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FAMILY LAW—CHILDHOOD MORBID OBESITY: HOW EXCESS POUNDS CAN TIP THE SCALES OF JUSTICE IN FAVOR OF REMOVING A CHILD FROM THE HOME AND/OR TERMINATION OF PARENTAL RIGHTS

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NOTES

FAMILY LAW—CHILDHOOD MORBID OBESITY: HOW EXCESS POUNDS CAN TIP THE SCALES OF JUSTICE IN FAVOR OF REMOVING A CHILD FROM THE HOME AND/OR TERMINATION OF PARENTAL RIGHTS

ABSTRACT

Due to the growing epidemic of obesity in the United States, courts have begun addressing the issue of whether childhood morbid obesity is a life threatening condition, the existence of which violates states' child abuse and neglect statutes, and warrants state involvement in the form of removal of the child from the home or termination of parental rights. Four states have thus far been presented with this question: Iowa, New Mexico, New York, and Pennsylvania. These courts, in deciding whether or not to remove a morbidly obese child from the home, have considered the weight and overall health and well-being of the child's parents as a relevant factor in determining whether or not the parents can provide adequate care for their child's specialized needs.

The author focuses her analysis on the Commonwealth of Massachusetts and argues that Massachusetts's courts should deem parents' health and well-being a relevant factor in determining whether parents are able to provide adequate care for their morbidly obese children. The prior four courts' inclusion of parents' health and well-being, including their own morbid obesity, is wholly relevant to the best interests of the child and is the appropriate standard for Massachusetts's courts to follow. This Note analogizes Massachusetts's consideration of parental fitness as a factor in a case involving an incarcerated parent with the issue of considering parents' health and well-being as a factor in cases involving childhood morbid obesity. It also compares the best interests of the child standard used in adoption cases with the instant issue.

INTRODUCTION

I am not an average sixteen year old; I stand five feet three inches

tall and weigh 451 pounds.[1] *I have had weight issues since I was an infant, but in the past year, I gained one hundred pounds.*[2] *Officials at my school were concerned about my rapid weight gain, poor performance, and absenteeism, so they had a gastroenterologist evaluate me.*[3] *My doctor diagnosed me with morbid obesity.*[4] *She said that my health had become a "life threatening situation" and admitted me to the hospital.*[5] *I also suffer from complications resulting from my obesity: my liver is enlarged, I have hypertension, insulin resistance, knee pain, and respiratory problems that cause me to wear an oxygen mask at night.*[6] *I do not have many friends; I spend about nine hours per day either on my computer or watching television.*[7]

My mom does not come with me to my doctors' appointments because she is obese as well and physically cannot leave our house.[8] *It is especially hard for us because my dad died from a heart attack when he was only thirty-seven years old, leaving just my mom to care for me.*[9] *After my doctor's evaluation, my mom voluntarily placed me in the custody of the state.*[10] *While I was in foster care, I was on a strict diet and walked for exercise.*[11] *In just under three months, I lost fifty*

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1. *In re* D.K., 58 Pa. D. & C.4th 353, 354 (C.P. 2002). According to the Centers for Disease Control and Prevention (CDC), a sixteen-year-old boy in the fiftieth percentile should weigh approximately 135 pounds. *Weight-for-age Percentiles: Boys, 2 to 20 years*, CTS. FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/growthcharts/data/set3/chart%2003.pdf (last updated May 30, 2000).

2. *In re D.K.*, 58 Pa. D. & C.4th at 355.

3. *Id.*

4. *Id.* The CDC measures overweight and obesity for adults and children by body mass index (BMI), which is calculated using the individual's height and weight. *Basics about Childhood Obesity*, CTRS. FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/obesity/childhood/basics.html (last updated Apr. 27, 2012). Categorization of overweight and obesity for adults and children differ as "[a] child's weight status is determined using an age- and sex-specific percentile for BMI rather than the BMI categories used for adults because children's body composition varies as they age and varies between boys and girls." *Id.* The CDC categorizes overweight children as "a BMI at or above the 85th percentile and lower than the 95th percentile for children of the same age and sex," and obese children as "a BMI at or above the 95th percentile for children of the same age and sex." *Id.* For adults, the CDC defines overweight as a BMI between 25 and 29.9" and obesity as "a BMI of 30 or higher." *Defining Overweight and Obesity*, CTRS. FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/obesity/adult/defining.html (last updated Apr. 27, 2012).

5. *In re D.K.*, 58 Pa. D. & C.4th at 355.

6. *Id.*

7. *Id.*

8. *Id.* at 354.

9. *Id.* at 354 n.1.

10. *Id.* at 355.

11. *Id.* at 356.

pounds.[12] *Now, I want to go back home with my mom.*[13] *However, despite the fact that she wants me to come home too, I am court ordered to remain in foster care.*[14]

The above narrative is the unfortunate story of a sixteen-year-old child, known as "D.K." D.K.'s removal from his mother's custody as a result of his childhood morbid obesity was a case of first impression in Pennsylvania.[15] Although one may hope that D.K.'s situation is an isolated case, the fact is that other cases have addressed childhood morbid obesity in the United States.[16]

Obesity is a growing epidemic in the United States, and children are no less susceptible than adults. As of 2010, almost seventeen percent of children between the ages of 2 and 19 were obese.[17] Obesity prevalence within the same age group has almost tripled since 1980.[18] Due to this staggering increase, courts have begun addressing the issue of whether childhood morbid obesity is a life threatening condition, the existence of which violates states' child abuse and neglect statutes, and warrants state involvement in the form of removal of the child from the home or termination of parental rights.

Four states have thus far been presented with this question: Iowa, New Mexico, New York, and Pennsylvania.[19] Because child protection

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12. *Id.*

13. *Id.*

14. *Id.* at 356, 361.

15. *Id.* at 354.

16. *See In re* L.T., 494 N.W.2d 450, 451 (Iowa Ct. App. 1992); New Mexico *ex rel.* Children, Youth and Families Dep't v. John R., 203 P.3d 167, 169 (N.M. Ct. App. 2009); *In re* Brittany T., 835 N.Y.S.2d 829, 831 (Fam. Ct. 2007), *rev'd*, 852 N.Y.S.2d 475 (App. Div.3d 2008).

17. Cynthia Ogden & Margaret Carroll, *Prevalence of Obesity Among Children and Adolescents: United States, Trends 1963-1965 Through 2007-2008*, NAT. CTR. FOR HEALTH STAT. 1, June 2010, *available at* http://www.cdc.gov/nchs/data/hestat/obesity_child_07_08/obesity_child_07_08.pdf; *see also Overweight and Obesity: U.S. Obesity Trends*, CTRS. FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/obesity/data/trends.html (last updated July 21, 2011).

18. *Overweight and Obesity: Data and Statistics*, CTRS. FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/obesity/childhood/data.html (last updated Jan. 11, 2013).

19. *See In re L.T.*, 494 N.W.2d at 452 (upholding the juvenile court's finding that "Liza" was a child in need of assistance and her removal from the home was in her best interests); *John R.*, 203 P.3d at 172 (adhering to the best interests of the child standard when reviewing an appeal of an order terminating the rights of the parents of a morbidly obese child); *In re Brittany T.*, 835 N.Y.S.2d at 831 (holding that removal of Brittany from the home due to her morbid obesity and several comorbidities was "appropriate and necessary"); *In re D.K.*, 58 Pa. D. & C.4th at 360 (ordering that D.K. remain in foster care in order to continue addressing his morbid obesity and associated comorbidities).

The above four cases represent those opinions which have been published; this Note does not foreclose the possibility that other cases involving removal of a morbidly obese child from

law is statutorily defined and thus a creature of individual state law, in order to thoroughly address this issue within the confines of this Note, the analysis will focus on the Commonwealth of Massachusetts.[20] Although Massachusetts has not yet been presented with this issue, the state "is experiencing an epidemic of childhood obesity"[21] and will undoubtedly hear such a case in the future. At that time, Massachusetts's courts will be faced with a case of first impression and will likely rely on prior case law in rendering an opinion.

Prior courts, in deciding whether or not to remove a morbidly obese child from the home, have considered the weight and overall health and well-being of the child's parents as a relevant factor in determining whether or not the parents can provide adequate care for their child's specialized needs. This Note argues that Massachusetts's courts should deem parents' health and well-being a relevant factor in determining whether parents are able to provide adequate care for their morbidly obese children. The prior courts' inclusion of parents' health and well-being, including their own morbid obesity, is wholly relevant to the best interests of the child and is the appropriate standard for Massachusetts's courts to follow.

Part I of this Note provides background on cases involving childhood morbid obesity in the United States and the four prior courts' analyses in determining that removal of four morbidly obese children from their homes was the appropriate state action. Part II provides background on the relevant federal and Massachusetts's case law, statutes, and regulations concerning the standard for removal of a child from his or her home. Part III argues that Massachusetts's courts should follow the analysis and considerations of the prior case law including the parents' health and well-being and the parents' own morbid obesity when they are first presented with a case involving childhood morbid obesity and state involvement. Part IV analogizes Massachusetts's consideration of parental fitness as a factor in a case involving an

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his or her home have been heard in other jurisdictions but were decidedly not published in a legal reporter. For example, court records and opinions may be sealed or otherwise unavailable because of the concern for the sensitivity and privacy of the minor child involved.

20. Massachusetts is the home state of the *Western New England Law Review* as well as a state that has not yet addressed this issue.

21. *MPHA Issue Priority: Childhood Obesity*, MASS. PUB. HEALTH ASS'N, http://www.mphaweb.org/issues_childobesity.htm (last visited May 13, 2013). The percentage of overweight or obese children in Massachusetts is alarming, with "25-30 percent of the state's 10-17-year olds" included in this categorization. *Id.* It is important to note that not all available statistics utilize the same age range for "children" and therefore should be independently considered. This Note does not address the issue of appropriately defining the term "children" or the standards of measuring morbid obesity.

incarcerated parent[22] with the issue of considering parents' health and well-being as a factor in cases involving childhood morbid obesity. It also compares the best interests of the child standard used in adoption cases with the instant issue.

I. PRIOR CASE LAW

Four states have directly addressed the issue of state involvement in cases involving morbidly obese children: Iowa, New Mexico, New York, and Pennsylvania.[23]

A. *Iowa:* In re *L.T., 494 N.W.2d 450 (Iowa Ct. App. 1992)*

Iowa was the first of four states to hear a case involving childhood morbid obesity. The case of *In re L.T.* involved the appeal of "Liza's" mother, Natalie, from the juvenile court's order that her ten-year-old daughter be placed in a residential treatment facility to help resolve her morbid obesity, depression, and personality disorder.[24] The basis of the mother's appeal was that the trial court erred in finding that Liza was a "child . . . in need of assistance under Iowa Code § 232.2(6)(f) (1991)," that reasonable efforts to prevent removal had been made, and that residential group home placement was the least restrictive placement.[25]

1. Pertinent Facts and the Court's Analysis

Ten-year-old Liza's struggle with obesity began around age seven as a result of her parents' unstable marriage as well as her father's alcohol abuse and subsequent physical abuse of her mother.[26] During the last two years of her parents' marriage, Liza gained eighty pounds.[27] After her parents' divorce, Liza's doctor advised Natalie that Liza required psychiatric counseling as well as inpatient treatment for her morbid obesity.[28] At that time, Liza was ten years old, five feet three inches tall, and 270 pounds.[29]

Liza was hospitalized for a one-month period following the recommendation of a child psychiatrist.[30] At the time of her admission

22. *See In re* Care and Prot. of Amalie, 872 N.E.2d 741, 746 (Mass. App. Ct. 2007).
23. *See supra* note 19 and accompanying text.
24. *In re L.T.*, 494 N.W.2d at 451.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*

to the hospital, Liza's weight had increased to 290 pounds and she "had a yeast infection growing out of control in the skin creases on her abdomen" which "produced an extremely strong body odor."[31] Liza was officially diagnosed with "severe infantile personality disorder and a problem with morbid obesity."[32] At the end of her one-month hospitalization, Liza weighed 266 pounds and was recommended to a residential treatment program to "address [her] potentially life-threatening obesity."[33]

Liza's mother refused to place her in the residential treatment program and did not schedule appointments with the hospital's dietary program.[34] The State of Iowa accordingly initiated a court proceeding, after which the juvenile court "found Liza to be a child in need of assistance requir[ing] immediate treatment" of her morbid obesity.[35]

On appeal, the Court of Appeals of Iowa placed "paramount concern" on "the welfare and best interests of the child."[36] The appeals court reviewed the record for "clear and convincing evidence" that Liza was "a child in need of assistance."[37] The record showed that the cause of Liza's potentially life-threatening obesity was her chronic depression and tendency to "overeat[] to relieve [that] depression."[38] The court also upheld the juvenile court's finding that Liza's severe obesity interfered with socialization that is required for a child "to develop physically, mentally, and emotionally."[39]

Unfortunately, Liza's psychiatrist stated that Liza's problems could not "be effectively treated on an outpatient basis" and subsequently recommended that Liza enroll in a residential program.[40] Liza's mother was "unable to effectively assist Liza with her problem of obesity" and on occasion even provoked and encouraged Liza to cope with her

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31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 452.
35. *Id.*
36. *Id.*
37. *Id.* In Iowa, a "[c]hild in need of assistance" is:

> [A]n unmarried child who is in need of treatment to cure or alleviate serious mental illness or disorder, or emotional damage as evidenced by severe anxiety, depression, withdrawal or untoward aggressive behavior toward self or others and whose parent, guardian, or custodian is unwilling or unable to provide such treatment.

Id. (citing IOWA CODE § 232.2(6)(f) (1991)).
38. *In re L.T.*, 494 N.W.2d at 452.
39. *Id.*
40. *Id.*

depression and stress with food.[41] Liza failed to lose weight or attend dietary classes while under her mother's care, and her mother also refused to consider inpatient treatment for Liza's obesity.[42] Due to Natalie's lack of cooperation and assistance with her daughter's obesity, the court of appeals affirmed the juvenile court's finding that Liza was "a child in need of assistance."[43] As such, her removal from the home was necessary.[44]

B. *Pennsylvania:* In re *D.K.*, *58 Pa. D. & C.4th 353 (C.P. 2002)*

The Commonwealth of Pennsylvania was presented with a case of first impression regarding removal of a morbidly obese child from his home in the case of *In re D.K.*[45] Many of the pertinent facts of this case are described in the introductory narrative. However, it is worthy of reiteration that at the time of state intervention, D.K. was a morbidly obese teenager in the sole custody of his morbidly obese and housebound mother, Donna K.[46] Donna K. voluntarily placed D.K. in the custody of the Commonwealth and, three months after a successful physician-supervised diet and exercise routine, D.K. sought to return home to the custody of his mother.[47] The issue before the trial court was whether custody of D.K. should remain with the Commonwealth or be restored to Donna K.

The Pennsylvania court began its analysis of this case by ensuring its adherence to the Juvenile Act codified at 42 PA. CONS. STAT. § 6302(1) (West 2011).[48] The court framed its analysis around the question of whether D.K.'s mother could "provide the required level of support and reinforcement required for her child's specialized needs," *not* whether she could "care[] for a normal child."[49]

In concluding that D.K.'s situation was one in which the Commonwealth should intervene, the court used a "life threatening" test

41. *Id.*

42. *Id.* at 452-53.

43. *Id.* at 453.

44. *Id.*

45. 58 Pa. D. & C.4th 353, 353 (C.P. 2002).

46. *Id.* at 354.

47. *Id.* at 355-56.

48. *Id.* at 357. The Juvenile Act permits the Commonwealth's interference with the family unit in circumstances involving "'[a] child who (1) is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his physical, mental, or emotional health, or morals.'" *Id.* (quoting 42 PA. CONS. STAT. § 6302(1) (West, 2011)).

49. *In re D.K.*, 58 Pa. D. & C.4th at 357.

to evaluate the severity of D.K.'s obesity.[50] The court likened the severity of morbid obesity and the need for Commonwealth intervention to malnourishment cases "to the point of near starvation."[51] Based on the medical testimony, the court ruled that Northumberland County Children and Youth Services (CYS) "established by clear and convincing evidence that" D.K. was properly removed from the home and placed in CYS's custody as a dependent.[52]

In considering whether D.K. should be reunited with his mother, the court once again considered the intent of the Juvenile Act: to preserve the family unit.[53] Prior to separating a child from his or her family, Pennsylvania courts consider whether CYS can provide the parent with instructions for the skills needed to care for the child and "provide follow-up supervision in the home."[54] In D.K.'s case, the court held that his mother "d[id] not have the natural abilities typical of *any* parent, as she [wa]s limited by her own extreme obesity."[55] The court specifically focused on Donna K.'s inability to leave the home to attend D.K.'s appointments, as well as her lack of initiative in seeking medical attention for her son's morbid obesity and related physical and psychological issues, including absenteeism from school.[56]

The fact that D.K.'s morbid obesity was first addressed and subsequently improved only after "his hospitalization and placement in foster care" led the court to conclude that remaining in foster care at that time was a necessity.[57] Accordingly, the court noted that such placement in foster care would last only as long as was necessary.[58]

The court issued an eighteen-count order following its decision.[59] The order stipulated that D.K. must meet and maintain health and lifestyle goals, including "a membership in a fitness facility," before

50. *Id.* at 358. Under this test, the minor's "obesity must be of a severe nature reaching the life threatening or morbid state, which has also manifested itself in physical . . . or mental problems." *Id.*

51. *Id.* The case of D.K., the court argues, is at "the other end of the nourishment spectrum." *Id.*

52. *Id.*

53. *Id.*; 42 PA. CONS. STAT. § 6301(b) (West 2011).

54. *In re D.K.*, 58 Pa. D. & C.4th at 358-59.

55. *Id.* at 359 (emphasis added).

56. *Id.*

57. *Id.* at 360.

58. *Id.* The possibility of reunification was not foreclosed if, for example, Donna K. was able to provide the necessary care and support of D.K.'s new eating and exercise regimen. *Id.*

59. *Id.* at 361-62.

returning home.[60] The court's order, however, was not solely focused on D.K.; it also included provisions to which his mother must adhere prior to reunification.[61] These orders included Donna K.'s attendance at all of D.K.'s medical appointments, cooperation with a resource worker for nutritional help, providing appropriate foods as required by D.K.'s diet, her attendance at counseling with D.K., and attention to her own health and well-being.[62]

C. *New York:* In re *Brittany T., 835 N.Y.S.2d 829 (Fam. Ct. 2007)*

In re Brittany T. was a case of first impression before the Family Court of New York.[63] The issue before the court was whether it was in the best interests of "Brittany," a morbidly obese child suffering from several comorbidities, to be removed from the home due to her parents' lack of attention to her serious medical concerns.[64]

1. Pertinent Facts

Brittany's parents voluntarily placed her in foster care with the Department of Social Services, which, in turn, placed her with her maternal aunt.[65] The court granted the placement "due to [the] serious and continuing health concerns related to the child's morbid obesity."[66] About five months after the placement, Brittany was returned to her parents' care.[67] However, the reunion did not last long; Brittany was once again placed in foster care as a result of her parents' violation of the court's order.[68] Between the ages of eight and twelve, Brittany's

60. *Id.* at 361.

61. *Id.* at 362.

62. *Id.*

63. *In re* Brittany T., 835 N.Y.S.2d 829, 831 (Fam. Ct. 2007), *rev'd*, 852 N.Y.S.2d 475 (App. Div.3d 2008). The New York Supreme Court, Appellate Division reversed the Family Court of New York's holding on the finding that Brittany's parents did not willfully violate the order of supervision. *In re Brittany T.*, 852 N.Y.S.2d at 480. For instance, the New York Supreme Court, Appellate Division held that Brittany's parents did not willfully violate term 27, which required them to enroll Brittany at a local gym and ensure her attendance at least two to three times per week. *Id.* at 479. The court concluded that "[t]he child's attendance, while not perfect, did represent a recognition by respondents of their obligations under the terms of this order and, given the circumstances, constituted a good faith attempt to fulfill them." *Id.* This reversal did not address the court's consideration of the parents' overall health and well-being in their ability to care for Brittany, nor did it discredit the appropriate standard of review as clear and convincing evidence.

64. *In re Brittany T.*, 835 N.Y.S.2d at 831.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

weight ranged from 237 to 266 pounds.[69]

The Department of Social Services alleged that Brittany's parents violated the court's previously issued order by failing to do the following: ensure that Brittany regularly attend school, take her to the gym at least two to three times per week, and participate in a nutrition and education program.[70]

Testimony provided by a pediatric gastroenterologist and nutritionist indicated that Brittany was considered morbidly obese according to medical definitions.[71] In addition to morbid obesity, Brittany suffered from comorbidities, such as gallstones, fatty liver disease, sleep apnea, high blood pressure, and pain in her knee joints; she also experienced social and psychological impacts because of her morbid obesity.[72]

Although Brittany's doctor established a multidisciplinary program including "behavior modification, lifestyle changes, dietary assistance, and exercise therapy," he expressed concern for Brittany's overall lack of success with the program.[73] He expected Brittany's health to deteriorate further and become "life-limiting" if she did not receive proper attention for her morbid obesity.[74]

2. The Court's Rationale

In evaluating this case, the court heard testimony from Brittany's pediatrician, school counselor, and the director of an eating disorder center, who all opined that, although they had observed some improvements in her physical and emotional health, their concerns remained about her morbid obesity, school attendance, and emotional well-being.[75]

Notably, the court then considered the overall health and well-being of Brittany's parents.[76] The record showed that Brittany's father was forty-one years old, wheelchair bound, and suffered from

69. *Id.*

70. *Id.* at 831-32.

71. *Id.* at 833. The standard used in this case to determine morbid obesity was a measurement of the child's BMI. As noted in this case, a healthy BMI is between 18 and 25; a BMI exceeding 40 is considered morbidly obese; and Brittany's BMI was an astounding 50. *Id.*

72. *Id.*

73. *Id.* at 834.

74. *Id.*

75. *Id.* at 834-35.

76. *Id.* at 835.

cardiomyopathy, muscular dystrophy, arthritis, and scoliosis.[77] Brittany's mother was thirty-two years old and very obese herself, weighing 436 pounds.[78] Both parents testified that Brittany had missed appointments and school days, but stated that they "tried their best."[79] Nonetheless, the lower court vehemently rejected Brittany's parents' explanations of their lack of compliance with the order of supervision finding them to be "spurious, unpersuasive and largely lacking credibility."[80] Although recognizing Brittany's parents' physical limitations, the Family Court of New York ultimately held that "this neither excuse[d] nor prohibit[ed] them from executing their parental and court-ordered responsibilities."[81] While the Supreme Court, Appellate Division ultimately reversed the Family Court's holding, it applied the same standard of clear and convincing evidence when determining the best interests of the child.[82]

The lower court found that Brittany's parents violated the terms of the court's order on the standard of willfulness and without just cause.[83] Precedent case law in New York suggests that a clear and convincing evidence standard should be applied in order to establish a willful violation of the court's order of supervision.[84]

The court concluded that Brittany's parents willfully violated the court's clearly defined order of supervision without just cause by missing Brittany's nutrition appointments and failing to ensure Brittany attended school.[85] The result of such willful violation resulted in a negative physical and emotional impact on Brittany.[86] The court found it shocking and inconceivable that Brittany's parents had such a "lack of commitment and motivation" in addressing Brittany's morbid obesity and thus held that Brittany's parents willfully disregarded doctors'

77. *Id.*

78. *Id.* Brittany's mother also suffered from breathing difficulties. *Id.*

79. *Id.* at 836.

80. *Id.*

81. *Id.* at 837.

82. *In re* Brittany T., 852 N.Y.S.2d 475, 480 (App. Div.3d 2008).

83. *In re Brittany T.*, 835 N.Y.S.2d at 837. The court made this analysis without statutory authority. The court asserted that when lacking a statutorily defined standard, it is up to the judiciary to determine what level of proof is required for any given proceeding. *Id.* at 839. On appeal, the clear and convincing standard of proof in determining a violation of the order of supervision was affirmed. *In re Brittany T.*, 852 N.Y.S.2d at 478. Although the New York Supreme Court, Appellate Division came to the opposite conclusion of the Family Court of New York, it applied the same standard of proof and did not discredit the Family Court's consideration of the parents' overall health and well-being in their analysis. *Id.*

84. *In re Brittany T.*, 835 N.Y.S.2d at 839.

85. *Id.* at 837.

86. *Id.*

advice so as to amount to a violation of the terms of the court's order.[87]

When considering Brittany's placement in light of the willful violations of the court's order, the court considered the best interests of the child based on a totality of the facts and circumstances.[88] Because the consideration of removing Brittany from her home due to her morbid obesity was an issue of first impression for the court, it relied on the analysis in *In re D.K.*, stating that:

> [B]ecause of the parent's limitations and the lack of attention in addressing the child's medical appointments and schooling, it was clear that best interests required the continued placement of the child in foster care until such time as the parent could ". . . demonstrate the ability to offer the required assistance and support to her son," and until ". . . new eating habits, education and exercise programs become more ingrained and of a habitual nature."[89]

The court also relied on the New York statutory definition of neglect in concluding that Brittany was neglected by her parents due to their failure to provide a minimum degree of care with respect to her educational and medical needs, as measured by a reasonableness standard.[90] The potential negative consequences of state intervention were also considered by the court and it was noted that state intervention would likely not be justified in a case where the child was simply overweight.[91] The case of Brittany, however, involved a "severe, life-limiting danger[] due to parental lifestyle and persistent neglect."[92] Thus, removal of Brittany from her home was justified.

The court agreed with the holding in *In re D.K.* that the instant case "[wa]s no less a cause for determining neglect and ordering removal than it was a matter where a child was at risk of life-limiting consequences due to malnourishment."[93] The court confirmed that the appropriate standard of removal due to the child's morbid obesity should be obesity "of a severe nature reaching the life threatening or morbid state, which has also manifested itself in physical problems . . . or mental problems."[94]

Concluding that the Department of Social Services exceeded

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87. *Id.*
88. *Id.* at 838.
89. *Id.* (quoting *In re* D.K., 58 Pa. D. & C.4th 353, 360 (C.P. 2002)).
90. *In re Brittany T.*, 835 N.Y.S.2d at 838-39.
91. *Id.* at 839.
92. *Id.*
93. *Id.*
94. *Id.* (quoting *In re D.K.*, 58 Pa. D. & C.4th at 358).

reasonable efforts to prevent removal, the court found that removal of Brittany from her home and placement with the Department was in her best interests.[95] Return of Brittany to her parents was the court's ultimate permanency goal, but only at such a time as Brittany could maintain a healthy weight and lifestyle, and when her parents were able to provide adequate home, school and community support, including "an environment conducive to healthy eating habits, exercise regimens, and to meeting educational attendance requirements."[96]

D. *New Mexico: New Mexico* ex rel. *Children, Youth and Families Department v. John R., 203 P.3d 167 (N.M. Ct. App. 2009)*

This New Mexico case was on appeal based on the child's right, having reached the age of fourteen during the course of the proceeding, to obtain counsel.[97] However, the child's mother argued on appeal that the state "failed to make reasonable efforts to assist her in alleviating the causes and conditions of neglect . . . failed to prove [she] was unable to alleviate the causes and conditions of neglect, and the termination of parental rights" could not have rested solely "on the best interests of the child."[98] The court of appeals ultimately reversed the district court's decision, finding reversible error in failing to appoint the child her own counsel upon reaching age fourteen.[99] However, the court reiterated that the best interests of the child standard should continue to govern when hearing a proceeding to terminate parental rights.[100]

1. Pertinent Facts

When the twelve-year-old child, whose name is not denoted, was taken into custody by the state, she was already suffering from serious and interrelated medical problems including hypothyroidism, sleep apnea, mental retardation, attention deficit hyperactivity disorder (ADHD), and morbid obesity.[101] The child "was virtually immobile because her weight made it difficult for her to walk, even with a walker, and her wheelchair was broken."[102] The child's parents exacerbated her health problems by not providing treatment or administering her

95. *In re Brittany T.*, 835 N.Y.S.2d at 839.

96. *Id.* at 839-40.

97. New Mexico *ex rel.* Children, Youth and Families Dep't v. John R., 203 P.3d 167, 168 (N.M. Ct. App. 2009).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 168-69.

102. *Id.*

medicine.[103] Based on a finding of neglect, the district court ordered the child to remain in the custody of the state for up to two years while her parents underwent a treatment plan aimed at reunification.[104]

After the child lost 120 pounds and her parents learned new parenting and nutritional skills, the state arranged for the parents to take the child for a trial home visit.[105] Unfortunately, during the home visit, the child's health quickly deteriorated and she began gaining weight back at a rate of two to three pounds per week.[106] The state recommended the child be returned to foster care and placed back in treatment; she once again made great progress upon her return to foster care.[107] The state subsequently changed its permanency plan from reunification to termination of parental rights.[108]

2. The Court's Analysis

Although a significant portion of the court's opinion focused on the reversible error committed by the district court in failing to appoint the child her own attorney upon reaching age fourteen, the court also addressed the mother's argument on appeal that the best interests of the child standard was improper as the basis for terminating her parental rights.[109] The court looked to the relevant New Mexico statute entitled the "Children's Code," which provides that "the court must 'give primary consideration to the physical, mental and emotional welfare and needs of the child, including the likelihood of the child being adopted if parental rights are terminated.'"[110] The court disagreed with the mother's argument, reiterating that parents do not have absolute rights to raise their children without state involvement and that parental rights are secondary to the child's best interests.[111]

II. TERMINATION OF PARENTAL RIGHTS: FEDERAL AND MASSACHUSETTS STANDARDS

In all child protection cases, tension exists between "[t]he

103. *Id.*

104. *Id.* Part of the court's order to the parents included "nutritional training." *Id.*

105. *Id.*

106. *Id.* In addition, her parents were not facilitating treatment for her sleep apnea and hypothyroidism. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 172.

110. *Id.* (quoting N.M. STAT. ANN. § 32A-4-28(A) (West 2005)).

111. *Id.* (quoting *In re* Adoption of Francisco A., 866 P.2d 1175, 1181 (N.M. Ct. App. 1993)).

fundamental liberty interest of natural parents in the care, custody, and management of their child"[112] and the state's two interests of "preserving and promoting the welfare of the child and the fiscal and administrative interest in reducing the cost and burden of such proceedings."[113] Although courts are not accustomed to viewing weight as a factor in parental fitness, due to the growing obesity epidemic in the United States, courts should alter their perception of parental fitness to include a parent's morbid obesity as one factor. Some view morbid obesity as merely another factor in a parental unfitness evaluation, requiring nothing more than a routine application of well-established child protection laws. However, there is a significant danger that societal prejudice and preconceptions about morbid obesity will intrude on a parent's constitutionally protected right to raise his or her child. This Note's recommendation to Massachusetts's courts is cognizant of and protects against this danger.

The unique issue presented in *In re D.K.* and *In re Brittany T.* concerns the morbid obesity not only of the children, but also of the parents.[114] Under the federal standard, in order for the state to succeed in terminating the rights of a morbidly obese parent, it is required to demonstrate by clear and convincing evidence that such morbid obesity, along with any other pertinent factors, gives rise to a finding of parental unfitness.[115] This level of proof, as compared with the lesser burden of preponderance of the evidence, gives greater protection to the parents against termination of their fundamental liberty to care for their children as they see fit.[116]

The standard used in Massachusetts's state courts for termination of parental rights incorporates the federal requirement that the state prove parental unfitness by clear and convincing evidence[117] and adds that

112. Santosky v. Kramer, 455 U.S. 745, 753 (1982).

113. *Id.* at 766. The U.S. Supreme Court sought to protect the interests of both the natural parents and the state by implementing a clear and convincing evidence standard in order to terminate parental rights—a stricter standard than a preponderance of the evidence. *Id.*

114. *In re* Brittany T., 835 N.Y.S.2d 829, 835 (Fam. Ct. 2007), *rev'd*, 852 N.Y.S.2d 475 (App. Div.3d 208); *In re* D.K., 58 Pa. D. & C.4th 353, 354 (C.P. 2002).

115. *See Santosky*, 455 U.S. at 747-48 (providing that the federal standard for termination of parental rights requires the state to demonstrate parental unfitness by a clear and convincing evidence standard).

116. *See* Bezio v. Patenaude, 410 N.E.2d 1207, 1214 (Mass. 1980) ("Natural parents should be denied custody only if they are unfit to further the welfare of their children.").

117. *See, e.g.*, Adoption of Mary, 610 N.E.2d 898, 902 (Mass. 1993) ("The judge must find by clear and convincing evidence that a parent is presently unfit to provide for the welfare and best interests of the child in order to grant a petition that terminates a natural parent's legal rights."); Adoption of Lucinda, No. 07-P-1751, 2008 Mass. App. LEXIS 890, at *2

parental unfitness is assessed "by taking into consideration a parent's character, temperament, conduct, and capacity to provide for the child in the same context with the child's particular needs, affections, and age."[118]

In addition to the federal requirement described above, Massachusetts also requires a showing by the state that termination of parental rights is in the child's best interests.[119] These factors are necessarily intertwined.[120] In this respect, clear and convincing evidence of parental unfitness acts as a condition precedent before the court can evaluate the child's best interests.[121] In this regard, a mere showing of a parent's morbid obesity will not necessarily result in a finding of parental unfitness. On a comparable issue, the Massachusetts Court of Appeals held that "[i]n the absence of a showing that a cocaine-using parent has been neglectful or abusive in the care of that parent's child . . . a cocaine habit, without more, [does not] translate[] automatically into legal unfitness to act as a parent."[122]

A similar comparison can be made to the 1980 case of *Bezio v. Patenaude*, in which an openly homosexual single mother sought to reverse the probate court's holding because it failed to apply the parental fitness test.[123] The Supreme Judicial Court of Massachusetts reversed the probate court's decision, concluding that:

> A finding that a parent is unfit to further the welfare of the child must be predicated upon parental behavior which adversely affects the child. The State may not deprive parents of custody of their children "simply because their households fail to meet the ideals approved by the community . . . [or] simply because the parents

(Mass. App. Ct. July 25, 2008) ("Before terminating a parent's rights to his biological child, a judge must find by clear and convincing evidence that the parent is currently unfit to provide for the welfare and best interests of his child." (citing *Santosky*, 455 U.S. at 747-48)).

118. *Adoption of Mary*, 610 N.E.2d at 902.

119. *See generally* Adoption of Ilona, 944 N.E.2d 115, 121 (Mass. 2011); *In re* Adoption of Xan, No. 10-P-2244, 2011 Mass. App. LEXIS 707, at *1 (Mass. App. Ct. May 25, 2011).

120. *Bezio*, 410 N.E.2d at 1214-15 ("Neither the 'parental fitness' test nor the 'best interests of the child' test is properly applied to the exclusion of the other . . . . [T]he tests are not separate and distinct but cognate and connected.") (internal quotations and citations omitted).

121. *Id.* at 1211 ("[I]t is a fundamental principal that the Commonwealth may not attempt to force the breakup of a natural family without an affirmative showing of parental unfitness.") (internal quotations and citations omitted).

122. Adoption of Katharine, 674 N.E.2d 256, 261 (Mass. App. Ct. 1997). Courts may, however, "consider past conduct [including a previous pattern of abuse or neglect] to predict future ability and performance." *Id.*

123. *Bezio*, 410 N.E.2d at 1211.

embrace ideologies or pursue life-styles at odds with the average."[124]

Based on the facts in *Bezio*, the Supreme Judicial Court of Massachusetts concluded that there was no automatic "correlation between the mother's homosexuality and her [parental] fitness."[125] This conclusion is analogous to the holding in *Adoption of Katharine* that there is no automatic conclusion of parental unfitness based on a parent's drug habit.[126]

Unlike D.K., the children at issue in *Adoption of Katharine* and *Bezio* were not suffering any adverse effects from their parents' alleged unfitness.[127] Comparing these children to D.K., whose severe morbid obesity was first brought to light only after the state intervened, begs the question whether parents' morbid obesity does in fact directly correlate with parental unfitness, unlike drug habits and homosexuality.[128] The facts of *In re D.K.* certainly could lead to such a conclusion. However, such a sweeping generalization would not be in keeping with the federal or Massachusetts standard for termination of parental rights.

Courts must apply *both* the parental fitness *and* the best interests of the child tests, which are largely intertwined, to the facts of the case before them. To conclude that a parent's morbid obesity necessarily results in a finding of unfitness prior to considering the facts of the case would constitute overreaching by the state and deny natural parents their fundamental right to raise their children as they see fit. Simply disagreeing with a lifestyle choice would not be grounds for termination, absent other conclusory facts tending to support parental unfitness and that termination of parental rights is in the best interests of the child.[129]

As exemplified by societal attitudes prior to *Bezio*, at one time, sexual orientation was seen as grounds to deprive a parent of his or her

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124. *Id.* at 1216 (internal quotations and citations omitted).

125. *Id.*

126. *Adoption of Katharine*, 674 N.E.2d at 261. Drug addiction alone does not create per se parental unfitness, but often the problems associated with drug addiction, such as poverty and intoxication, do provide for a finding of parental unfitness. *Id.*

127. *See, e.g.*, *Bezio*, 410 N.E.2d at 1215-16; *Adoption of Katharine*, 674 N.E.2d at 257 (the record reflected that Katharine was "very alert . . . very happy and healthy . . . very neat.").

128. *In re* D.K., 58 Pa. D. & C.4th 353, 360 (C.P. 2002).

129. Furthermore, although 80% of obese children have at least one obese parent, the opposite conclusion cannot be similarly asserted; that is, just because a parent is obese does not necessarily mean that his or her child is or will become obese. *See infra* note 165. Therefore, it would be inappropriate for Massachusetts's courts to automatically determine parental unfitness in a case involving a morbidly obese parent. Rather, parental unfitness must be evaluated on a case-by-case basis and necessarily incorporate the best interests of the child.

constitutional right to raise his or her child.[130] As a society, we must ensure that morbid obesity is not treated in the same fashion. While a parent's morbid obesity can and should be one relevant factor in the determination of parental unfitness, it should not be completely dispositive of parental unfitness.

As a final precursor to seeking termination of parental rights, Massachusetts requires the Department of Children & Families (DCF) to make "reasonable efforts" to return the child to his or her natural parents.[131] The Commonwealth of Massachusetts has even gone so far as to incorporate this requirement into its statutory scheme.[132] The General Laws of Massachusetts proclaim the Commonwealth's policy is:

> [T]o direct its efforts, first, to the strengthening and encouragement of family life for the protection and care of children; to assist and encourage the use by any family of all available resources to this end; and to provide substitute care of children only when the family itself or the resources available to the family are unable to provide the necessary care and protection to insure the rights of any child to sound health and normal physical, mental, spiritual and moral development.[133]

The intent of the Commonwealth of Massachusetts is clearly set forth in the above statute. The policy is broad enough to encompass removal of a morbidly obese child and termination of parental rights if DCF can demonstrate parental unfitness by clear and convincing evidence, that state involvement is in the child's best interests, and that DCF made reasonable efforts to preserve the family unit. If DCF can meet the parental fitness and best interests of the child standards, the above statute provides for removal of a child when necessary to "insure . . . *sound health and normal physical*, mental, spiritual and moral development."[134] Childhood morbid obesity significantly impairs the child's "sound health and normal physical . . . development" and, thus, to remove a morbidly obese child from his or her home, upon a showing of parental unfitness and the child's best interests, is harmonious with the policy of the Commonwealth.[135]

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130. *Bezio*, 410 N.E.2d at 1215.

131. Adoption of Ilona, 944 N.E.2d 115, 122 (Mass. 2011).

132. MASS. GEN. LAWS ch. 119, § 1 (West Supp. 2011).

133. *Id.*

134. *Id.* (emphasis added) (emphasizing that "[t]he health and safety of the child shall be of paramount concern and shall include the long-term well-being of the child").

135. *Id.* Although seemingly in concert with the intent of the Commonwealth, the argument could be made that removal of morbidly obese children from their homes is discriminatory against certain races, ethnicities, and socio-economic classes that have a higher

Statutory compilations and state codes of regulation provide courts with guidance when reviewing cases of first impression.[136] Statutes and regulations were used in the prior cases to ensure compliance with departmental goals regarding the appropriateness of state intervention into the family unit, to define the relevant terms at issue, and to determine the requisite standard of review and burdens of proof.

The Code of Massachusetts Regulations (CMR) provides similar guidance upon which a court could rest when hearing a case of first impression involving the removal of a morbidly obese child from his or her home and the possible termination of parental rights.[137] Courts should consider the intent and essence of the CMR, as it pertains to DCF, as well. The specific CMR sections that provide guidance in this area are "Glossary,"[138] "Statement of Philosophy,"[139] and "Principles of

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prevalence of childhood obesity. For instance, in "2007-2008, Hispanic boys, aged 2 to 19 years, were significantly more likely to be obese than non-Hispanic white boys, and non-Hispanic black girls were significantly more likely to be obese than non-Hispanic white girls." *Overweight and Obesity: NHANES Survey (1976-1980 and 2003-2006)*, CTRS. FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/obesity/childhood/prevalence.html (last updated Jan. 11, 2013). *See also* Katherine Unger Davis, *Racial Disparities in Childhood Obesity: Causes, Consequences, and Solutions*, 14 U. PA. J.L. & SOC. CHANGE 313, 320-21 (2011). Although these statistics tend to show a true disparity in the prevalence of obesity between races, ethnicities, and socio-economic classes, as long as Massachusetts's courts strictly apply the parental unfitness and best interests of the child tests as well as provide reasonable accommodations for parents' special needs prior to seeking termination of parental rights in a case involving a morbidly obese child, such termination of parental rights would not be deemed a pretext for discrimination.

136. Indeed, the Pennsylvania court in *In re D.K.* began its analysis by ensuring its adherence to the Juvenile Act's limitations on state involvement into family life. *In re* D.K., 58 Pa. D. & C.4th 353, 357 (C.P. 2002). Similarly, the Iowa court in *In re L.T.* looked to the statutory definition of a "child in need of assistance" in order to conclude that Liza fell squarely within the statutory framework which would thus warrant state intervention. *In re* L.T., 494 N.W.2d 450, 452 (Iowa Ct. App. 1992). The state of New Mexico also sought statutory support for its best interests of the child analysis and termination of parental rights. New Mexico *ex rel.* Children, Youth and Families Dep't v. John R., 203 P.3d 167, 171-72 (N.M. Ct. App. 2009).

137. *See generally* 110 MASS. CODE REGS. 1.01, 1.02, 2.00 (2008).

138. 110 MASS. CODE REGS. 2.00 (2008) (defining in relevant part the following: "child" ("[A] person who has not reached his/her 18th birthday, but does not include unborn children."); "emergency" ("[A] situation where the failure to take immediate action would place a family and/or child at substantial risk of serious and imminent family disruption, or death, or serious emotional or physical injury."); "mature child" ("[A] child who is able to understand the circumstances and implications of the situation in which he/she is involved and is able to participate in the decision-making process without excessive anxiety or fear. A child . . . 14 years of age or older is presumed to be a mature child."); "medical emergency" ("[A]ny immediately life threatening condition . . . includ[ing] . . . any condition where delay in treatment will endanger the life, limb or mental well being of the patient."); and "neglect" ("[F]ailure *by a caretaker*, either deliberately or through negligence or inability, to take those actions necessary to provide a child with minimally adequate food, clothing, shelter, medical care, supervision, emotional stability and growth, or other essential care.")).

Service."[140] An analysis of these sections helps to capture the intent of the CMR. Once the intent of the CMR is established, it can be extrapolated to apply to cases involving removal of morbidly obese children from their homes. Part III of this Note will explain how Massachusetts's courts can use the Commonwealth's intent, demonstrated by case law, statutes, and regulations, in their evaluation of the first case involving removal of a morbidly obese child from his or her home.

III. THE APPROPRIATE STANDARD OF REVIEW FOR MASSACHUSETTS'S FIRST CASE INVOLVING REMOVAL OF A MORBIDLY OBESE CHILD FROM THE HOME

Prior courts, in deciding whether or not to remove a morbidly obese child from the home, have considered the weight and overall health and well-being of the child's parents as a relevant factor in determining whether or not the parents can provide adequate care for their child's specialized needs. Massachusetts's courts, when first presented with this issue, should consider parents' health and well-being as a relevant factor in determining whether parents are able to provide adequate care for their morbidly obese children. The prior courts' inclusion of parents' health and well-being, including their own morbid obesity, is wholly relevant to the determination of parental unfitness and the best interests of the child and is the appropriate standard for Massachusetts's courts to follow.

The decisions of the prior courts do not explicitly include the courts' analyses of parental fitness.[141] Instead, the courts placed greater

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139. 110 MASS. CODE REGS. 1.01 (2008) (addressing the goal of DCF, which is to "strengthen and encourage family life so that every family can care for and protect its children"). In support of this goal, DCF attempts to assist families in order to maintain family unity. However, if a family cannot provide the necessary care for its children, DCF "will intervene to protect the right of children to sound health and normal physical and mental development." *Id.* This section is particularly cautious about DCF's balance between its dual obligations of protecting children while also respecting the right of families to be free from state intervention; striking this balance will govern DCF's activities. *Id.*

140. 110 MASS. CODE REGS. 1.02 (2008) (seeking to protect children's safety and promote "stability and permanency" and acknowledging that "the family is the best source of child rearing," and "that substitute care is a temporary solution").

141. *See* Adoption of Katharine, 674 N.E.2d 256, 258 (Mass App. Ct. 1997) ("At the core of the inquiry is the question of what is in the best interests of the child, although the answer to that question in any given case is bound up with the determination of unfitness. The child's best interests may bear on how much parental deficiency is tolerable, or, conversely, the degree of parental deficiency may determine the child's best interests.").

The prior courts did, however, include some discussion of parental unfitness. *See, e.g.*, *In re L.T.*, 494 N.W.2d at 452 (finding that Liza's mother was "unable to effectively assist

emphasis on applying the facts of each case to the best interests of the child standard.[142] Massachusetts's courts, upon establishing parental unfitness, should follow the prior courts' analyses and dedicate more of their focus to the best interests of the child. The best interests of the child standard considers the physical and emotional health of the child, including whether the child is suffering from a life-threatening illness.[143] As suggested by its name, under this standard, the emphasis of the court is on the child; parental rights are secondary.

Because the four prior cases were cases of first impression in their respective jurisdictions, the courts appropriately began their analyses by ensuring compliance with applicable child abuse and neglect statutes.[144] For example, the court in *In re D.K.* relied on the Commonwealth of Pennsylvania's Juvenile Act for relevant definitions and statutory intent surrounding the removal of a child from the home.[145] In addition to relying on applicable statutes for guidance in resolving these issues of first impression, the more recent cases considered the standard of review used in previous decisions. Specifically, the court in *In re Brittany T.* relied heavily upon the analysis provided in *In re D.K.*, despite the fact that these cases were decided in different jurisdictions.[146] Similarly, when Massachusetts is presented with this issue, it should first consult the General Laws of Massachusetts and the CMR for guidance. It should then consider the analyses performed by the prior courts. Although the holdings in these cases are not binding upon Massachusetts's courts, the analyses made by the prior courts can be

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Liza with her problem of obesity"); *John R.*, 203 P.3d at 169 (finding that the child was neglected in part due to her parents' exacerbation of her health problems by not providing treatment and administering medicine); *In re* Brittany T., 835 N.Y.S.2d 829, 838-39 (Fam. Ct. 2007); *rev'd*, 852 N.Y.S.2d 475 (App. Div.3d 2008) (concluding that Brittany was neglected by her parents due to their failure to provide a minimum degree of care with respect to her educational and medical needs); *In re D.K.*, 58 Pa. D. & C.4th at 359 (concluding that D.K.'s mother "d[id] not have the natural abilities typical of *any* parent, as she [wa]s limited by her own extreme obesity") (emphasis added).

142. *See, e.g.*, *John R.*, 203 P.3d at 172; *In re Brittany T.*, 835 N.Y.S.2d at 831, 838-39.

143. *See In re L.T.*, 494 N.W.2d at 452; *John R.*, 203 P.3d at 172; *In re Brittany T.*, 835 N.Y.S.2d at 838.

144. *See, e.g.*, *In re L.T.*, 494 N.W.2d at 452 (citing IOWA CODE § 232.2(6)(f) (1991)); *John R.*, 203 P.3d at 172 (quoting N.M. STAT. ANN. § 32A-4-28(A) (West 2005)); *In re D.K.*, 58 Pa. D. & C.4th at 357 (quoting 42 PA. CONS. STAT. § 6302(1) (West 2011)).

145. *In re D.K.*, 58 Pa. D. & C.4th at 357-58 (quoting 42 PA. CONS. STAT. § 6302(1) (West 2011)).

146. *In re Brittany T.*, 835 N.Y.S.2d at 839. The two cases are even more connected as it has been noted that both rely on testimony provided by the same medical expert, Dr. Cochran, regarding the children's morbid obesity. *Id.* at 834; *In re D.K.*, 58 Pa. D. & C.4th at 362; Coyla J. O'Connor, Note, *Childhood Obesity and State Intervention: A Call to Order!*, 38 STETSON L. REV. 131, 147 n.85 (2008).

used as persuasive support for concluding that a morbidly obese child should or should not be removed from his or her home based on the totality of the facts and circumstances.

A. *Standard for Removal of a Child From the Home*

As previously mentioned, the prior cases did not include detailed consideration of the parental unfitness prong required by the federal and Massachusetts standards for removal of a child from his or her home.[147] Instead, the focus of the prior courts was on the best interests of the child, which is necessarily evaluated in connection with the parental fitness test.[148] The best interests of the child standard encompasses the health and well-being of the parents because a parent's inability to provide adequate care for the child's physical and emotional needs can warrant state involvement to protect the child.[149] For example, in D.K.'s situation, his mother was physically unable to leave the home to accompany him to his medical appointments.[150] In fact, it was not until the Commonwealth of Pennsylvania intervened that D.K.'s serious medical afflictions were even brought to light.[151] Although disconcerting, it is possible that the first case presented to a Massachusetts court could resemble these facts. In that instance, the court would need to determine whether or not the parents' health and well-being, including the parents' own morbid obesity, conflicts with the child's best interests.

The Pennsylvania court determined that a morbidly obese parent, such as Donna K., cannot provide adequate care for a morbidly obese child.[152] It is for that reason that parental health and well-being,

147. *See infra* Part IV.A (analogizing the parental unfitness standard in cases finding parental unfitness of morbidly obese parents to those finding parental unfitness of incarcerated parents).

148. Parental unfitness and the best interests of the child are largely intertwined in courts' analyses. *See, e.g.*, Adoption of Katharine, 674 N.E.2d 256, 258 (Mass App. Ct. 1997).

149. It should be noted that the best interests of the child is only one factor in justifying state intervention. The child's morbid obesity must also be a life threatening condition. *See generally* Melissa Mitgang, *Childhood Obesity and State Intervention: An Examination of the Health Risks of Pediatric Obesity and When They Justify State Involvement*, 44 COLUM. J.L. & SOC. PROBS. 553, 556-59 (2011). The author agrees that state intervention is drastic and should only be used when the child's obesity is life threatening, so as to prevent state intervention in cases of mere overweight children. Using a more lenient standard would unjustifiably infringe upon parents' rights, while using a stricter standard would not sufficiently protect morbidly obese children.

150. *In re D.K.*, 58 Pa. D. & C.4th at 354.

151. *Id.* at 360.

152. *Id.* at 357.

including morbid obesity, should be incorporated by Massachusetts's courts into the best interests of the child standard.[153]

In re D.K. is not the only opinion that Massachusetts's courts could consult to decide whether or not to include parents' health and well-being in this determination—the Family Court of New York in *In re Brittany T.* provides supporting evidence that this inclusion would be appropriate in a case of first impression in Massachusetts. Recall that, like Donna K., Brittany's mother was also very obese and exhibited a lack of compliance with the court's order to ensure that Brittany attended school, went to a gym, and participated in nutrition and education programs.[154] The Family Court of New York followed the analysis in *In re D.K.* by considering the best interests of the child and ultimately concluding that removal from the home was the appropriate state action.[155] In so concluding, the New York court examined the totality of the facts and circumstances and determined that the state showed by clear and convincing evidence that Brittany's parents willfully violated the court's order.[156] Therefore, it was in Brittany's best interests to remain in foster care at that time.[157]

In further consideration of the best interests of the child standard, the Family Court of New York continued its analysis by determining whether Brittany's parents willfully violated the court's order.[158] In this analysis, the court considered the health and well-being of Brittany's parents, including her father's physical confinement to a wheelchair and her mother's obesity and resulting comorbidities.[159]

The recommendation to Massachusetts to consider the physical disability of a parent would be inconsistent with 110 MASS. CODE REGS. 1.09 (2008), which prohibits discrimination against a disabled individual who receives DCF services. However, Massachusetts has not expressly incorporated morbid obesity in its statutory definition of disability.[160] It

153. This argument is not meant to assert that a morbidly obese parent cannot care for *any* child, but rather that a morbidly obese parent such as Donna K. cannot adequately care for a child who has serious and specialized needs due to the child's own morbid obesity. The court in *In re D.K.* addresses this concern by framing the issue as whether Donna K. could "provide the required level of support and reinforcement required for her child's specialized needs," *not* whether she could care for a "normal child." *Id.*

154. *In re* Brittany T., 835 N.Y.S.2d 829, 831-32, 835 (Fam. Ct. 2007), *rev'd,* 852 N.Y.S.2d 475 (App. Div. 2008).

155. *Id.* at 838.

156. *Id.* at 837.

157. *Id.* at 838-39.

158. *Id.* at 836.

159. *Id.* at 835.

160. MASS GEN. LAWS. ANN. ch. 19C, § 1 (West 2011). Nor has federal law. *See* 42

can be argued that including a parent's own morbid obesity comports with both federal and Massachusetts's notions of protection against disability discrimination with regard to services provided by DCF. The Americans with Disabilities Act (ADA), Massachusetts anti-discrimination laws, and the Constitution require DCF to reasonably accommodate the parents' special needs prior to seeking termination of parental rights.[161] Therefore, regardless of whether Massachusetts courts currently, eventually, or never consider morbid obesity a disability by definition, DCF must first provide reasonable accommodations for the parents' special needs prior to seeking a termination proceeding. The courts in prior cases provided accommodations to special needs parents,[162] and Massachusetts's courts should follow suit in their first case involving removal of a morbidly obese child from a home with special needs parents.

Since it is not inherently discriminatory for Massachusetts to consider the health and well-being of a morbidly obese child's parent in the context of the best interests of the child standard, Massachusetts's courts should also include the emotional and mental health of the parent in this standard. The court in *In re L.T.* did this when it concluded that Liza's mother was uncooperative with DCF and was even provoking Liza's stress-induced eating.[163] Living in such an environment was not in the child's best interests, and the court accordingly ordered that Liza remain in foster care.[164] Although not *physically* unable to provide adequate care for her daughter's specialized needs, Natalie was unable to

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U.S.C. §12102(2) (1991); EEOC v. Texas Bus Lines, 923 F. Supp. 965, 976 (S.D. Tex. 1996) ("[N]either the case law nor the applicable regulations include morbid obesity as a disability under the ADA."). In the employment context, the state of Michigan has broadly interpreted its discrimination laws to afford protection to overweight employees from discrimination based on weight. Teri Morris, Note, *States Carry Weight of Employment Discrimination Protection: Resolving the Growing Problem of Weight Bias in the Workplace*, 32 W. NEW ENG. L. REV. 173, 177 (2010). This example does not detract from the crux of this Note's argument because, regardless of a parent's purported or actual disability, the court must first assess parental ability and fitness to provide adequate care for the child and then determine the best interests of the child. *See* Adoption of Mary, 610 N.E.2d 898, 902 (Mass. 1993); Adoption of Xan, No. 10-P-2244, 2011 Mass. App. LEXIS 707, at *1 (Mass. App. Ct. May 25, 2011). For Massachusetts's courts to rule otherwise "would improperly elevate the rights of the parent above those of the child." *In re* Adoption of Gregory, 747 N.E.2d 120, 125 (Mass. 2001) (internal citations omitted).

161. *In re Adoption of Gregory*, 747 N.E.2d at 126.

162. *See* State of New Mexico *ex rel.* Children, Youth and Families Dep't v. John R., 203 P.3d 167, 169 (N.M. Ct. App. 2009) (providing the parents with parenting and nutritional education and trial home visits with their daughter, all of which proved unsuccessful, prior to termination of parental rights).

163. *In re* L.T., 494 N.W.2d 450, 452-53 (Iowa Ct. App. 1992).

164. *Id.* at 453.

emotionally support her daughter and assist in combating her life-threatening morbid obesity. The analysis performed by the Iowa court in *In re L.T.* to include parents' emotional and mental ability to provide adequate care for the morbidly obese child should be followed by Massachusetts's courts if the facts presented provide for such an analysis.

B. *Further Considerations in Shaping a Recommendation to Massachusetts's Courts*

Included in the analyses of the prior cases is the parents' overall health and well-being, including the manifestation of morbid obesity or other physically debilitating ailments of one or both parents. The prior courts have all applied similar standards of review for this type of case and have included the morbidly obese child's parents' overall health and well-being including physical, mental, and emotional limitations that would significantly impact the parents' ability to provide adequate care for the specialized needs associated with the child's morbid obesity. The courts in each of these cases did not come to such a conclusion lightly, nor was it based on mere hypothetical situations that could result if the child were returned to his or her parents' care without further state intervention. Relapses, for instance, caused the court to give more consideration to factors such as the parents' health and well-being in determining the best interests of the child.[165]

The problem Massachusetts would seek to prevent arises when the morbidly obese child returns to a home with parents who do not instill the nutrition and exercise regimens taught to the child while in foster care, resulting in the child's relapse to old habits and rapid weight regain. The child in *John R.* had successfully lost 120 pounds in foster care and upon her return to her mentally and emotionally unsupportive parents, the child gained between two and three pounds per week.[166] This deteriorative behavior should be of utmost concern to the Massachusetts court that first crafts an opinion and plan for

165. One possible reason for relapses is the fact that approximately 80% of obese children have at least one obese parent. Lindsey Murtagh, *Judicial Interventions for Morbidly Obese Children*, 35 J.L. MED. & ETHICS 497, 498 (2007). Although not dispositive, this assertion tends to support the prior courts' inclusion of parents' weight as a factor in determining the best interests of the child. When a parent, due to obesity, is physically unable to care for his or her child's specialized needs, it is only appropriate for the court to interfere with the family unit in order to protect the child. It is not unreasonable for the court to order a parent to address his or her own health concerns before reunification of the child and parent can occur. *See, e.g.*, *In re* D.K., 58 Pa. D. & C.4th 353, 362 (C.P. 2002).

166. *John R.*, 203 P.3d at 169. The child was returned to foster care and once again lost weight and received proper nutrition. *Id.*

reunification.

In order to prevent relapses from occurring, the prior courts ordered not only that the morbidly obese child remain in foster care until further review, but also that the parents meet certain goals enumerated in the courts' orders. For example, the Pennsylvania court in *In re D.K.* issued an eighteen-count order requiring, *inter alia*, that Donna K. attend all of D.K.'s medical appointments before reunification could occur.[167] One may argue that such an order is inherently discriminatory against Donna K. based on her morbid obesity. It is undisputed that at the time the order was written, it was physically impossible for Donna K. to accompany D.K. to his doctors' appointments because she was housebound due to her extreme obesity.[168] Accordingly, it appears that the only way Donna K. would be able to satisfy the court's order and regain custody of her child would be to lose weight. Opponents may argue that courts should not be given such discretion when interfering with the family unit and that future courts, when issuing an order or plan for reunification, should not follow the Pennsylvania court by discriminating against morbidly obese parents and unjustifiably mandating that a parent lose weight in order to be reunified with his or her child.

Despite arguments to the contrary, it would be appropriate and within the statutory boundaries for Massachusetts's courts to issue an order similar to the Pennsylvania court in *In re D.K.* if the totality of the facts and circumstances led the court to conclude that it was in the best interests of the child to remain in foster care.[169] Although the short term benefits of removal may be manifested in the form of immediate weight loss, Massachusetts's courts should also carefully consider the long-term benefits of intervention: preservation of the family unit and alteration of the child's behavior. Interventions aimed at the family as a unit instead of the child as an individual may be more successful in achieving long-term results because parents serve as role models to their children both

167. *In re D.K.*, 58 Pa. D. & C.4th at 361.

168. *Id.* at 354.

169. The author suggests that Massachusetts's courts use the order in *In re D.K.* as an example of the requirements of both the child and the parent(s) prior to restoration of custody. *See id.* at 361-63 (requiring for example that D.K. "obtain and maintain a healthy weight and lifestyle . . . obtain and maintain a membership in a fitness facility" and that Donna K. "cooperate[] with a resource worker for help with nutrition . . . provide the appropriate foods in the home and prepare them as required by the diet . . . provide a safe, stable, and healthy home environment . . . address her own health concerns and well-being . . ."). An order addressing both the child and the parent(s) will help ensure that the entire family is involved in restoring custody with the natural parents and preserving the family unit.

in diet and in exercise.[170] Such interventions may altogether avoid termination of parental rights.

The Massachusetts neglect statute requires parents to provide "necessary and proper physical . . . care."[171] Massachusetts permits state intervention in extremely limited circumstances of child neglect where the courts find that treatment would be life-prolonging. However, Massachusetts's interpretation of its neglect statute is strict and does not expand the definition of neglect.[172] In order for Massachusetts to remove a morbidly obese child from the home or terminate parental rights, the court would have to interpret the state's child neglect statute to include morbid obesity. Although Massachusetts is particularly aware of its dual obligation to protect children while also limiting unwarranted state intervention,[173] it should nonetheless interpret its neglect statute to include morbid obesity, because the interest of protecting these children far surpasses the state's policy of limiting government intervention. Childhood morbid obesity is life threatening and without state intervention on the basis of neglect, these children are at risk of dying an early and preventable death.[174]

IV. ANALOGOUS CASE LAW IN SUPPORT OF MASSACHUSETTS'S ANALYSIS OF PARENTAL FITNESS AND THE BEST INTERESTS OF THE CHILD STANDARD

Massachusetts's case law on the parental fitness of incarcerated parents as well as a Missouri case involving the denial of a morbidly obese parent's adoption application can be analogized to the instant issue to strengthen the argument that Massachusetts's courts should follow the multi-jurisdictional case law that has been developed in childhood

170. *See generally* Murtagh, *supra* note 165, at 499 (asserting that courts should involve the family as a whole in order to properly address and correct the poor eating and exercise habits of parents and other role models that could otherwise continue to hinder the child's progress during and after state involvement).

171. MASS. GEN. LAWS ANN. ch. 119, § 24 (West Supp. 2012).

172. Shireen Arani, Case Comment, *State Intervention in Cases of Obesity-Related Medical Neglect*, 82 B.U. L. REV. 875, 884 (2002). Author Stephanie Sciarani suggests four types of jurisdictions, which are split on neglect statutes: strict construction, restrained construction, moderate construction, and broad construction jurisdictions. Massachusetts is a strict construction jurisdiction. This leaves little room for statutory interpretation, because the definition of negligence accounts only for "harm stemming from failure to provide the necessities of life." Stephanie Sciarani, Note, *Morbid Childhood Obesity: The Pressing Need to Expand Statutory Definitions of Child Neglect*, 32 T. JEFFERSON L. REV. 313, 319 (2010).

173. *See* 110 MASS. CODE REGS. 1.01 (2008).

174. The average life expectancy of people who are severely obese is reduced by an estimated 5 to 20 years. S. Jay Olshansky et al., *A Potential Decline in Life Expectancy in the United States in the 21st Century*, 352 NEW ENG. J. MED. 1138, 1140 (2005).

morbid obesity jurisprudence. When determining the parental fitness of an incarcerated parent, Massachusetts's courts have considered the best interests of the child.[175] Likewise, a Missouri case that denied the adoption application of a morbidly obese parent directly corresponds to the argument that Massachusetts's courts should incorporate parental health and well-being in an analysis of the best interests of a morbidly obese child.

A. *Incarcerated Parents*

An analogy can be drawn between parents with physical limitations such as morbid obesity and incarcerated parents such as the mother in the case of *Care and Protection of Amalie*.[176] In that case, the Massachusetts Appeals Court considered the mother's parental fitness and ability to address her children's special needs in concluding that the termination of her rights was in the best interests of the children.[177]

The mother, whose name was not denoted, "was found guilty of drug trafficking and distribution of controlled substances in a school zone, and was sentenced to serve seven years in prison."[178] During her incarceration, her daughter, Amalie, was placed in two different foster homes.[179] Amalie, like the four morbidly obese children discussed in Part I of this Note, was a child with specialized needs.[180] Amalie was ultimately placed in a residential program to address her special needs; she showed significant improvement upon this placement, but continued to require intensive care and supervision.[181]

The court of appeals considered the mother's appeal based on her argument that the juvenile court erred in finding that she was unfit to parent her two children.[182] The court of appeals defined parental unfitness as "grievous shortcomings or handicaps that put the child's welfare much at hazard."[183] Ultimately, the court concluded that the

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175. *See In re* Care and Prot. of Amalie, 872 N.E.2d. 741, 746 (Mass. App. Ct. 2007).

176. *In re Care and Prot. of Amalie*, 872 N.E.2d at 746 (upholding the juvenile court's finding of parental unfitness and subsequent termination of parental rights as the appropriate state action based on the best interests of the child).

177. *Id.* Although this mother had two children, the focus of this case was on Amalie.

178. *Id.* at 745.

179. *Id.*

180. In particular, Amalie suffered from reactive attachment disorder, posttraumatic stress disorder, and ADHD. *Id.* She was hospitalized for psychiatric treatment and seizures in addition to being aggressive, self-destructive, suicidal, and violent toward her foster parents. *Id.*

181. *Id.*

182. *Id.* at 746.

183. *Id.* (internal quotation marks omitted).

mother was unfit to parent because she refused to acknowledge that her involvement with drugs was impacting her ability to parent, refused to acknowledge that her children had special needs, and that she was accordingly unable to address those needs.[184]

The corollary between Amalie and D.K.'s mothers supports the assertion that Massachusetts courts, when deciding a case involving the parental rights of a parent of a morbidly obese child, should consider parental fitness as defined in *In re Care and Protection of Amalie*. Both mothers were physically limited—one by her incarceration, the other by her morbid obesity—in their ability to provide adequate care for their child's specialized needs.[185] Further, both mothers failed to acknowledge or address their child's specialized needs prior to state involvement.[186] However, neither mother was per se unfit due to her incarceration or morbid obesity. Rather, their unfitness was determined by the aggravating circumstances coupled with their incarceration and morbid obesity. For instance, Amalie's mother, although incarcerated, was deemed unfit to parent Amalie because of the aggravating circumstances of drug use and refusal to acknowledge her daughter's special needs.[187] Similarly, Donna K. was unfit to parent D.K. not only because of her morbid obesity, but because of the aggravating circumstances of her lack of initiative in seeking medical attention for D.K. and her failure to address his absenteeism from school.[188]

The Massachusetts Appeals Court relied upon precedent Massachusetts case law that held "[t]he specialized needs of a particular child when combined with the deficiencies of a parent's character, temperament, capacity, or conduct may clearly establish parental

184. *Id.* The court noted that termination of parental rights is not the automatic result of a finding of parental unfitness. *Id.* at 747. Rather, the best interests of the child standard is the dispositive test for the appropriate state action based on the finding of parental unfitness. *Id.* at 746.

185. Although Amalie's mother was *involuntarily* limited from providing care to her children based on her court ordered incarceration, Donna K. *voluntarily* limited herself from providing care to D.K. based on her morbid obesity, an almost exclusively preventable condition. *But see* Yijun Liu et al., *Food Addiction and Obesity: Evidence from Bench to Bedside*, 42(2) J. OF PSYCHOACTIVE DRUGS, June 2010, at 133, 134 (supporting the theory that "[F]ood addiction is the result of loss of control, impulsive and/or compulsive behavior that results from emotional and environmental conditions and a psychological dependence on food."). Despite scientific studies to suggest that food addiction could be one cause of obesity, it is uncontroverted that unlike Amalie's mother, prior to state involvement, Donna K. was in no way *legally* prevented from providing care to D.K.

186. *In re Care and Prot. of Amalie*, 872 N.E.2d at 746; *In re* D.K., 58 Pa. D. & C.4th 353, 360 (C.P. 2002).

187. *In re Care and Prot. of Amalie*, 872 N.E.2d at 746.

188. *In re D.K.*, 58 Pa. D. & C.4th at 359.

unfitness."[189] Such analysis gives credence to this Note's recommendation that Massachusetts's courts, when deciding a case of first impression involving parental rights of a morbidly obese child, should consider in their analysis the parents' overall health and well-being.[190] Physical handicaps such as morbid obesity that impact parents' ability to provide adequate care for their child's specialized needs can jeopardize the child's welfare and warrant state intervention.

When deciding this issue, Massachusetts's courts should follow this Note's recommendation of including parents' overall health and well-being in their analysis of the best interests of the child because such inclusion finds support in prior—albeit nonbinding—case law, the Massachusetts Appeals Court's decision in *Care and Protection of Amalie*, and the applicable sections of the CMR and Massachusetts General Laws. To decide this issue otherwise would be contrary to the prior case law, comparable Massachusetts case law, Massachusetts General Laws and Regulations, and the CMR.

B. *Adoption Cases and the Best Interests of the Child Standard*

Another parallel can be drawn between the best interests of the child standard used in neglect and adoption cases and the instant issue.[191] The argument that health should not be a determinative factor in whether or not a parent is suitable to adopt is illustrated by the recent denial of a Missouri couple's adoption request based on the father's obesity.[192] The adoptive father, Gary, weighed approximately 550 pounds at the time he and his wife sought adoption of a baby named Max.[193] After losing 250

189. *In re Care and Prot. of Amalie*, 872 N.E.2d at 746 (quoting *In re* Dep't of Soc. Servs. to Dispense with Consent to Adoption, 463 N.E.2d 1187, 1191 (Mass. App. Ct. 1984)).

190. While Massachusetts's courts should consider parents' health and well-being, poor health alone is not determinative of per se parental unfitness. Similar to incarceration and drug addition, there must exist other aggravating circumstances to warrant a finding of unfitness.

191. Courts in other countries have considered adoptive parents' health, including weight, in determining whether or not they are suitable for adoption. *See* Brenda K. DeVries, Note, *Health Should Not be a Determinative Factor of Whether One Will be a Suitable Adoptive Parent*, 6 IND. HEALTH L. REV. 137, 145 (2009). Adoptive parents in South Korea and Taiwan must have a body mass index (BMI) less than 30. *Id.* Similarly, China requires "adoptive parents to have a BMI below 40." *Id.* at 145-46. In addition to adoptive parents' weight, China precludes those "who have a facial deformity; and people who take antidepressants." *Id.* at 146 (citation omitted).

192. *Id.* at 140. MO. ANN. STAT. § 453.121 (West Supp. 2011) only permits disclosure of nonidentifying information "to the adoptive parents, legal guardians, adopted adult or the adopted adult's lineal descendants if the adopted adult is deceased, upon written request therefor." Accordingly, the author was unable to obtain a copy of the decision in this case.

193. DeVries, *supra* note 191, at 140.

pounds as a result of gastric bypass surgery, Gary and his wife's application for adoption of Max was granted.[194] This suggests that at least one of the court's determinative factors in originally denying the adoption request was Gary's obesity.[195]

Every state's statutory adoption scheme has been liberally construed to include the best interests of the child standard when considering adoptions.[196] Because the best interests of the child standard is vague, it is subject to discriminatory opinions rendered by judges.[197] Although the factors used by courts in approving adoption requests are broad and include physical health, it is difficult to determine overall health to any degree of certainty. For instance, an overweight prospective parent is not necessarily unhealthy, and a trim and active prospective parent is not necessarily completely healthy, as he or she could have a non-obvious serious medical condition.

The best interests of the child standard is similarly applied to both adoption cases and cases involving removal of a child from the home. In the case of D.K.'s housebound and morbidly obese mother, the court considered D.K.'s mother's physical health and well-being in ruling that removal of D.K. was appropriate due to his mother's inability to provide adequate care.[198] Massachusetts's courts should make determinations regarding the removal of a morbidly obese child from his or her home and/or termination of parental rights on a case-by-case basis, taking into consideration all of the facts and circumstances.

The inclusion of the parents' health and well-being in determining removal of a morbidly obese child from the home is appropriate because a parent's own morbid obesity directly correlates with the child's lack of success with dietary and exercise programs when returned to the home.[199] In a case involving a morbidly obese parent who cannot physically provide adequate care for his or her own morbidly obese child with specialized needs, state intervention to seek removal of the child is justified. While no one factor is dispositive in such an analysis, it is appropriate to include parents' obesity and other physical health concerns in determining whether or not removal is an appropriate remedy for a case involving childhood morbid obesity.

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194. *Id.* at 141.

195. *See supra* note 192 and accompanying text. Because the decision is unavailable to the author, the exact factors considered by the court remain unknown.

196. DeVries, *supra* note 191, at 142.

197. *Id.* at 143.

198. *In re* D.K., 58 Pa. D. & C.4th 353, 359 (C.P. 2002).

199. *See* New Mexico, *ex rel.* Children, Youth and Families Dep't v. John R., 203 P.3d 167, 169 (N.M. Ct. App. 2009).

CONCLUSION

It is plain to see that the Pennsylvania court followed the correct analysis and reached the appropriate conclusion in ordering that D.K. remain in foster care until such time as, *inter alia*, his mother could address her own health concerns to enable her to attend all of her son's medical appointments.[200] It is because the Pennsylvania court considered Donna K.'s overall health and well-being, including her own debilitating morbid obesity, in its analysis of her ability to provide adequate care of D.K., that D.K. was afforded the opportunity to continue his weight loss and nutritional success first achieved in foster care.

If Massachusetts's courts do not include parents' overall health and well-being in their analyses of parental fitness in cases involving morbidly obese children, it is the child who will ultimately suffer. It is not surprising that morbidly obese children who have experienced weight loss success in foster care often revert back to their poor diet and exercise habits when returned to unfit parents.[201] Such a problem could be prevented in Massachusetts if the courts' consideration of parental fitness and ability to care for the child took into account the parents' own health and well-being, including their physical limitations due to morbid obesity. Success early on in state intervention would reduce the need for future state involvement, thus comporting with Massachusetts's dual obligations to protect children while preventing warrantless intrusions into the family unit.

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200. *In re D.K.*, 58 Pa. D. & C.4th at 362.

201. *See, e.g.*, *John R.*, 203 P.3d at 169.

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