 35 N.Y.2d 767, 320 N.E.2d 865, 362 N.Y.S.2d 149 (1974) (mem.) (the court of appeals affirmed the termination order due to the staleness of the case; the court would have preferred more evidence of the nexus between the mother's mental illness and her inability to care for

expert testimony of the parent's mental illness, courts have provided an expert to the parent who is unable to afford one to rebut the agency's evidence.[45] Additionally, since the statutory test requires proof of the parent's mental illness in the near future, courts have taken judicial notice of the advancement in medical treatment for controlling mental illness.[46]

B. *Termination by Permanent Neglect*

A parent may have his parental rights terminated if it can be proven, by a fair preponderance of the evidence,[47] that he has "permanently neglected" his child.[48] A child is permanently neglected when he has been in foster care[49] for over one year and the parent has failed to "maintain contact with or plan for the future of the child, although physically and financially able to do so."[50] During the period the child is in foster care, the agency

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her child).

One appellate division court deemed the statute to be constitutional because it addresses conduct rather than status. *In re* Sylvia M., 82 A.D.2d 217, 237, 443 N.Y.S.2d 214, 226 (1st Dep't 1981). As one Massachusetts court stated, "loss of a child may be as onerous a penalty as the deprivation of the parents' freedom." *In re* the Custody of a Minor, 377 Mass. 876, 884, 389 N.E.2d 68, 74 (1979). If, as the Massachusetts court has stated, termination of parental rights is on the same level as criminal incarceration, a penalty imposed because of a person's status as being mentally ill would be unconstitutional. *See* Robinson v. California, 370 U.S. 660, 666 (1962) (dictum). The Court stated that to make the status of being mentally ill a criminal offense would violate the eighth and fourteenth amendments. *Id.*

45. *In re* Roth, 97 Misc.2d 834, 412 N.Y.S.2d 568 (Fam. Ct. Monroe County 1979). The expert may be used in rebut the agency's expert testimony or to question the capability of expert examinations in general. *Id.* at 835-36, 412 N.Y.S.2d at 568-69.

46. *See, e.g., In re* the N. Children, 107 Misc.2d 763, 766, 435 N.Y.S.2d 1018, 1020-21 (Fam. Ct. Kings County 1981).

47. N.Y. Soc. Serv. Law § 384-b(3)(g) (McKinney Supp. 1981). *See infra* note 55.

48. *Id.* § 384-b(4)(d). *See supra* note 9.

49. *See supra* notes 25-27, 33.

50. N.Y. Soc. Serv. Law § 384-b(7)(a) (McKinney Supp. 1981). *See supra* note 9. The phrase "to plan for the future of the child" means:

> to take such steps as may be necessary to provide an adequate, stable home and parental care for the child within a period of time which is reasonable under the financial circumstances available to the parent. The plan must be realistic and feasible, and good faith effort shall not, of itself, be determinative. In determining whether a parent has planned for the future of the child, the court may consider the failure of the parent to utilize medical, psychiatric, psychological or other social and rehabilitative services and material resources made available to such parent.

Id. § 384-b(7)(c).

must use "diligent efforts" to encourage and strengthen the relationship between parent and child when such efforts will not be detrimental to the best interests of the child.[51] A parent who suffers from alcoholism or drug abuse will be excused from maintaining contact with or planning for the future of the child only when such parent is actually hospitalized, institutionalized, or incarcerated for such sickness.[52] Once a fact-finding hearing on the parent's permanent neglect is completed, a dispositional hearing to determine the best interests of the child is required before termination can be ordered.[53]

The permanent neglect provision has been upheld as constitutional in providing adequate protection to the parent's constitutional right to raise a family.[54] The requirement of proof of permanent neglect by a fair preponderance of the evidence, however, has recently come under attack as a violation of due process of such rights.[55] Some courts, in recognizing the fundamen-

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51. *Id.* § 384-b(7)(a). *See supra* note 9. "Diligent efforts" means:

> reasonable attempts by an authorized agency to assist, develop and encourage a meaningful relationship between the parent and child, including but not limited to:
>
> (1) consultation and cooperation with the parents in developing a plan for appropriate services to the child and his family;
>
> (2) making suitable arrangements for the parents to visit the child;
>
> (3) provision of services and other assistance to the parents so that problems preventing the discharge of the child from care may be resolved or ameliorated; and
>
> (4) informing the parents at appropriate intervals of the child's progress, development and health.

Id. § 384-b(7)(f).

52. *Id.* § 384-b(7)(d).

53. N.Y. FAM. CT. ACT. §§ 622-25 (McKinney 1975). A "dispositional hearing" is defined as a "hearing to determine whether the interests of the child require that the parent's custody . . . be terminated permanently and, if so, what order of disposition should be made." *Id.* § 623. *See supra* note 19.

54. *See, e.g., In re* Anthony L. C.C., 48 A.D.2d 415, 419, 370 N.Y.S.2d 219, 222 (3d Dep't), *appeal denied,* 37 N.Y.2d 708 (1975). *See infra* note 55.

55. *In re* John A.A., 75 A.D.2d 910, 427 N.Y.S.2d 319 (3d Dep't 1980) (mem.), *appeal dismissed,* 51 N.Y.2d 768 (1981), *rev'd sub. nom.* Santosky v. Kramer, 50 U.S.L.W. 4333 (U.S. Mar. 24, 1982) (No. 80-5889) (5-4 decision). The Supreme Court held that to sever the parents' ties to their children, the state must prove permanent neglect by the stricter standard of "clear and convincing evidence." *Id.* at 4339. The ruling left the state free to attempt to terminate the parents' rights by meeting the higher standard. Justice Blackmun, writing for the majority, said he meant to "express no view on the merits" of the case. *Id.*

tal interest involved,[56] have applied a higher standard of proof—clear and convincing evidence—to safeguard against the wrongful dissolution of a family relationship that might be able to be rehabilitated, given proper guidance and assistance.[57]

When a parent is mentally ill, an agency petitioning the court to terminate his parental rights often alleges the grounds of mental illness and, alternatively, permanent neglect.[58] It is argued that the mentally ill parent is not physically disabled; thus such parent must plan for his child's future when he is shown to be physically and financially able to do so.[59]

III. *In re* Hime Y.

A. *The Facts and the Lower Courts' Decisions*

Hime Y., removed from her mother's custody by an emergency court order when she was three days old, has never lived with her natural mother, Elaine S. Y.[60] Hime was placed in a

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56. *See supra* notes 14-16 and accompanying text.

57. *E.g., In re* Marilyn H., 106 Misc.2d 972, 979-80, 436 N.Y.S.2d 814, 818-19 (Fam. Ct. N.Y. County 1981). *But cf.* NATIONAL COUNCIL OF JUVENILE COURT JUDGES, MODEL STATUTE FOR TERMINATION OF PARENTAL RIGHTS § 8(1) [Reference File] FAM. L. REP. (BNA) 201:0070 (1977) (fair preponderance of the evidence is the level of proof for the Act for terminations on the grounds of mental illness and permanent neglect).

58. *See, e.g., In re* Y'Anique Neal, 75 A.D.2d 741, 427 N.Y.S.2d 432 (1st Dep't 1980) (mem.).

59. *In re* Stephen B., 60 Misc. 2d 662, 666-67, 303 N.Y.S.2d 438, 443 (Fam. Ct. N.Y. County 1969) (physically able to plan interpreted literally to apply to powers of locomotion only). *Contra In re* James S., 98 Misc.2d 650, 414 N.Y.S.2d 477 (Fam. Ct. Monroe County 1979) (physically able to plan interpreted to include mental capacity).

60. *In re* Suzanne Y., 92 Misc.2d 652, 653, 401 N.Y.S.2d 383, 384 (Fam. Ct. N.Y. County 1977). Hime Y. is the second daughter born to Elaine. *Id.* Suzanne, Elaine's first child, was born on April 15, 1972. *In re* Suzanne N. Yem, 54 A.D.2d 673, 674, 388 N.Y.S.2d 7, 9 (1st Dep't 1976) (Kupferman, J.P., dissenting in part) (mem.). Elaine was found "go-go dancing" after midnight with Suzanne, then three weeks old, wrapped in a feces-soiled afghan. *In re* Suzanne Y., 92 Misc.2d 652, 653, 401 N.Y.S.2d 383, 384 (Fam. Ct. N.Y. County 1977). In response to this incident, neglect proceedings were commenced based on Elaine's failure to plan for Suzanne. Suzanne was placed with foster parents once the petition was granted. *Id.*

Hime, born March 10, 1975, was immediately removed from Elaine in the hospital by the agency on the ground of Elaine's derivative neglect of Hime. *Id.* at 653-54, 401 N.Y.S.2d at 384. The agency acted pursuant to title ten of the New York Family Court Act; the relevant sections read as follows:

> Section 1046. Evidence
>
> (a) In any hearing under this article (i) proof of the abuse or neglect of one child shall be admissible evidence on the issue of the abuse or neglect of any other child

foster home by the Jewish Child Care Association, the agency which moved for the emergency court order to protect Hime.[61] When Hime was sixteen months old the agency petitioned the family court seeking to terminate Elaine's parental rights on the grounds of Elaine's mental illness and permanent neglect.[62]

The family court found that although Elaine was currently mentally ill, the testimony of Dr. Kessel, the court-appointed pyschiatrist, failed to prove, by clear and convincing evidence, that in the near future Elaine would be unable to care for Hime.[63] In denying the petition to terminate Elaine's parental rights, the court stated that "there may yet be room to salvage" the parent-child relationship.[64] The court ordered that Elaine was to have Hime for one full day every week, under the supervision of a social worker, for a period of three months, to attempt to rebuild the parent-child relationship.[65] Upon completion of the three month period, despite Elaine's failure to care for and build a relationship with Hime, the court found no au-

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of, or the legal responsibility of, the respondent . . . .

N.Y. FAM. CT. ACT § 1046(a)(i) (McKinney 1975).

Section 1024. Emergency removal without court order (a) . . . a duly incorporated society for the prevention of cruelty to children . . . may take a child into protective custody . . . without [a court] order under section one thousand twenty-two and without the consent of the parent . . . , regardless of whether the parent . . . , is absent, if (i) the child is in such circumstance or condition that his continuing in said place of residence or in the care and custody of the parent . . . presents an imminent danger to the child's life or health; and

(ii) there is not enough time to apply for an order under section one thousand twenty-two.

Id. § 1024(a).

This Note focuses on the proceedings as to Hime only.

61. *In re* Hime Y., 52 N.Y.2d at 245, 418 N.E.2d at 1306, 437 N.Y.S2d at 287 (1981).

62. *In re* Suzanne Y., 92 Misc.2d 652, 654, 401 N.Y.S.2d 383, 384 (Fam. Ct. N.Y. County 1977).

63. Dr. Kessel testified that Elaine was incapable of caring for Hime at present, but he noted that Elaine had made tremendous improvement and predicted that, although he could not specify a date, at some time in the future she might be able to care for Hime. He pointed to her willingness towards therapy and her proper use of prescribed medication as encouraging signs. He further explained that Elaine's mental illness was related to childbirth, which, in view of her age, had no chance of recurrence. *Id.* at 656, 401 N.Y.S.2d at 386.

64. *Id.* at 661, 401 N.Y.S.2d at 389.

65. *Id.* at 661-62, 401 N.Y.S.2d at 389. The court, recognizing that the agency caseworker had been protective of Hime and hostile towards Elaine, ordered that these visits be supervised by an impartial social worker from the Legal Aid Society. *Id.*

thority to order termination of Elaine's parental rights.[66] To protect both Elaine's and Hime's interests, the court granted long-term custody of Hime to the foster parents with liberal visitation privileges to Elaine.[67]

The appellate division,[68] upon reexamination of the evidence, found that Elaine was shown to be mentally ill for seven years prior to the termination proceeding, and only one expert suggested that she might recover "at some unknown future date."[69] The court found Elaine to be "minimally functional" despite medical treatment, and not to "be trusted, either now or in for foreseeable future, to supply the child with necessaries."[70] Modifying the family court's decision, the appellate division granted the petition to terminate Elaine's parental rights on the ground of her mental illness.[71] The appellate division dismissed the ground of termination of Elaine's parental rights based on permanent neglect as "academic," concluding that her mental illness necessarily precluded her from being physically able to

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66. *In re* Suzanne Y., 95 Misc.2d 733, 734, 411 N.Y.S.2d 132, 133 (Fam. Ct. N.Y. County 1978). The court was unable to find sufficient proof of any ground of parental unfitness as set forth in section 384-b, but the court viewed the poossibility of the return of Hime to Elaine as "disastrous." *Id.* at 735, 411 N.Y.S.2d at 133. The court refused to terminate Elaine's parental rights despite the finding of "extraordinary circumstances" as established in Bennett v. Jeffreys, 40 N.Y.2d 543, 356 N.E.2d 277, 387 N.Y.S.2d 821 (1976). *In re* Suzanne Y., 95 Misc.2d 733, 735-36, 411 N.Y.S.2d 132, 133-34 (Fam. Ct. N.Y. County 1978). *See supra* note 19.

67. *In re* Suzanne Y., 95 Misc.2d 733, 736, 411 N.Y.S.2d 132, 134 (Fam. Ct. N.Y. County 1978).

68. Both Elaine and the agency appealed the family court decision. *In re* Hime Y., 73 A.D.2d 154, 154, 425 N.Y.S.2d 336, 336 (1st Dep't 1980).

69. *Id.* at 160, 425 N.Y.S.2d at 340. The court, examining various psychiatrists' and psychologists' testimony of their prior examinations of Elaine, found that she "hear[d] voices," had a "lifelong history of marginal adjustment," had "schizophrenia, chronic undifferentiated type, in partial remission or control," and was "grossly psychotic." *Id.* at 157-58, 425 N.Y.S.2d at 338.

The court found that the medical evidence established that between 1971 and 1978 there had been no measurable change in Elaine's mental condition. Every psychiatrist, including Dr. Kessel, concluded that Elaine could not care for her children. Dr. Kessel's prediction as to Elaine's possible future recovery was the sole deviation from the findings of her unfitness. *Id.* at 160, 425 N.Y.S.2d at 340. The court viewed Elaine's failure to call a psychiatrist in her behalf as "an unfavorable inference with regard to the evidence thus withheld." *Id.* at 156, 425 N.Y.S.2d at 338 (citation omitted).

70. *Id.* at 160, 425 N.Y.S.2d at 340.

71. *Id.* at 160-61, 425 N.Y.S.2d at 340-41. The court justified its decision to terminate Elaine's parental rights stating that they had to act now "to protect the children." *Id.* at 160, 425 N.Y.S.2d at 340.

plan for Hime's future.[72]

B. *The Court of Appeals Decision*

1. *The Majority Opinion*

The majority,[73] reviewing the appellate division's decision terminating Elaine's parental rights, agreed that there was no doubt as to the sufficiency of the evidence submitted by the agency and the expert witnesses that Elaine "had been and at the present time was unable, by reason of a mental illness, to provide proper care for Hime."[74] The evidence as to Elaine's possible future condition and ability to care, however, was less persuasive.[75] Of all the experts who had examined Elaine, only one addressed her future condition, and in light of ongoing treatment that expert foresaw "a good possibility [that] she could care for the child" at some future date.[76] Since no expert testimony was offered to refute the possibility of Elaine's future recovery, the majority reasoned that termination of Elaine's parental rights due to her mental illness and inability to care for Hime would have to necessarily rest upon inferences drawn from her past and present inability.[77] The majority stated that such inferences alone could not serve as the clear and convincing proof required for termination of parental rights in cases where expert testimony as to the parent's recovery in the future was favorable.[78] Accordingly, the majority vacated the appellate divi-

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72. *Id.* at 160, 425 N.Y.S.2d at 340-41.

73. Judge Jones delivered the majority opinion, joined by Chief Judge Cooke and Judges Jasen, Gabrielli, and Meyer. Judge Wachtler delivered the dissenting opinion, joined by Judge Fuchsberg. *In re* Hime Y., 52 N.Y.2d 242, 418 N.E.2d 1305, 437 N.Y.S.2d 286 (1981).

74. *Id.* at 248, 418 N.E.2d at 1307, 437 N.Y.S.2d at 288. The majority examined the scope of the expert testimony required in cases alleging mental illness as a ground for termination of parental rights. The majority questioned whether the testimony must consider the consequences of the condition rather than only the existence of a condition, and further, whether the issue of care, both currently and in the near future, was a proper subject for expert testimony; but the majority offered no opinion on either point. *Id.*

75. *Id.*

76. *Id.* at 248-49, 418 N.E.2d at 1307, 437 N.Y.S.2d at 288-89. *See supra* note 63.

77. *Id.* at 249, 418 N.E.2d at 1308, 437 N.Y.S.2d at 289.

78. *Id.* The majority suggested, however, that in a case where no professional opinion was given as to future incapacity, past and present condition might warrant an inference of future incapacity which would be sufficient to terminate parental rights. *Id.*

sion's termination of Elaine's parental rights based on her mental illness and inability to care for Hime.[79]

Considering whether the appellate division was correct in dismissing the ground of Elaine's permanent neglect as "academic," the majority examined whether a parent's mental illness would preclude a finding of that parent's permanent neglect.[80] Finding no express reference to mental illness in the definition of permanent neglect,[81] the majority reasoned that a mentally ill parent need only be shown to fail to plan for his child's future, although physically and financially able to do so, to have his parental rights terminated on the ground of permanent neglect.[82] The majority did not read the language of the definition of permanent neglect as "encompassing [a] mental condition or status," nor did they treat mental incapacity as a physical disability.[83] The majority stated:

> Indeed, it may be contended that most natural mothers who fail to plan for their own children are subject to some form of mental disturbance; if mental inadequacy were to be considered an acceptable excuse for failure to plan the scope of the statutory provision would be narrowed to a point of near practical uselessness.[84]

Moreover, the majority reasoned that if the legislature had intended mental illness to serve as an excuse for the failure to plan, the legislature could have so provided by including such a statement in the definition of permanent neglect.[85] Thus, the

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79. *Id.*

80. *Id.* at 249-50, 418 N.E.2d at 1308, 437 N.Y.S.2d at 289. The appellate division reasoned that mental illness would create a physical disability precluding the parent from planning. *See supra* note 72 and accompanying text.

81. *See supra* note 9 for the statutory definition of permanent neglect.

82. *In re* Hime Y., 52 N.Y.2d at 250, 418 N.E.2d at 1308, 437 N.Y.S.2d at 290. Elaine's ability to maintain contact with Hime was not an issue, for Elaine had regularly attended her monthly visits with Hime before any action was commenced. *In re* Suzanne Y., 92 Misc.2d 652, 655, 401 N.Y.S.2d 383, 385 (Fam. Ct. N.Y. County 1977).

83. *In re* Hime Y., 52 N.Y.2d at 250, 418 N.E.2d at 1308, 437 N.Y.S.2d at 290.

84. *Id.* at 250-51, 418 N.E.2d at 1308-09, 437 N.Y.S.2d at 290.

85. *Id.* at 251, 418 N.E.2d at 1309, 437 N.Y.S.2d at 290. The majority noted that the permanent neglect provision explicitly excluded alcoholism and drug abuse as possible excuses for failing to plan, except where the parent was actually hospitalized or institutionalized for the sickness. *Id.* at 251 n.5, 418 N.E.2d at 1309 n.5, 437 N.Y.S.2d at 290 n.5. The majority further acknowledged that the legislature had provided for mental illness in another subsection, reasoning that the omission of mental illness in the definition

majority concluded that "mental illness does not, *ipso facto*, establish physical disability exonerating a parent from the obligation to plan for her child," and remanded the case to the appellate division to examine whether Elaine permanently neglected Hime.[86]

2. *The Dissent*

Judge Wachtler, joined by Judge Fuchsberg in the dissenting opinion, found the evidence sufficient to terminate Elaine's parantal rights on the ground of her mental illness and inability to care for Hime currently and in the near future.[87] Judge Wachtler examined Elaine's history of mental illness and concluded that the "record convincingly shows that this is a long-standing and persistent mental disorder which has proven resistant to successful treatment in the past, is presently uncorrected, and will in all likelihood continue in the future at least during the child's formative years."[88]

The dissent objected to the majority's reading of the statute as demanding clear and convincing evidence by "definitive" expert testimony of future mental illness and inability to care.[89] The statute, Judge Wachtler stated, does not attach such significance to the opinions of experts.[90] He argued that requiring clear and convincing evidence by "definitive" expert testimony of such illness and inability imposes an "unrealistic requirement as a prerequisite" considering the "traditional reluctance of candid experts to offer opinions without some reservation."[91]

Judge Wachtler, in conclusion, remarked:

> the statutory goal of providing permanent homes for children whose parents' mental condition renders them unfit to raise . . . [their children] now or in the foreseeable future . . . should not

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of permanent neglect was not an oversight by the legislature. *Id.* at 251, 418 N.E.2d at 1309, 437 N.Y.S.2d at 290.

86. *Id.* at 251, 418 N.E.2d at 1309, 437 N.Y.S.2d at 290.

87. *Id.* at 251-52, 418 N.E.2d at 1309, 437 N.Y.S.2d at 290 (Wachtler, J., dissenting).

88. *Id.*

89. *Id.* at 252, 418 N.E.2d at 1309, 437 N.Y.S.2d at 290 (Wachtler, J., dissenting).

90. *Id.*

91. *Id.* According to Judge Wachtler, the majority's test was not the proof of future mental illness, but the absence of an expert's suggestion of a "vague possibility" of recovery from such illness. *Id.*

be frustrated simply because an expert witness suggests a vague possibility that the parent might at some date in the future, perhaps the distant future, recover from an illness that has resisted treatment throughout the child's life, and long before the child was born.[92]

C. *Subsequent Decisions of In re Hime Y.*

The appellate division, upon remand from the court of appeals, found Elaine to have permanently neglected Hime, by failing, for a period of more than one year following the date Hime came into the care of an authorized agency, to plan for Hime's future, although physically and financially able to do so.[93] The appellate division, following the guidance of the court of appeals in reading the words "physically able" to plan,[94] found Elaine to have "the power to perambulate, the strength to handle the child, and the physical ability to execute a plan."[95] Thus, the court deemed Elaine to be physically able to plan an as required by statute, however the court noted "as a practical matter, the mother could not 'physically' effectuate a plan that she could not conceptualize or formulate."[96] The court also deemed Elaine to be financially able to plan, based on her social security benefits and the inference drawn from her refusal to provide any details of her income or financial resources.[97] Termination of Elaine's parental rights was ordered, modifying the order of the family court on the grounds of Elaine's mental illness and her permanent neglect of Hime.[98]

The court of appeals affirmed the appellate division's decision, finding the weight of the evidence of Elaine's permanent

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92. *Id.* at 252, 418 N.E.2d at 1309, 437 N.Y.S.2d at 290-91 (Wachtler, J., dissenting) (citation omitted).

93 *In re* Hime Y., 81 A.D.2d 313, 314, 440 N.Y.S.2d 635, 636 (1st Dep't 1981). The court found Elaine to have failed to plan for Hime's future from her discharge from Bellevue Hospital on June 26, 1975 to the commencement of this proceeding on August 18, 1976. *Id.*

94. *See supra* notes 80-86 and accompanying text.

95. *In re* Hime Y., 81 A.D.2d 313, 314, 440 N.Y.S.2d 635, 636 (1st Dep't 1981).

96. *Id.*

97. *Id.* at 316, 440 N.Y.S.2d at 636-37. The court noted that Elaine had disclosed at a prior hearing that she was a professional singer, dancer, actress, and model. *Id.* at 316, 440 N.Y.S.2d at 636.

98. *Id.* at 317, 440 N.Y.S.2d at 637.

neglect to be sufficient to support termination of her parental rights based on such neglect.[99]

IV. Analysis

A. *Expert Testimony and Mental Illness in the Foreseeable Future*

Section 384-b of the Social Services Law requires expert testimony of the parent's mental illness and inability to care "presently and for the foreseeable future" to terminate parental rights.[100] Such testimony may be augmented by other relevant evidence, but every proceeding to terminate parental rights on the ground of mental illness must have a court-appointed expert examine the parent's mental history and condition.[101] Proof of the parent's past and present mental illness can come from examinations and medical records, but proof of future mental illness must rest upon inferences drawn from the parent's past and present condition.[102] Inferences of future mental illness and inability to care must meet the statutory requirement of clear and

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99. *In re* Hime Y., 54 N.Y.2d 282, 286, 429 N.E.2d 792, 793-94, 445 N.Y.S.2d 114, 115-116 (1981) (per curiam).

100. N.Y. Soc. Serv. Law § 384-b(6)(e) (McKinney Supp. 1981). *See supra* notes 37-39 and accompanying text.

101. *See supra* notes 37-39 and accompanying text. Often the court-appointed psychiatrist examines the parent only "minutes before" he testifies. *E.g.*, *In re* Sylvia M., 82 A.D.2d 217, 227, 443 N.Y.S.2d 214, 220 (1st Dep't 1981).

102. Prediction of future mental illness necessarily rests upon inferences drawn from past behavior and speculation as to the person's reactions, in the future, to various situations and stimuli. A. Watson, Psychiatry for Lawyers 301 (1968). The level of accuracy of expert prediction of future mental illness, in Dr. Watson's view, does not "remotely approach perfection." *Id.* Dr. Watson states:

> [t]he well-trained dynamic psychiatrist, if he were to know specifically what future events his patient would be subjected to, could predict with a high degree of accurancy what his patient's reactions would be. However, with the wide variety of possible life situations, all of which impinge differently on the psyche and alter its end product of action, it is very difficult to state specifically what the future behavior of an individual will be. The best possible prediction must be stated in equivocal terms: *If* a certain type of event occur, and *if* the persons in his environment have been relating to him in a certain way, since the patient will follow his typical patterns from the past, *then* his reaction will be such and such. This, of course, is indefinite and leaves many ponderables. But, it limits possibilities in a substantial way. While not so accurate as we might prefer, this is probably as good a prediction as is possible at the present time.

Id. at 301-02 (emphasis in original).

convincing evidence to terminate parental rights.[103] To substantiate such inferences courts rely upon expert testimony to explain the possibility of the parent's recovery and to predict the parent's future condition. Thus termination of parental rights rests upon the expert's prediction of a slight chance of improvement in the parent's condition.

The majority in *Hime Y.*, confronted with an expert's favorable prediction of Elaine's mental condition, could not find sufficient proof of her mental illness and inability to care for Hime in the "foreseeable future."[104] The expert's prediction of Elaine's recovery sometime in the future prevented the termination of Elaine's parental rights based on her mental illness, despite her history of a long-standing mental illness with little or no improvement.[105] As the dissent properly noted, few experts are willing to give unequivocal opinions without some reservation[106] given the difficulty in assessing future mental condition in light of advancements in treatment and medicine.[107] The instances where an expert predicts little chance of recovery may become rare. As a result of *Hime Y.*, a mere possibility of recovery at some indeterminate date, or an inability to precisely determine the type or extent of the mental illness,[108] may serve as justifications for refusing to terminate parental rights. Accord-

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103. *See supra* notes 35, 78 and accompanying text.

104. *In re* Hime Y., 52 N.Y.2d at 249, 418 N.E.2d at 1308, 437 N.Y.S.2d at 289.

105. *Id.* at 248, 418 N.E.2d at 1307, 437 N.Y.S.2d at 288.

106. *Id.* at 252, 418 N.E.2d at 1309, 437 N.Y.S.2d at 290 (Wachtler, J., dissenting). *See supra* text accompanying notes 90-91.

107. *See supra* note 46 and accompanying text.

108. Not every expert examining a parent will agree upon the parent's type of mental illness. *See, e.g., In re* Sylvia M., 82 A.D.2d 217, 241, 443 N.Y.S.2d 214, 228 (1st Dep't 1981) (Fein, J., concurring). Judge Fein, concurring in the result of terminating the parental rights of the mother on permanent neglect rather than mental illness, stated: "[e]ven in this respect we cannot be unmindful of disputes among psychiatrists and in the psychiatric literature concerning the appropriateness of diagnosing schizophrenia in particular cases." *Id.*

Psychiatrists generally use widely accepted labels based on the presence of certain signs and symptoms to define a person's mental condition. A. WATSON, *supra* note 102, at 294. Dr. Watson states: [t]he judgment of which label to apply to a given patient is indeed a difficult one. There very often will be considerable disagreement between psychiatrists in the choice of labels, even though all may tend to agree on the clinical findings they observe and which lead to the labeling. This is a factor of extreme importance when evaluating the "battle of the experts."
Id.

ingly, the applicability of the mental illness provision will be limited to cases where the mental illness of the parent is so pervasive and debilitating that there can be little question of the parent's inability to recover.

Section 384-b(4)(c), although requiring proof of inability in the future, offers no specific guidance as to how far in the future an expert's prediction must explore.[109] The courts and the experts are left with the vague standard of the "foreseeable future" to assess the parent's mental condition and ability to care for his child when determining whether parental rights should be terminated.[110] Although the vague standard has been looked to as providing great leeway to the courts in protecting the parent's rights,[111] such a standard permits great speculation which can result in varied applications by the courts. This vague standard requires the courts to strain to find proof of mental illness sufficient to terminate parental rights;[112] if the parent has any chance of recovery in the future, his child will be subjected to temporary foster care placement with frequent disruptions of his family setting with little hope of a stable family relationship by either adoption or long-term placement.[113] To better protect the child's interest in having a stable family relationship, a more definite standard with realistic and measurable criteria needs to be developed. Such a standard should adequately protect the parent's rights, while permitting the courts and experts to assess

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109. *See supra* note 74.

110. The time period covered by the term "the foreseeable future" is open to much debate. The Elements of Style describes "the foreseeable future" as "[a] cliché, and a fuzzy one. How much of the future is foreseeable? Ten minutes? Ten years? Any of it? By whom is it foreseeable? Seers? Experts? Everybody? W. STRUNK JR. & E.B. WHITE, THE ELEMENTS OF STYLE 59 (3d ed. 1979).

111. *See, e.g., In re* Sylvia M., 82 A.D.2d 217, 236, 443 N.Y.S.2d 214, 225 (1st Dep't 1981).

112. *See id.* at 239, 443 N.Y.S.2d at 226-27. The court, deciding the second case before it in a consolidated action, examined the record and noted that one expert deemed the father to be a chronic, undifferentiated schizophrenic, but a psychiatrist called by the father testified that the father was no longer a schizophrenic. *Id.* at 227, 443 N.Y.S.2d at 220. The expert for the father saw the father's recovery as very possible, and "doubted that there could be 'a clear and convincing diagnosis' sufficient to make a long term prediction." *Id.* at 228, 443 N.Y.S.2d at 220-21. Despite this favorable testimony as to the father's possible recovery, the court found sufficient proof in the record to terminate the father's parental rights on the ground of mental illness. *Id.* at 240, 443 N.Y.S.2d at 227.

113. *See supra* note 27 and accompanying text.

the parent's mental condition and ability to care.[114]

B. *Mental Illness and the Ability to Plan*

Unable to terminate Elaine's parental rights on the ground of her mental illness and inability to care for Hime, the majority advised that a parent's mental illness would not serve as an excuse from his planning for the child's future, thus permitting termination of Elaine's parental rights on the ground of her permanent neglect of Hime.[115] The majority interpreted the permanent neglect provision as requiring the parent to be "physically and financially able" to plan.[116] To be excused from planning a parent must be institutionalized, incarcerated, physically disabled, or financially unable to plan; absent such situations a parent who fails for over one year to plan for his child's future, for whatever reason, will have his parental rights terminated.[117]

By failing to recognize the mentally ill parent's condition as preventing such parent from being physically able to plan, the majority relegates the status of being mentally ill to the same level as being an alcoholic or a drug abuser. The majority, drawing support for not reading mental illness as an excuse from planning, noted that alcoholism and drug abuse are not excuses for failing to plan despite their possible adverse effects on the parent's mental faculties, unless the parent is actually hospitalized for such illness.[118] By relying on the alcoholism and drug

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114. Various standards to terminate parental rights in general have been offered by many experts which may offer guidance in shaping better legislation. *See, e.g.*, BEYOND THE BEST INTERESTS, *supra* note 24, at 53-64, (where the authors devised a "least detrimental alternative" approach, similar to a "best interests of the child" approach, focusing on the impact of the parental ability or unfitness as it affects the child); Wald, *supra* note 28, at 688-700, (where the author uses age as a factor in determining the standard of review, based on the adoptability of children and their best interests); NATIONAL COUNCIL OF JUVENILE COURT JUDGES, MODEL STATUTE FOR TERMINATION OF PARENTAL RIGHTS, *supra* note 57, at 201:0069.

115. *In re* Hime Y., 52 N.Y.2d at 251, 418 N.E.2d at 1309, 437 N.Y.S.2d at 290. The majority acknowledged, however, that one family court equated mental illness with a physical disability, thus precluding the parent from being physically able to plan. *Id.* at 250, 418 N.E.2d at 1309, 437 N.Y.S.2d at 290 (citing *In re* James S., 98 Misc.2d 650, 414 N.Y.S.2d 477 (Fam. Ct. Monroe County 1979)).

116. *In re* Hime Y., 52 N.Y.2d at 250, 418 N.E.2d at 1308, 437 N.Y.S.2d at 290.

117. *See* N.Y. Soc. SERV. LAW § 384-b(4)(d), (7) (McKinney Supp. 1981). *See supra* note 9.

118. *In re* Hime Y., 52 N.Y.2d at 251 n.5, 418 N.E.2d at 1309 n.5, 437 N.Y.S.2d at

abuse language as excluding mental capacity from the test of permanent neglect, the majority effectively limits excuses from failing to plan to the physical separation of the parent and child. Future recovery from alcoholism or drug abuse is not a factor in terminating parental rights based on permanent neglect; the test only deals with past inability.[119] By treating mental illness similar to alcoholism or drug abuse, the majority avoids having to find, by clear and convincing evidence, a parent's inability to care in the "foreseeable future" due to his mental illness as required under the mental illness provision.[120] Consequently, a parent who is not hospitalized for his mental illness is required to plan for his child's future; if that parent fails to plan for over one year, his parental rights will be terminated regardless of any chance of his recovery in the near future.

The majority, by reasoning that mental incapacity is not a physical disability,[121] establishes a planning requirement that ignores reality. Planning for the future of one's child is a process demanding mental capacity. A parent must set developmental aims for the child; at the same time, he must assess how much money is needed, decide when to buy clothing, and make plans for the child's schooling. Physical ability may be more important in the day-to-day care of the child, but for the future of the child the parent must be mentally able to formulate a plan. The appellate division, on remand from the court of appeals, recognized this distinction stating, "as a practical matter, the mother could not 'physically' effectuate a plan that she could not conceptualize or formulate."[122] Despite the appellate division's acknowledgment of this inconsistency in the majority's reading of the permanent neglect provision, the court of appeals affirmed the termination of Elaine's parental rights, never addressing this issue.[123] The result of the *Hime Y.* decisions relegates planning to mere physical and financial ability, with no consideration of

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290 n.5. *See supra* note 85.

119. *See* N.Y. Soc. Serv. Law § 384-b(4)(d), (7) (McKinney Supp. 1981). *See supra* note 9.

120. *Id.* § 384-b(4)(c). *See supra* note 4.

121. *In re* Hime Y., 52 N.Y.2d at 250, 418 N.E.2d at 1308, 437 N.Y.S.2d at 290.

122. *In re* Hime Y., 81 A.D.2d 313, 315, 440 N.Y.S.2d 635, 636 (1st Dep't 1981).

123. *In re* Hime Y., 54 N.Y.2d 282, 286, 429 N.E.2d 792, 793, 445 N.Y.S.2d 114, 115 (1981) (per curiam).

ability to conceptualize or formulate a plan.

In restricting the test for planning under the permanent neglect provision to physical and financial ability, the majority ignores the findings of the Temporary Commission of Child Abuse and Neglect, the commission responsible for most of the recent changes in the Social Services Law.[124] The commission, interviewing people on the wording of the planning requirement now contained in section 384-b(7)(a), found that "[t]he planning requirement was viewed by many of those interviewed as an allusion to the most significant barometer of parental capacity. They declare that parents are unable to think realistically about the future, and that their plans are wistful fantasies."[125] A minority of persons interviewed proposed a substitute standard modeled after the mental illness provision, where permanent neglect would be "the inability of the parent to care properly for the child in the foreseeable future."[126] Despite the commission's findings that the general public viewed the planning requirement of the permanent neglect provision as more than physical and financial ability, the majority refused to recognize any mental element in the ability to plan for the purposes of the permanent neglect provision.

Refusing to equate a mental illness with a physical disability, the majority in *Hime Y.* stated that to do so would effectively narrow the scope of the statute to "a point of near practical uselessness."[127] The majority's fear was that mental illness would become a catchall excuse for the failure to plan for a child when permanent neglect is alleged.[128] By eliminating mental illness as a possible excuse for failing to plan, the majority broadens the use of the permanent neglect provision, enabling termination of parental rights in instances where it was previously impossible to do so. Rather than awaiting broad restriction or expansion of the permanent neglect provision by judicial interpretation of the language and intent of the statute, the legisla-

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124. *See* THE FINAL REPORT OF THE TEMPORARY STATE COMMISSION ON CHILD WELFARE, *reprinted in,* THE CHILDREN OF THE STATE: BARRIERS TO THE FREEING OF CHILDREN FOR ADOPTION (1976).

125. *Id.* at 26.

126. *Id.*

127. *In re* Hime Y., 52 N.Y.2d at 251, 418 N.E.2d at 1309, 437 N.Y.S.2d at 290.

128. *See id. See supra* text accompanying note 84.

ture needs to redefine the provision and its excuses. The planning requirement should be redrawn to consider the parent's mental, physical, and financial ability to care for his child's future. Further, there should be court-appointed psychiatrists to augment the court's own fact-finding ability to help determine whether certain excuses for the failure to plan by reason of mental illness are bona fide.[129]

The history of the termination of the parental rights statute demonstrates the courts' difficulty in terminating parental rights under the piecemeal guidance of the legislature.[130] Termination of parental rights based on the parent's mental illness has been particularly difficult. Prior to the enactment of section 384-b(4)(c) of the Social Services Law, such terminations were done on the ground of abandonment of the child by the mentally ill parent.[131] As a result of *Hime Y.*, to terminate parental rights under the mental illness provision there must be unequivocal, uncontradicted expert opinion evidence of future mental illness and inability to care for one's child.[132] Only as a result of the change by the legislature in 1973 of the permanent neglect provision's test of being able to maintain contact with *and* plan for the child's future to being able to maintain contact with *or* plan for the child's future is the majority in *Hime Y.* able to extend the permanent neglect provision to cover instances where a mentally ill parent fails to plan for his child's future despite the parent's frequent contacts with the child.[133] Rather than merely attempting to revive unworkable provisions by amending the existing language or by adding new provisions, the legislature needs to reevaluate the specific grounds of termination of parental rights and their interaction.

V. Conclusion

To terminate the parental rights of a parent on the statutory ground of mental illness, courts must find the parent unable

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129. *Cf. supra* note 37 (court-appointed psychiatrists are required for termination based on the mental illness provision).

130. *See generally* CHILDREN OF THE STATE I, *supra* note 4, at 44 (history of the termination of parental rights statute).

131. *Id. See supra* note 4.

132. *See supra* notes 100-108 and accompanying text.

133. *See supra* note 9.

to care, by reason of his mental illness, for his child "presently and for the foreseeable future." The court of appeals in *Hime Y.* found the mother to be unable to care for her child currently, but due to the court-appointed expert's favorable prediction of the mother's recovery at some undetermined time in the "foreseeable future," the mother's parental rights could not be terminated based on her mental illness. If an expert, at trial, suggests favorable recovery of the parent or refuses to rule out such possibility, the court may not use the mental illness provision to terminate such parent's parental rights. The statutory test is thus reduced to the absence of expert testimony of any future recovery of the parent.

Unable to terminate the parent's parental rights under the mental illness provision, the majority advised that such parent could have her rights terminated on the ground of permanent neglect by her failing to plan, although physically and financially able to do so, for her child's future. A parent's mental illness will not be an excuse from being physically able to plan, for the court of appeals refused to equate a mental illness with a physical disability. By reading the words "physically able" to plan for the child's future literally, the majority enforces a planning requirement that has no element of mental capacity. Such a requirement ignores reality and the legislative intent of the provision, and it reduces planning by a parent for his child's future to a mere physical act.

William F. Bogle, Jr.