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Keeping Families Together

Preserving the Rights of Parents with Psychiatric Disabilities

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Keeping families together is a critical part of enabling many parents with psychiatric disabilities to achieve recovery and live fulfilling lives. For any family, separating children from parents is a painful and traumatic event with ongoing ramifications for both parents and children. For parents with psychiatric disabilities, losing their children can be particularly devastating. Losing custody of a child or having parental rights terminated not only tears apart the families of parents with psychiatric disabilities but also eliminates critical support systems that enable many individuals to manage the effects of their psychiatric disability.

For decades, society expected individuals with psychiatric disabilities to live in institutions or other segregated settings, and not to be self-sufficient people who worked and started their own families. We have increasingly begun to expect that people with significant psychiatric disabilities will live in their own homes, hold jobs, and participate in their communities. While state mental health systems have begun—albeit too slowly—to afford more individuals with psychiatric disabilities the opportunity to live in integrated settings, there has been little effort to support these individuals in their role as parents.

In a lengthy report issued in September 2012, the National Council on Disability, an independent federal agency, concluded that “the legal system is not protecting the rights of parents with disabilities and their children.”¹ According to the council, parents with disabilities are “the only distinct community of Americans who must struggle to retain custody of their children.”² Moreover, parents with psychiatric disabilities are the most likely to be adversely affected by the child welfare and legal systems, the Council found, with removal rates of children as high as 70 to 80 percent.³ The council also cited a study finding that parents with a disability label in their school records were more than three times as likely to have their parental rights terminated than parents without such a label.⁴ Moreover, the study found that the most common dis-

¹NATIONAL COUNCIL ON DISABILITY, *ROCKING THE CRADLE: ENSURING THE RIGHTS OF PARENTS WITH DISABILITIES AND THEIR CHILDREN* 14 (2012), <http://1.usa.gov/VQ1E5S>.

²*Id.*

³*Id.* at 92 & n.259 (citing Loran B. Kundra & Leslie B. Alexander, *Termination of Parental Rights Proceedings: Legal Considerations and Practical Strategies for Parents with Psychiatric Disabilities and the Practitioners Who Serve Them*, 33 *PSYCHIATRIC REHABILITATION JOURNAL* 142, 143 (2009)). Kundra and Alexander also cite a 2006 study finding that mothers with serious mental illness lost their children at a rate three times as high as similarly situated mothers without mental illness (*id.* at 94 & n.267; Kundra & Alexander, *supra*, at 143).

⁴NATIONAL COUNCIL ON DISABILITY, *supra* note 1, at 92.

ability labels for parents whose rights are terminated are emotional and behavioral disorders.⁵

While a wide variety of parents with disabilities experience poor treatment in the child welfare system, here I focus on parents with psychiatric disabilities. I begin with an overview of the legal framework in which child welfare proceedings operate, explain some of the reasons why parents with psychiatric disabilities have fared so poorly in these proceedings, and offer recommendations for attorneys representing children in these proceedings.

The Legal Framework

State proceedings concerning custody and termination of parental rights are governed by state laws and processes as well as the federal Adoption and Safe Families Act. For parents with disabilities, the Americans with Disabilities Act (ADA) provides additional protections. While some courts have been reluctant to apply the ADA in termination proceedings, advocates should be aware of the ADA's application since it can be an important tool to protect parents with psychiatric disabilities.

Termination of Parental Rights Based on a Mental Illness. Approximately three quarters of states specifically include mental illness as a ground for termination of parental rights where the disability makes a person unable to parent.⁶ A few states

qualify this ground further.⁷ For example, Iowa law provides that parental rights may be terminated where “the parent has a chronic mental illness and has been repeatedly institutionalized for mental illness, and presents a danger to self or others”⁸ Wisconsin law allows termination where a parent with a mental illness or a developmental disability is an inpatient at a hospital or other treatment facility and has been there for two of the past five years.⁹ In states that do not have a specific termination ground tied to mental illness, termination may still occur, of course, based on the parent’s inability to parent for reasons related to a mental illness.

Adoption and Safe Families Act. The federal Adoption and Safe Families Act requires states to make “reasonable efforts” to “preserve and reunify families . . . to prevent or eliminate the need for removing the child from the child’s home.”¹⁰ The Act does not provide a private right of action for parents to enforce the “reasonable efforts” provision.¹¹ However, in order to be compliant with the federal law, states have codified the “reasonable efforts” in their statutory schemes. Neither the Act nor most state child welfare statutes explicitly require the “reasonable efforts” to be designed to meet the needs of parents with disabilities.¹² A number of courts have found, however, that the “reasonable efforts” standard is not met unless the state meets a parent’s disability-related needs and have reversed termination-of-

⁵*Id.*

⁶Elizabeth Lightfoot & Traci LaLiberte, University of Minnesota, Guide for Creating Legislative Change: Disability in the Termination of Parental Rights and Other Child Custody Statutes 2 (July 2007), <http://bit.ly/11n1yGp> (thirty-six states list mental illness as ground for termination of parental rights).

⁷See Elizabeth Lightfoot & Traci LaLiberte, University of Minnesota, *The Inclusion of Disability as Grounds for Termination of Parental Rights in State Codes*, 17 POLICY RESEARCH BRIEF 3 (Oct. 2006), <http://bit.ly/10maTYZ>.

⁸IOWA CODE § 232.116(1)(k)(2); see Lightfoot & LaLiberte, *supra* note 7.

⁹Wis. STAT. § 48.415(3); see Lightfoot & LaLiberte, *supra* note 7.

¹⁰Adoption and Safe Families Act of 1997, 42 U.S.C. § 671(a)(15)(B). The Act amended the Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500.

¹¹*Suter v. Artist M.*, 503 U.S. 347, 363 (1992). The U.S. Department of Health and Human Services can enforce the provision by reducing or eliminating payments to a state that does not comply with the reasonable-efforts requirement (*id.* at 360). The Adoption and Safe Families Act requires that, in order for a state to receive federal reimbursement for foster care payments made with respect to a child involuntarily removed from his home, there must be a judicial determination that reasonable efforts were made (*id.* (citing 42 U.S.C. § 671(a)(1)).

¹²Arkansas’s child welfare statute does require that the state make reasonable accommodations in accordance with the Americans with Disabilities Act (ADA) to parents with disabilities in order to allow parents meaningful access to reunification and preservation services (ARK. CODE ANN. § 9-27-341). Idaho and Vermont require that reasonable efforts include the provision of supportive services to parents with disabilities (IDAHO CODE § 16-1619(3); VT. STAT. ANN. tit. 52, § 4922(b)).

parental rights orders accordingly.¹³ These court decisions require child welfare systems to coordinate with state disability service systems to provide parents with disabilities the services they need.

Some states do not require that reasonable efforts to preserve or reunify the family be made if the parent's mental illness is deemed to make the parent unable to benefit from such efforts. The Adoption and Safe Families Act states that reasonable efforts are not required where the parent has killed another child, has had parental rights to another child involuntarily terminated, or "has subjected the child to aggravated circumstances (as defined in State law, which definition may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse)."¹⁴ A parent's mental illness hardly fits within the types of examples of aggravated circumstances listed in the Adoption and Safe Families Act. Nonetheless, under a number of state laws "a mental illness that makes the parent unable to benefit from reunification services is an "aggravated circumstance."¹⁵ In these states a parent's psychiatric disability may result in the parent having rights terminated without having received reunification services.

The Americans with Disabilities Act. By its terms, the ADA applies to state services designed to help parents main-

tain or regain custody of their children as well as to the initiation of proceedings to terminate parental rights.¹⁶ Title II of the ADA prohibits state and local government entities from discriminating against individuals with disabilities in their programs, services, and activities.¹⁷ Specifically, a public entity is not allowed to provide individuals with disabilities an unequal opportunity to participate in its programs, services, or activities.¹⁸ A public entity must make reasonable modifications in its programs, services, and activities to ensure equally effective participation.¹⁹ Reunification and other family preservation services are "programs, services, or activities." Similarly, proceedings to terminate parental rights are a program or activity. The ADA's broad language makes no exceptions for activities that implicate strong state interests or that are not for the benefit of people with disabilities, the U.S. Supreme Court held in *Pennsylvania Department of Corrections v. Yeskey*.²⁰

Thus, where the state fails to make reasonable modifications of family reunification or preservation services to meet the needs of parents with psychiatric disabilities, those parents should be able to assert the ADA defensively in child welfare proceedings that seek to terminate parent rights or modify custody. The ADA should protect a parent against straightforward disability dis-

¹³See, e.g., *In re Adoption/Guardianship Nos. J9610436 and J9711031*, 796 A.2d 778 (Md. 2002) (state failed to provide adequate reunification services tailored to meet needs of father with mental disability); *Mary Ellen C. v. Arizona Department of Economic Security*, 971 P.2d 1046, 1048–49 (Ariz. Ct. App. 1999) (state is obliged to undertake measures that offer a "reasonable possibility of success" and failed to do so here: state did not offer mother significant reunification services for almost a year after removing child, state failed to follow recommendations of evaluating psychologist, such as providing intensive psychiatric services); *In re the Dependency of H.W. and V.W.*, 961 P.2d 963, 967 (Wash. Ct. App. 1998) (while state attempted to tailor parenting classes and other services to mother's developmental disability, state did not attempt to match mother with services available through applicable state department, although mother was in fact eligible for assisted living program); *In re Victoria M.*, 255 Cal. Rptr. 498 (Cal. Ct. App. 1989) (termination order unsupported by sufficient evidence because mother with developmental disability was given no assistance in finding housing required by her reunification plan, her parenting skills counseling provided counseling only as to protection against sexual abuse, and mother was never referred to regional developmental disabilities service center).

¹⁴42 U.S.C. § 671(a)(15)(D)(i).

¹⁵See ALASKA STAT. § 47.10.086(c)(5), ARIZ. REV. STAT. § 8-846(B)(1)(b), CAL. WELF. & INST. CODE § 361.5(b)(2), KY. REV. STAT. ANN. § 610.127(6), UTAH CODE ANN. § 78A-6-312(2)(a), P.R. LAWS ANN. tit. 8, § 447s(3)(c).

¹⁶Americans with Disabilities Act, 42 U.S.C. §§ 12132 *et seq.*

¹⁷*Id.* § 12132.

¹⁸28 C.F.R. §§ 35.130(b)(1)(ii).

¹⁹*Id.* §§ 35.130(b)(7).

²⁰*Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998) (rejecting argument that Title II of ADA does not apply to prisons).

crimination, such as the initiation of termination or dependency proceedings based on factors that would not normally give rise to such proceedings against a parent without a disability.

Concluding that termination proceedings are not the type of “service, program or activity” contemplated by the ADA, some courts have refused to apply the ADA to termination proceedings.²¹ Other courts have held that their jurisdiction is limited to interpreting the state child welfare law.²² Still others have held that the ADA cannot be used defensively.²³ A petition of certiorari filed with the Supreme Court in 2006 challenged these rationales as inconsistent with the ADA’s plain language and with the Supreme Court’s *Yeskey* decision.²⁴ The Supreme Court did not grant certiorari.

A number of courts, even if they do not find actual ADA violations, have allowed parents to assert the ADA as a defense in termination of parental rights cases, holding that the ADA requires reasonable accommodations to enable parents with disabilities to participate in services.²⁵ Others have held that reasonable

modifications may be required only when requested early in the process, or that the ADA applies to dependency proceedings but not to termination-of-parental rights proceedings.²⁶ And some, while acknowledging that the ADA applies to reunification services, have permitted parents to enforce their ADA rights only by filing separate lawsuits.²⁷

Why Parents with Psychiatric Disabilities Lose their Children at Disproportionately High Rates

Parents with psychiatric disabilities lose their children at disproportionately high rates. The structure of state termination laws, and the failure of state child welfare systems and mental health systems to offer these parents the help they need, all contribute to the high rate of loss.

State Termination Laws that Focus on Psychiatric Disability. One reason why parents with psychiatric disabilities have lost custody of their children or their parental rights at such a high rate is that an overwhelming majority of state laws list mental illness as a distinct ground for termination of parental rights.²⁸ These

²¹See, e.g., *Adoption of Gregory*, 747 N.E.2d 120, 121 (Mass. 2001); *In re Antony B.*, 54 A.2d 893, 899 (Conn. App. Ct. 1999).

²²See, e.g., *In the Interest of Torrance P.*, 522 N.W.2d 243, 244–45 (Wis. Ct. App. 1994) (duty to make diligent effort to provide court-ordered services is defined by state statute governing proceedings to terminate parental rights and not ADA; federal act does not increase those responsibilities or dictate how they must be discharged).

²³*In re Doe*, 60 P.3d 285, 293 (Haw. 2002); *In re Rodriguez*, No. 98CA007073, 1999 WL 568115, at *8 (Ohio Ct. App. Aug. 4, 1999).

²⁴*Irving N. v. Rhode Island Department of Children, Youth and Families*, No. 06-603 (cert. petition filed Oct. 30, 2006), cert. denied, 127 S. Ct. 1372 (2007) (for petition of certiorari including opinions below, see <http://bit.ly/Xrd7rv>).

²⁵See, e.g., *In re C.M.*, No. 04-1052, 2004 WL 1900100, at *2 (Iowa Ct. App. Aug. 26, 2004); *In re K.K.*, No. 04-0166, 2004 WL 574685, at *1 (Iowa Ct. App. March 24, 2004); *In re S.S.*, No. 04-1421, 2002 WL 31425426, at *2 (Iowa Ct. App. Oct. 30, 2002); *In re Dependency of C.C.*, No. 40888-7-I, 1999 WL 106824, at *5 (Wash. Ct. App. March 1, 1999); *In re John D.*, 934 P.2d 308, 313–14 (N.M. Ct. App. 1997); *In the Interest of K.K.W.*, No. CCL-86-2039, 7 National Disability Law Reporter ¶ 111 (Tex. County Ct. Anderson County July 11, 1995) (finding state violated ADA by failing to modify reunification services to assure equally effective services to parent with schizophrenia) (in my files). See also *In re Terry*, 610 N.W.2d 563, 570 (Mich. Ct. App. 2000) (holding that proceedings to terminate parental rights are not services, programs, or activities but at same time prohibiting court from finding that reasonable efforts were made if reunification services violated ADA). In some cases, courts applied the ADA but concluded that the ADA does not require services for parents with disabilities if such services are not offered to parents without disabilities (see, e.g., *In re Welfare of Angelo H.*, 102 P.3d 822, 826 (Wash. Ct. App. 2004)).

²⁶See, e.g., *In re M.J.M.*, No. 02-0499, 2002 WL 987437, at *1 (Iowa Ct. App. 2002) (ADA not violated because parents did not request specific reunification services before termination hearing); *In re B.S.*, 693 A.2d 716, 722 (Vt. 1997) (“we do not mean to suggest that parents lack any remedy for [department’s] alleged violations of the ADA”; parents “should raise complaints about services . . . in a timely fashion”); *Stone v. Daviess County Division of Children and Family Services*, 656 N.E.2d 824, 830 (Ind. Ct. App. 1995) (ADA does not apply to proceedings to terminate parental rights because services not required at that stage but does apply to dependency proceedings).

²⁷See, e.g., *In re Chance Jahmel B.*, 723 N.Y.S.2d 626, 634, 640 (N.Y. Fam. Ct. 2001); *In re Doe*, 60 P.3d 285, 291 (Haw. 2002); *Adoption of Gregory*, 747 N.E.2d 120, 126–27 (Mass. 2001).

²⁸See *supra* notes 6–7 and accompanying text.

laws authorize termination based on unfitness to parent. While the laws do not authorize termination of parental rights based solely on a parent having a mental illness, they invite a focus on the disability itself rather than on specific behavior that puts a child at risk. The laws also suggest that there is a strong link between mental illness and the inability to parent.²⁹ As some have pointed out,

[i]t is much easier to diagnos[e] a parent's disability, which is often done by a professional in an office, than it is to assess a person's ability to parent, which would require evaluation of numerous parent-child interactions in natural settings and would arguably also require an assessment of parental supports.³⁰

As noted above, some states do not require reunification services where a parent is deemed unable to benefit from those services due to mental illness. In these states there is an even greater risk that the focus of state evaluations will be on the parent's disability-related deficits and that the state will not even explore reasonable accommodations for the parent. In one particularly distressing example, a judge found parents with intellectual disabilities to be unfit parents and unable to benefit from reunification services based largely on a dirty apartment that had since been cleaned; the judge concluded that the parents would not benefit from services because of a "bad luck of the draw genetically."³¹

Failure of Court or Child Welfare System. Another significant factor in the

high rate of loss of custody and parental rights is the failure of the court system to ensure that people with psychiatric disabilities receive a meaningful opportunity to parent. This failure stems in part from the courts' reliance on caseworkers and professional evaluators who, when evaluating parents, employ incorrect and stereotypical notions about the capacities of parents with psychiatric disabilities. Also contributing to the failure is the child welfare system's lack of focus on the types of services that parents with psychiatric disabilities may need in order to parent effectively.

Numerous commentators have discussed the prevalence of negative attitudes among child welfare agency caseworkers and among professionals who conduct parenting capacity evaluations for the courts.³² As one author observed, many caseworkers—courts' primary source of information—display unfounded beliefs that parents with mental disabilities are violent, incompetent, and dangerous. These caseworkers consequently fail to make needed efforts to reunite families or recommend helpful services.³³

Evaluating professionals often focus on the general limitations of individuals who share the parent's diagnosis, and the evaluators describe projected, rather than actual, parental failures.³⁴ In one case an evaluating psychologist opined that a mother with a psychiatric disability was "addicted" to the termination proceeding and had completed all of the required activities in her case plan as a means of escaping the loneliness "that the borderline personality disorder does

²⁹See Lightfoot & LaLiberte, *supra* note 7, at 4–5; Susan Stefan, *Accommodating Families: Using the Americans with Disabilities Act to Keep Families Together*, 2 SAINT LOUIS UNIVERSITY JOURNAL OF HEALTH LAW AND POLICY 135, 167–68 (2008) (describing barriers to family preservation posed by state laws that explicitly use psychiatric diagnoses as basis to expedite termination proceedings or limit participation of parents with psychiatric disabilities), <http://bit.ly/VviabO>.

³⁰Elizabeth Lightfoot & Traci LaLiberte, *Parental Supports for Parents with Intellectual and Developmental Disabilities*, 49 INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, at 1, 2–3 (Oct. 2011), <http://bit.ly/VYH7ZL>.

³¹*In re A.M. et al.*, No. E055273, 2012 WL 4467657, at *8 (Cal. Ct. App. Sept. 28, 2012) (reversing termination order of lower court).

³²See, e.g., Jude T. Pannell, *Unaccommodated: Parents with Mental Disabilities in Iowa's Child Welfare System and the Americans with Disabilities Act*, 59 DRAKE LAW REVIEW 1165 (Summer 2011), <http://bit.ly/WnwnqW>; NATIONAL COUNCIL ON DISABILITY, *supra* note 1, at 158–60; Stefan, *supra* note 29, at 170–71; Jane Byeff Korn, *Crazy (Mental Illness Under the ADA)*, 36 UNIVERSITY OF MICHIGAN JOURNAL OF LAW REFORM 585, 640–41 (Spring 2003).

³³Pannell, *supra* note 32, at 1183.

³⁴*Id.* at 1184.

feel.”³⁵ Often evaluators reach their conclusions without ever having observed the parent interact with the child.³⁶

Moreover, the child welfare system rarely affords parents with psychiatric disabilities the services they need. The family preservation services that parents receive through the courts are typically not designed with parents with psychiatric disabilities in mind.³⁷ These services tend to be standard parenting classes and other services not geared toward the specific needs of parents with disabilities. Parents with psychiatric disabilities may need services such as supportive housing, supported employment, or assistance with activities such as meal planning, shopping, and managing finances. Evaluations ordered by family courts, however, frequently fail to identify these types of service needs.³⁸

As a consequence, many parents with psychiatric disabilities do everything that is required of them by the child welfare system but lose their children anyway because their needs remain unmet and their difficulties uncorrected. In some cases parents cannot comply with their case plan because they do not have access to the kinds of services they need to comply.

Failure of the Mental Health System to Meet Parenting Needs. The types of services needed by many parents with psychiatric disabilities are typically available through state or local mental health systems. Child welfare agencies may not coordinate with those agencies, however—particularly when they are not aware of the particular mental health services that would help allevi-

ate the parent’s challenges. And mental health authorities generally do not focus on their clients’ roles as parents.³⁹ A majority of state mental health authorities are unaware of which of their clients are parents, and most have no policies concerning clients who are parents.⁴⁰ Most residential settings offered to mental health system clients do not permit children to live with their parents, and most mental health agencies do not offer parenting assistance.⁴¹

What Attorneys and Advocates Can Do

Advocates can take a number of steps to help their clients protect their rights to parent their children.

Hire the Correct Expert. As noted above, court-arranged evaluations frequently fail to identify service needs related to a parent’s disability. Moreover, such evaluations often minimize the capabilities of parents with psychiatric disabilities, rely on generalized descriptions of limitations associated with these disabilities, and identify projected or expected parental failures rather than actual ones.

Parents must be able to present their own expert testimony through an expert familiar with the needs and capabilities of people with psychiatric disabilities. Advocates should find an expert who has worked with individuals with significant psychiatric disabilities on parenting skills and has confidence in the general abilities of such individuals to be successful parents. While legal services programs may face resource challenges, some state laws permit court reimbursement of expert fees where parents demonstrate the need

³⁵*Simms v. Department of Health and Rehabilitative Services*, 641 So. 2d 957, 962 n.2 (Fla. App. 3d 1994) (highlighted in Stefan, *supra* note 29).

³⁶NATIONAL COUNCIL ON DISABILITY, *supra* note 1, at 157–58.

³⁷See, e.g., Theresa Glennon, *Walking with Them: Advocating for Parents with Mental Illnesses in the Child Welfare System*, 12 TEMPLE POLITICAL AND CIVIL RIGHTS LAW REVIEW 273, 296–97 (2003).

³⁸See, e.g., *id.*; Susan Kerr, *The Application of the Americans with Disabilities Act to the Termination of the Parental Rights of Individuals with Mental Disabilities*, 16 JOURNAL OF CONTEMPORARY HEALTH LAW AND POLICY 387, 415 (2000).

³⁹See, e.g., Stefan, *supra* note 29, at 168–69; Glennon, *supra* note 37, at 296.

⁴⁰Kathleen Biebel et al., *The Responsiveness of State Mental Health Authorities to Parents with Mental Illness*, 32 ADMINISTRATION AND POLICY IN MENTAL HEALTH AND MENTAL HEALTH SERVICES RESEARCH 31 (Sept. 2004).

⁴¹Stefan, *supra* note 29, at 168–69.

for expert testimony concerning their parenting capacity.⁴²

Collaborate with Disability Organizations. Collaboration with legal organizations or lay advocates who work with individuals with psychiatric disabilities may promote better outcomes in parental rights cases. Some organizations to consult are state-based protection and advocacy systems, independent living centers, and national organizations such as the Judge David L. Bazelon Center for Mental Health Law, the National Disability Rights Network, the National Alliance on Mental Illness, and Mental Health America.

These organizations may be helpful in identifying good experts and connecting parents with services—particularly when the child welfare system has not identified or made those services available. Consulting these organizations may help parents determine to what services they may be entitled through Medicaid as well as other programs and help parents secure housing, among other needs.

Seek Services Early. Too often parents with disabilities find themselves arguing for the first time in termination-of-parental-rights proceedings that the state has not made reasonable efforts to reunify the family because the state failed to consider the parent’s disabilities. But at this point no one has identified what services the parent actually needs. Parents and their advocates must identify and provide needed services as early as possible.

Once the child is removed from the parent’s home and sees the parent only during short visits, demonstrating parenting skills becomes more difficult for the parent. The longer the child has been living outside the parent’s home, the greater the chance that the child will develop bonds with a foster family. And that may make showing that the parent should be reunified with the child harder for the parent. As the process goes on, courts become increasingly reluctant to order the provision of additional services to parents.

Parents attempting to raise their ADA rights in child welfare proceedings tend to have greater difficulty doing so the later in the proceedings they raise the argument. Some courts have refused to consider ADA claims once termination proceedings are initiated.

Consider Using the ADA Defensively. Parents should raise ADA claims defensively in child welfare proceedings where such claims have not been precluded by the courts. Even if a court ultimately bases its ruling on the “reasonable efforts” requirement and on the “best interests of the child” standard that guides decisions in child welfare proceedings, raising the ADA in these proceedings may influence the court’s thinking in positive ways. First, the ADA’s reasonable-modification mandate suggests that, for parents with disabilities, child welfare systems may have to proceed differently. For example, states may be required to offer services in a different manner or coordinate with mental health or disability service systems to ensure that parents receive services that will help them reunify with their children.

Second, in states that do not require that reasonable efforts be made if a parent is deemed unable to benefit from services due to a mental illness, the ADA may give the parent added protections. In such states the ADA may require the state to provide services necessary to assist the parent. The ADA requires that determinations be made on an individualized basis, not on generalizations about one’s disability but rather on current, objective medical evidence.⁴³

Third, the ADA is a civil rights statute. Parents who go to court to argue that the ADA imposes additional obligations on the state when parents with disabilities are at issue may force courts to take more seriously the government’s obligations to these parents, even though the focus of the proceedings is the “best interests of the child.”

And, fourth, advocates should raise ADA claims initially in child welfare proceedings. This is true particularly if they wish to raise claims in federal court that the state

⁴²N.Y. County Law art. 18-B, § 722-c (2012).

⁴³See, e.g., *Chevron U.S.A. v. Echazabal*, 536 U.S. 73, 86 (2002); *Bragdon v. Abbott*, 524 U.S. 624, at 648–49 (1998); *cf. School Board v. Arline*, 480 U.S. 273, 287–88 (1987).

has violated the ADA by failing to make reasonable modifications for parents with disabilities. Parents bringing ADA challenges in federal court may face hurdles for a number of reasons. A federal court may cite the *Younger* abstention doctrine and decline to hear the ADA claims.⁴⁴ The *Rooker-Feldman* doctrine prohibits a federal court from deciding a claim where granting the relief the plaintiff seeks would require the court to decide that a state court determination was wrong or render the state court determination effectively void.⁴⁵ If the state court declines to address the ADA claims, however, then neither abstention concerns nor the *Rooker-Feldman* doctrine should bar a federal court from hearing an ADA claim that the state failed to modify services to accommodate a parent with a psychiatric disability.⁴⁶

Ultimately the most effective use of the ADA in the context of child welfare proceedings is likely in a systemic challenge to the failures of a child welfare system to meet the needs of parents with disabilities and offer them meaningful opportunities to preserve their families. Systemic litigation in this context not only would have the potential to change how the system takes into account the needs of parents with disabilities but also would enable a court to focus on the patterns of failure on the part of child welfare agencies rather than on scrutinizing in detail the limitations of individual parents with disabilities.⁴⁷

Seek Legislative Change. Advocates in several states have sought to amend child welfare statutes to provide greater protections for parents with disabilities. Several

states have enacted such amendments in recent years.⁴⁸ In Idaho, for example, advocates succeeded in removing references to disability as a factor to be considered in custody determinations. For example, Idaho now requires adaptive equipment and supportive services to be considered as part of parenting evaluations, requires evaluators to have expertise with respect to such services and equipment, and permits parents to introduce evidence concerning services available to assist individuals with disabilities in parenting.⁴⁹

Legislative changes to consider include removing references to disability as a ground for termination of parental rights or custody determinations and requiring that evaluators have expertise in the parent's disability, that any disability-related services helping prevent loss of custody or parental rights be identified and provided, and that child welfare systems coordinate with disability service systems to ensure that parents receive the services they need to preserve families.

The UPenn Collaborative on Community Integration (now the Temple University Collaborative on Community Inclusion of Individuals with Psychiatric Disabilities) and the Bazelon Center drafted a model law concerning parents with psychiatric disabilities in the child welfare system; the model law offers language on these and other issues.⁵⁰ Both organizations are available to provide advice and assistance on legislative efforts to protect parents with disabilities in child welfare proceedings.

⁴⁴The *Younger* abstention doctrine, based on *Younger v. Harris*, 401 U.S. 37 (1971), permits a federal court to abstain where deciding the federal claims would interfere with ongoing state court proceedings in which there is an important state interest, if there was an adequate opportunity to raise the federal claims in the state proceedings.

⁴⁵See *Rooker v. Fidelity Trust Company*, 263 U.S. 413, 416 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 486 (1983) (federal courts lack subject-matter jurisdiction to review final state court determinations or to decide claims that are "inextricably intertwined" with state-court determination).

⁴⁶A plaintiff's federal claim is not barred by the *Rooker-Feldman* doctrine if the plaintiff did not have a reasonable opportunity to raise the claim in the state-court proceedings (see, e.g., *Brown and Root Incorporated v. Breckenridge*, 211 F.3d 194, 201 (4th Cir. 2000); *Long v. Shorebank Development Corporation*, 182 F.3d 548, 558 (7th Cir. 1999); *Dale v. Moore*, 121 F.3d 624, 626 (11th Cir. 1997)). Neither does *Younger* abstention bar a federal claim under those circumstances.

⁴⁷See Stefan, *supra* note 29, at 139–41 (arguing that attempts to apply ADA to keep families together where one member has psychiatric disability should be made in systemic challenges rather than individual cases).

⁴⁸For a description of these legislative changes, see NATIONAL COUNCIL ON DISABILITY, *supra* note 1, at 289–94.

⁴⁹*Id.* at 290–91.

⁵⁰Jeniece Scott et al., UPenn Collaborative on Community Integration & Judge David L. Bazelon Center for Mental Health Law, Supporting Parents with Psychiatric Disabilities: A Model Reunification Statute (n.d.), <http://bit.ly/W0HiUq>.



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