THE AMERICANS WITH DISABILITIES ACT: LEGAL AND PRACTICAL APPLICATIONS IN CHILD PROTECTION PROCEEDINGS

JOSHUA B. KAY*

I. INTRODUCTION

Parents with disabilities, particularly those with intellectual disability and/or mental illness, are disproportionately represented in the child protection system.[1] Once involved in the system, they are far more likely than parents without disabilities to have their children removed and their parental rights terminated. The reasons for this are many. Parents with disabilities are relatively likely to experience other challenges that are themselves risk factors for child protection involvement. In addition, child protection agencies, attorneys, courts, and related professionals often lack knowledge and harbor biases about parents with disabilities, increasing the likelihood of more intrusive involvement in the family. Yet research does not support their negative assumptions about these parents. Not only do most of their children fare well, but when people with disabilities have parenting deficiencies, they can be addressed with appropriate services that accommodate their disabilities, suggesting that the high rate of termination of parental rights in this population is unwarranted.

The Americans with Disabilities Act of 1990 and stronger legal advocacy are viable tools to improve how the child protection system addresses the needs of parents with disabilities and their children.[2] Despite a problematic history of child protection courts limiting the reach of the

---

* Clinical Assistant Professor of Law, University of Michigan Law School; J.D., University of Michigan Law School; Ph.D., Clinical Psychology, University of Michigan. I am indebted to my colleagues in the University of Michigan Law School Child Advocacy Law Clinic, Professors Vivek Sankaran and Frank Vandervort, for their feedback and support. I also appreciate the feedback received from attendees at Capital University Law Review's Thirteenth Annual Wells Conference on Adoption Law at the Capital University Law School on February 8, 2017.

[1] David McConnell & Gwynnyth Llewellyn, *Stereotypes, Parents with Intellectual Disability, and Child Protection*, 24 J. SOC. WELFARE & FAM. L. 298–99 (2002). Intellectual disability involves significantly below average intellectual functioning coupled with limitations in adaptive skills. *Id.*

[2] The Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* [hereinafter "ADA"].

ADA, there is recent progress in case law and state statutes to realize the ADA's full potential by incorporating its requirements and removing parental disability as a ground for child protection intervention.

This paper discusses the interplay of disability rights and child protection cases. Part II describes the scope of this issue. Part III discusses the various challenges faced by parents with disabilities that increase their risk of involvement in child protection cases. This Part also describes biases about parents with disabilities often held by various players in the system, including case workers and judges. Part IV describes research indicating that the reality of child welfare for parents with disabilities belies commonly held biases. Part V discusses the ADA and its application to child protection cases, including how courts have decided these cases historically and some recent signs of progress in more fully applying the ADA in these matters. Finally, Part VI suggests approaches that legal advocates should adopt when they represent parents with disabilities.

II. PARENTS WITH DISABILITIES AND CHILD PROTECTION PROCEEDINGS

A. Scope of the Problem

The number of parents with any disability is substantial. An estimated "8.4 million parents with disabilities have children under 18 living at home."[3] Another estimate is that there are over 10 million families with children living in a home with a parent who has a disability.[4] Still, another researcher found that 15% of all American families include at least one parent with a disability.[5] Child protection involvement is a significant concern to the disability community, because the child protection system intervenes in their families relatively frequently, and their cases are far

---

[3] Rhoda Olkin et al., *Comparison of Parents With and Without Disabilities Raising Teens: Information from the NHIS and Two National Surveys*, 51 REHABILITATION PSYCHOL. 43, 44 (2006).

[4] Megan Kirshbaum & Rhoda Olkin, *Parents with Physical, Systemic, or Visual Disabilities*, 20 SEXUALITY & DISABILITY 65 (2002). *See also* Stephanie N. Gwillim, *The Death Penalty of Civil Cases: The Need for Individualized Assessment & Judicial Education when Terminating Parental Rights of Mentally Ill Individuals*, 29 ST. LOUIS U. PUB. L. REV. 341, 343 (2009) (citing research showing an increase in the number of families headed by a parent with a disability).

[5] Ella Callow, *Maintaining Families when Parents Have Disabilities*, 28 CHILD L. PRAC. 129 (2009).

more likely to result in termination of parental rights.[6] By one conservative estimate, 19% of children in the foster care system in 2012 were removed at least in part because of parental disability.[7] Research suggests that approximately 30% of child protection court cases involve parents with one or more disabilities, whether intellectual, psychiatric, physical, or sensory.[8] In comparison, people with disabilities represent approximately 15% of the population.[9] International and American studies have found that "children who have parents with disabilities are disproportionately involved in the child protection system and more likely to be placed in formal foster care."[10] The National Council on Disability has reported with alarm, the high rates of child protection involvement amongst parents with disabilities, and the Department of Health and Human Services and the Department of Justice, both charged with enforcing the ADA, have taken notice.[11] Parents with mental disabilities, whether intellectual or psychiatric, are at particularly high risk. Studies have suggested that these parents make up over one-fifth of parents involved in child protection systems.[12]

---

[6] *See, e.g.*, Maurice A. Feldman, *Parents with Intellectual Disabilities: Implications and Interventions*, *in* HANDBOOK OF CHILD ABUSE RESEARCH AND TREATMENT 401 (John R. Lutzker ed., 1998).

[7] Elizabeth Lightfoot & Sharyn DeZelar, *The Experiences and Outcomes of Children in Foster Care who Were Removed Because of a Parental Disability*, 62 CHILD. & YOUTH SERVS. REV. 22, 26 (2016).

[8] Phillip A. Swain & Nadine Cameron, *"Good Enough Parenting": Parental Disability and Child Protection*, 18 DISABILITY & SOC'Y 165, 169 (2003).

[9] *Id.* at 171.

[10] Lightfoot & DeZelar, *supra* note 7, at 27.

[11] NAT'L COUNCIL ON DISABILITY, ROCKING THE CRADLE: ENSURING THE RIGHTS OF PARENTS WITH DISABILITIES AND THEIR CHILDREN (2012), http://www.ncd.gov/sites/default/files/Documents/NCD_Parenting_508_0.pdf [https://perma.cc/N4A5-E3YU]; U.S. DEP'T OF HEALTH & HUMAN SERV., OFFICE FOR CIVIL RIGHTS ADMIN. FOR CHILDREN & FAMILIES & U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV. DISABILITY RIGHTS SECTION, PROTECTING THE RIGHTS OF PARENTS AND PROSPECTIVE PARENTS WITH DISABILITIES: TECHNICAL ASSISTANCE FOR STATE AND LOCAL CHILD WELFARE AGENCIES AND COURTS UNDER TITLE II OF THE AMERICANS WITH DISABILITIES ACT AND SECTION 504 OF THE REHABILITATION ACT 2 (Aug. 2015) [hereinafter, TECHNICAL ASSISTANCE] http://www.ada.gov/doj_hhs_ta/child_welfare_ta.pdf [https://perma.cc/3N9R-GQPC].

[12] Charisa Smith, *Making Good on an Historic Federal Precedent: Americans with Disabilities Act (ADA) Claims and the Termination of Parental Rights of Parents with*

(*continued*)

B. Once Involved in Child Protection Matters, Parents with Disabilities Often Fare Poorly

Parents with disabilities who are involved in child protection matters are at heightened risk of having their children removed and their parental rights terminated. One researcher asserts that parents with intellectual disabilities are singled out more than any other group as being at risk of child maltreatment, reporting findings that upwards of 80% of these parents in the United States and Canada experience a loss of child custody.[13] State intervention into families headed by intellectually disabled parents is more frequent and severe than in families that are similarly situated demographically but not headed by parents with intellectual disability.[14] For example, child removal rates among parents with intellectual disability are disproportionately high across international studies, with reports ranging from 40% to 60%.[15] Among mothers with mental illness, 40-80% lose long-term custody to one or more of their children, a range of rates that is substantially higher than for women without mental illness.[16] Child removal rates of 70% to 80% have been

---

Mental Disabilities, 18 QUINNIPIAC HEALTH L.J. 191, 203 (2015). *See also* David McConnell et al., *Parental Cognitive Impairment and Child Maltreatment in Canada*, 35 CHILD ABUSE & NEGLECT 621, 627 (2011) (over 27% of child protection court cases involved parents with cognitive disabilities); 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 J. 142, 143 (2009) (noting that mothers with mental illness have three times the risk of child protection involvement or child custody loss as those without mental illness); Gwillim, *supra* note 4, at 345–46 (noting high risk of child protection intervention among mothers with mental illness).

[13] Feldman, *supra* note 6, at 401.

[14] Robert L. Hayman, Jr., *Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent*, 103 HARV. L. REV. 1201, 1211 (1990).

[15] David McConnell & Gwynnyth Llewellyn, *Disability and Discrimination in Statutory Child Protection Proceedings*, 15 DISABILITY & SOC'Y 883 (2000); McConnell & Llewellyn, *supra* note 1, at 297; Callow, *supra* note 5, at 129; Ella Callow et al., *Parents with Disabilities in the United States: Prevalence, Perspectives, and a Proposal for Legislative Change to Protect the Right to Family in the Disability Community*, 17 TEX. J. C.L. & C.R. 9, 15 (2011).

[16] Colby Brunt & Leigh Goodmark, *Parenting in the Face of Prejudice: The Need for Representation for Parents with Mental Illness*, 36 CLEARINGHOUSE REV. 295, 297–98

(*continued*)

reported for mothers with mental illness.[17] Anecdotal reports suggest disproportionate removal rates amongst parents with physical or sensory disabilities as well.[18]

Researchers have noted that if parental disability is an identified reason for removal, then children are less likely to be returned to their parent, and the odds of termination of parental rights are higher.[19] International studies have found similar results.[20] Furthermore, children in these cases are more likely to be placed in nonrelative foster care rather than with relatives, are less likely to have a case plan goal of reunification, and face longer stays in foster care.[21] Parents with mental disabilities actually tend as a group to be more cooperative than many other parents involved in the child protection system, yet they are just as or more likely to have their rights terminated as less-compliant parents.[22]

III. WHY PARENTS WITH DISABILITIES ARE AT HIGH RISK OF CHILD PROTECTION INVOLVMENT

A. Parents with Disabilities Face Challenges That Heighten Their Risk of Child Protection Intervention

Parents with disabilities are at high risk for child protection intervention in part because they are at increased risk of experiencing other problems that are themselves risk factors for such intervention. One-quarter of families with a disabled parent live below the official poverty level, making them twice as likely as other families to be living in poverty.[23] Another researcher asserts that people with disabilities are three

---

(2002). *See also* Gwillim, *supra* note 4, at 346 (citing rates of 70% to 80%); Callow et al., *supra* note 15, at 15.

[17] Callow, *supra* note 5, at 129.

[18] Callow et al., *supra* note 15, at 15.

[19] Lightfoot & DeZelar, *supra* note 7, at 26.

[20] *Id.*

[21] *Id.* at 27.

[22] Jude T. Pannella, *Unaccommodated: Parents with Mental Disabilities in Iowa's Child Welfare System and the Americans with Disabilities Act*, 59 DRAKE L. REV. 1165, 1173 (2011).

[23] *Id. See also* Theresa Glennon, Symposium, *Walking with Them: Advocating for Parents with Mental Illness in the Child Welfare System*, 12 TEMP. POL. & CIV. RTS. L. REV. 273 (2003); Alexis C. Collentine, Note, *Respecting Intellectually Disabled Parents: A Call for Change in State Termination of Parental Rights Statutes*, 34 HOFSTRA L. REV. 535, 544 (2005).

times more likely than others to live in poverty.[24] In one survey, the household income of parents with disabilities averaged $15,000 less than that of parents without disabilities.[25] Parents with disabilities generally have less education than other parents and are twice as likely not to have completed high school.[26] They are more likely to be single parents and are less likely to be employed full time.[27]

Findings regarding poverty in families with a disabled parent are especially important to note, because poverty itself is a prominent risk factor for involvement with the child protection system.[28] For example, a national survey of child protection investigations found that approximately half of children in out-of-home care and a third of those receiving in-home child welfare services were identified by their case worker as having lived in poverty.[29] Over half of the children involved in the survey had a history of receiving government financial assistance, and around half lived in households with income less than half of the poverty level.[30] While child maltreatment spans the income range, it is equally clear that families living in or near poverty are grossly over-represented in the child protection system, and the adverse effects of poverty play into child protection involvement.[31]

Unlike people with the financial resources to buy private help to meet challenges that may arise, those living in poverty are more likely to access public services, and parents with disabilities are no exception.[32] Reliance on the public system of care carries risks, including that their parenting is

---

[24] Callow, *supra* note 5, at 129.

[25] Olkin et al., *supra* note 3, at 46.

[26] *Id.* at 44; Callow, *supra* note 5, at 129.

[27] Olkin et al., *supra* note 3, at 44; Callow, *supra* note 5, at 129 (people with disabilities are twice as likely to be unemployed as people without disabilities).

[28] Sarah H. Ramsey, Symposium, *Children in Poverty: Reconciling Children's Interests with Child Protective and Welfare Policies*, 61 MD. L. REV. 437, 438 (2002) ("The majority of families involved with (CPS) are low-income families."). *See also* Cynthia R. Mabry, *Second Chances: Insuring that Poor Families Remain Intact by Minimizing Socioeconomic Ramifications of Poverty*, 102 W. VA. L. REV. 607, 614 (2000).

[29] Richard P. Barth et al., *Placement into Foster Care and the Interplay of Urbanicity, Child Behavior Problems, and Poverty*, 76 AM. J. ORTHOPSYCHIATRY 358, 364 (2006).

[30] *Id.*

[31] *Id.*

[32] Rosemary Shaw Sackett, *Terminating Parental Rights of the Handicapped*, 25 FAM. L.Q. 253, 290 (1991).

subject to close scrutiny.[33] The professionals with whom parents with disabilities have frequent contact often end up being the sources of child protection referrals.[34] These sources have considerable credibility with Children's Protective Services (CPS), so there is likely to be intervention in response to a report.[35]

Poverty itself may increase parenting stress, as can co-occurring social isolation and substandard housing. For example, parents with intellectual disabilities appear to be under significant stress due to poverty, poor living conditions, stigmatization, domestic abuse, and the chronic threat of child removal.[36] Findings indicate clinically significant stress in mothers with intellectual disabilities, and symptoms of depression are common.[37] These mothers struggle with high rates of poverty, social isolation, and living in substandard housing.[38] Similar challenges have been found in studies of mothers with mental illness.[39] There is a danger that problems associated with these co-occurring factors will be attributed to the mere presence of disability, even though findings suggest that disability is not a direct predictor of child maltreatment.[40] For example, cognitive impairment

---

[33] Glennon, *supra* note 23, at 292.

[34] Susan Kerr, *The Application of the American with Disabilities Act to the Termination of the Parental Rights of Individuals with Mental Disabilities*, 16 J. CONTEMP. HEALTH L. & POL'Y 387, 402 (2000).

[35] *Id.* *See also,* Chris Watkins, Comment, *Beyond Status: The Americans with Disabilities Act and the Parental Rights of People Labeled Developmentally Disabled or Mentally Retarded*, 83 CAL. L. REV. 1415, 1435–36 (1995) (in other words, it is less likely that a report will be screened out or responded to with a relatively unobtrusive referral for community services).

[36] Feldman, *supra* note 6, at 403–04.

[37] *Id.* at 404.

[38] Collentine, *supra* note 23, at 544; Marjorie Aunos & Laura Pacheco, *Changing Perspective: Workers' Perceptions of Inter-Agency Collaboration with Parents with an Intellectual Disability*, 7 J. PUB. CHILD WELFARE 658, 659 (2013) (citing the presence of numerous risk factors for child protection involvement in parents with disabilities, including mental health problems, poverty, and social isolation).

[39] Jennifer E. Spreng, *The Private World of Juvenile Court: Mothers, Mental Illness, and the Relentless Machinery of the State*, 17 DUKE J. GENDER L. & POL'Y 189, 192–93 (2010).

[40] McConnell & Llewellyn, *supra* note 15, at 888; Kirshbaum & Olkin, *supra* note 4, at 13 (predictors of problem parenting are generally the same for parents with and without disabilities, suggesting that disability is not directly predictive of child maltreatment); Nina

(*continued*)

specifically places parents at risk of child protection court involvement, other case characteristics being equal.[41] Disability is likely to be seen as unchanging, unchangeable, and therefore immune to reunification services, whereas services could combat issues of poverty, providing adequate support and a solution to finding suitable housing.[42]

B. Parents with Disabilities Face Significant Bias and Lack of Knowledge

1. Functional vs. Categorical Perspectives

To understand why parents with disabilities are at such high risk of child protection intervention, it is important to consider how disability is viewed in society, including by professionals. There are two overarching, competing perspectives on disability.[43] The "functional" perspective emphasizes what the person knows, is able to do and learn, and the circumstances under which the person successfully learns or applies what is learned.[44] This approach requires an individualized analysis of a parent's ability to parent without highlighting disability for its own sake.[45] By focusing on abilities and contexts, services—including reunification services—can be tailored to the needs and abilities of individual recipients.[46]

In contrast, the "categorical" perspective emphasizes the criteria for placement in a particular category of disability, such as a specific mental illness, intellectual disability, or physical disability, much like a medical diagnosis.[47] Once the type of disability is known, a professional who takes a categorical view is at liberty to opine about the features of the disability and its effects on areas of functioning, including parenting, simply based

---

Wasow, *Planned Failure: California's Denial of Reunification Services to Parents with Mental Disabilities*, 31 N.Y.U. REV. L. & SOC. CHANGE 183, 209 (2006) (citing that parental mental illness is not a direct predictor of child maltreatment).

[41] McConnell et al., *supra* note 12, at 628.

[42] *See, e.g.*, McConnell & Llewellyn, *supra* note 15, at 886 (parenting deficiencies in people with intellectual disability are viewed as irremediable).

[43] Alexander J. Tymchuk, *The Importance of Matching Educational Interventions to Parent Needs in Child Maltreatment: Issues, Methods, and Recommendations*, *in* HANDBOOK OF CHILD ABUSE RESEARCH AND TREATMENT 421, 422 (John R. Lutzker ed., 1998).

[44] *Id.*

[45] Gwillim, *supra* note 4, at 356.

[46] Tymchuk, *supra* note 43, at 422.

[47] *Id.* at 422–23.

on the diagnosis rather than an evaluation of *this parent's* capacities. This approach has little regard for context and none for individual variation, and contributes to seeing disability as pervasive, problematic for parenting, and immutable. It also is not empirically supportable, because it is inappropriate to extrapolate from group statistics to describe a phenomenon in any one individual.[48] The child protection system largely takes a categorical approach to disability.[49] Parents with disabilities are viewed as categorically unfit to parent with little regard to individual variation.[50] For example, psychological evaluations are often completed in child protection cases, and it is not infrequent to see a diagnosis of mental illness coupled with a broad declaration that the illness renders the parent incapable of keeping his or her child safe, often without any discussion of the individual parent's specific abilities and deficiencies.[51] This approach is needlessly damaging to families. Instead, the focus must be on actual parenting behaviors, not diagnoses.[52]

Many commentators have noted that there is far too much variability between people with any given disability for a categorical approach to be useful.[53] These individual differences do not fit the needs of a child

---

[48] *See, e.g.*, Jeanne M. Kaiser, *Victimized Twice: The Reasonable Efforts Requirement in Child Protection Cases when Parents Have a Mental Illness*, 11 WHITTIER J. CHILD & FAM. ADVOC. 3, 13 (2011).

[49] Tymchuk, *supra* note 43, at 422–23; Gwillim, *supra* note 4, at 342; McConnell & Llewellyn, *supra* note 15, at 886 (arguing that research indicates that intellectual disability "is treated as *prima facie* evidence of parental inadequacy").

[50] Collentine, *supra* note 23, at 535; Gwillim, *supra* note 4, at 342.; Elizabeth Lightfoot et al., *The Inclusion of Disability as a Condition for Termination of Parental Rights*, 34 CHILD ABUSE & NEGLECT 927, 928 (2010) (arguing that "laws addressing parents with disabilities have tended to focus on disability in a categorical fashion rather than looking at individual parenting behaviors or abilities")

[51] Gwillim, *supra* note 4, at 342.

[52] Orly Rachmilovitz, *Achieving Due Process Through Comprehensive Care for Mentally Disabled Parents: A Less Restrictive Alternative to Family Separation*, 12 U. PA. J. CONST. L. 785, 812 (2010) (mere diagnosis "is a poor proxy for unfitness," with many other factors having at least as big an impact on parenting); Kaiser, *supra* note 48, at 24.

[53] MARTHA A. FIELD & VALERIE A. SANCHEZ, EQUAL TREATMENT FOR PEOPLE WITH MENTAL RETARDATION: HAVING AND RAISING CHILDREN 15 (1999); M.L. Ehlers-Flint, *Parenting Perceptions and Social Supports of Mothers with Cognitive Disabilities*, 20 SEXUALITY & DISABILITY 29, 42 (2002); Hayman, *supra* note 14, at 1213; Collentine, *supra* note 23, at 535; Watkins, *supra* note 35, at 1440–41; Kirshbaum & Olkin, *supra* note 4, at

(*continued*)

protection system in which case workers, lawyers, and judges are over-burdened and under-trained. In such a system, individualized inquiry into the case, though required by law, is not the norm, and the lack of such inquiry is especially striking given the considerable individual variation among people with disabilities. A "one size fits all" approach is more expedient for the child protection system but insufficient to address the needs of families.

2. *Biases and Preconceptions Among Child Protective Services Workers*

Starting with the investigation into a report of child maltreatment, biases and preconceptions influence the child protection system. In general, child protection workers are prone to comparing parents under investigation to middle class norms.[54] Given that so many parents involved in the child protection system live in poverty, "decision making by caseworkers becomes more subjective, less reliable, and more time-consuming" without a more realistic, comprehensive range of standards.[55] Furthermore, once parents come to the attention of CPS, they frequently face an under-funded, poorly staffed, and overburdened agency.[56] The chance of erroneous risk assessment is high, and there is little hope for effective assistance to address parenting problems.[57]

Research indicates that child protection workers have limited knowledge of disability and its impact on parenting, and the knowledge they believe they have may be based largely on stereotype.[58] For example, case workers are susceptible to believing that people with mental illness

---

66 (noting considerable diversity among people with physical, systemic, and visual disabilities); Smith, *supra* note 12, at 196 (noting varying impacts of mental disabilities on parenting skills); Aunos & Pacheco, *supra* note 38, at 658 (noting heterogeneity of abilities and needs among parents with intellectual disability); Kaiser, *supra* note 48, at 13 (arguing that there is a wide range of parenting skills across parents with mental illness, and many of their children do well).

[54] Tymchuk, *supra* note 43, at 426; Sackett, *supra* note 32, at 271.

[55] Tymchuk, *supra* note 43, at 426. *See also* Sackett, *supra* note 32, at 270.

[56] Ramsey, *supra* note 28, at 444.

[57] *Id.* at 445.

[58] Swain & Cameron, *supra* note 8, at 167. *See also* Callow et al., *supra* note 15, at 17 (noting a general bias that parents with disabilities cannot parent safely).

are inherently dangerous.[59] This widespread stereotype is unfounded, yet it may motivate case workers to treat these parents harshly.[60] Based on these negative beliefs, case workers may focus more on developing cases for termination than providing adequate services.[61] Yet the reality is that parents with mental illness have many of the same needs as other parents in the system, such as assistance with parenting skills, housing, job training, transportation, and obtaining public benefits—needs that case workers routinely work to meet in other cases.[62]

For parents with intellectual disability, the factors typically considered when evaluating parental fitness—the ability to give love and affection to the child, perform housekeeping tasks, and attend to the child's needs—may be supplemented by a fourth: the ability to stimulate children intellectually.[63] This ability, if evaluated at all, should be applied to all, but it "is mentioned almost exclusively in cases involving parental mental disability."[64] If a child is removed, the stereotype of intellectual disability as immutable and irremediable may be applied so that it is seen as an "irremovable barrier to child care."[65] In other words, the child has scant chance of being returned, and parents with intellectual disability are more likely to face termination of their parental rights.[66] This issue is all the more concerning when one considers that assessments of parents with alleged intellectual disability tend to be of poor quality, with intelligence testing commonly used in isolation even though there is no clear correlation between low IQ and parental unfitness.[67] Case workers have acknowledged that they need more training in assessing child maltreatment risk in parents with intellectual and developmental disabilities.[68] They also

---

[59] Gwillim, *supra* note 4, at 360. *See also* Kaiser, *supra* note 48, at 34 (noting the lack of training for case workers about mental illness).

[60] Glennon, *supra* note 23, at 278; Gwillim, *supra* note 4, at 361.

[61] Glennon, *supra* note 23, at 279; Gwillim, *supra* note 4, at 361.

[62] Kaiser, *supra* note 48, at 25.

[63] FIELD & SANCHEZ, *supra* note 53, at 275; Collentine, *supra* note 23, at 545 (noting the common presumption amongst case workers that parents with intellectual disabilities cannot provide adequate intellectual stimulation for their children to develop normally).

[64] FIELD & SANCHEZ, *supra* note 53, at 277.

[65] Hayman, *supra* note 14, at 1230.

[66] *Id.* at 1231.

[67] Collentine, *supra* note 23, at 542.

[68] Traci L. LaLiberte, *Are We Prepared? Child Welfare Work with Parents with Intellectual and/or Developmental Disabilities*, 7 J. PUB. CHILD WELFARE 633, 648 (2013).

need training in obtaining and coordinating services from mental health and developmental disability programs.[69]

3. *Family Preservation and Reunification Services are Often Inappropriate or Inadequate*

Although the child protection agency generally must provide services to prevent removal or reunify families, funding shortages limit their availability and quality.[70] Many service providers have little training or experience with disabled parents.[71] In addition, biases that providers often hold about people with disabilities may make them believe that harm to the child is inevitable, negatively influencing their commitment to providing quality services.[72] Indeed, child protection workers, judges, attorneys, and service providers may believe that services are futile for people with disabilities, and this bias can easily become a self-fulfilling prophecy by lowering the quality and scope of services provided.[73]

Specialized programming for parents with disabilities remains rare, leaving these parents more likely than others to struggle to meet the expectations of their reunification plans, resulting in termination of parental rights.[74] Indeed, court ordered service packages are generally alike regardless of case circumstances.[75] Court orders rarely refer to disability even if agency reports submitted to the court about the parent do, and they seldom require disability-specific services.[76] In short, services that accommodate disability are almost never provided.

It is important that case workers and other professionals evaluate and focus on each individual's specific circumstances, capabilities, and needs and not fall prey to biases and preconceptions.[77] In other words, they should adopt a functional perspective.[78] This framework lends itself to

---

[69] *Id.*

[70] FIELD & SANCHEZ, *supra* note 53, at 282.

[71] *See* Hayman, *supra* note 14, at 1224.

[72] *See id.* at 1229.

[73] *Id.* at 1232–33.

[74] Collentine, *supra* note 23, at 548–49.

[75] Swain & Cameron, *supra* note 8, at 170; Pannella, *supra* note 22, at 1174 (noting that services are often one-size-fits-all).

[76] *Id.* at 172, 175.

[77] Dave Shade, *Empowerment for the Pursuit of Happiness: Parents with Disabilities and the Americans with Disabilities Act*, 16 LAW & INEQ. 153, 162 (1998).

[78] *See supra* Section III.B.1.

careful consideration of specific services for a given family based on actual needs and how best to provide the services.[79] Instead, however, the assumption of futility for parents with disability, particularly intellectual disability, often results in a denial of services because workers and judges believe the condition cannot be ameliorated.[80] This denial is based on a fundamental misperception about disability, parenting, and what should be the proper target of intervention: courts and agencies confuse the need to remove child care inadequacies with the need to remove the disability itself, which is impossible.[81] Given that research indicates that people with intellectual disabilities can learn new skills if given appropriate services, services should not be denied for futility.[82]

Case service plans are often heavy on requirements and light on services, making it difficult for parents to demonstrate improved parenting and regain custody of their children.[83] One common requirement of case service plans is that a parent obtain and keep a job, which is difficult in the face of discrimination.[84] If mental health services are needed, which is often the case, people who rely on the public care system commonly face waiting lists, a particularly serious problem given the short statutory timeframes for showing progress in child protection cases.[85]

Even once a person receives services, the quality is often low, slowing any improvement.[86] Services tend to be structured as brief interventions, even if more intensive, longer-term intervention is required.[87] There is a desperate need for knowledgeable social service providers and intensive services.[88] In addition to counseling, many families need concrete support, like financial assistance, housing, medical care, food, transportation, and

---

[79] Shade, *supra* note 77, at 163.

[80] Watkins, *supra* note 35, at 1444.

[81] Kerr, *supra* note 34, at 413.

[82] *See infra* Part IV.

[83] Glennon, *supra* note 23, at 282.

[84] *Id.* at 283.

[85] *Id.* The Adoption and Safe Families Act ("ASFA") states that if a child has been in foster care for fifteen of the past twenty-two months, the court must order the agency to file a termination of parental rights petition unless one of a few exceptions applies. 42 U.S.C. § 675(5)(E) (2012). *See also* Kaiser, *supra* note 48, at 25 (noting that the services provided for parents with mental illness are often inappropriate and ineffective).

[86] Glennon, *supra* note 23, at 283.

[87] *Id.* at 296.

[88] *Id.*

help getting a job or getting public assistance.[89] These supports are directly helpful and may also lessen immediate crises so that other services, like counseling and other therapies, have a chance to be effective.[90] To put together an appropriate service package, rigorous assessment and prioritization are needed at intake, followed by comprehensive case reviews while the case is open, and supportive follow-up services.[91]

Research suggests that family services have the greatest effect if they last for a longer time period and are provided by highly skilled and experienced clinicians.[92] Unfortunately, the reality falls far short of this ideal, with services often being untimely, inappropriate, or unavailable.[93] Agencies can easily drag their feet in providing services, consuming the short window of opportunity before the state is required to file a termination of parental rights petition.[94] This tendency may be due in part to a lack of training and knowledge about adapted services and how to obtain and coordinate services from disability programs.[95]

4. Problematic Reliance on "Experts"

Child protection agency case workers often request—or courts spontaneously order—assessments of parents by mental health professionals who then testify as expert witnesses.[96] Juvenile court judges

---

[89] Robert F. Kelly, *Family Preservation and Reunification Programs in Child Protection Cases: Effectiveness, Best Practices, and Implications for Legal Representation, Judicial Practice, and Public Policy*, 34 FAM. L.Q. 359, 380 (2000). *See also* Kaiser, *supra* note 48, at 25 (noting that parents with mental illness in the child protection system need many of the same things as other parents in the system, including concrete assistance with housing, job training, transportation, public benefits, and parent skills training).

[90] Kelly, *supra* note 89, at 389.

[91] *Id.* at 380.

[92] *Id.* at 382–83.

[93] Mabry, *supra* note 28, at 645–46.

[94] Catherine J. Ross, *The Tyranny of Time: Vulnerable Children, "Bad" Mothers, and Statutory Deadlines in Parental Termination Proceedings*, 11 VA. J. SOC. POL'Y & L. 176, 202 (2004).

[95] *See* LaLiberte, *supra* note 68, at 648; Callow et al., *supra* note 15, at 18–20 (noting the lack of knowledge about adaptive equipment and services to facilitate parenting).

[96] Corina Benjet & Sandra T. Azar, *Evaluating the Parental Fitness of Psychiatrically Diagnosed Individuals: Advocating a Functional-Contextual Analysis of Parenting*, 17 J. FAM. PSYCHOL. 238, 239 (2003); FIELD & SANCHEZ, *supra* note 53, at 244.

tend to rely heavily on this expert testimony.[97] These experts often go unchallenged, and they frequently speak to the ultimate question: whether to terminate the rights of a parent.[98] Unfortunately, many expert witnesses harbor their own stereotypes about parents with disabilities.[99] These stereotypes may reinforce those that judges and case workers bring to the table, thereby replacing meaningful individualized inquiry with class-based declarations.[100] Commentators have suggested that courts should not—but often do—allow expert testimony about people with disabilities as a class rather than as individuals.[101] The courts all too easily agree with this testimony and improperly apply its conclusions about a group of people to the individual before them, effectively adopting the same faulty categorical perspective espoused by the experts to whom it turns time and again.[102]

Mental health experts in child protection cases often use psychometric testing, relying especially on IQ and assumptions about what people with various IQ scores can and cannot do rather than evaluating parenting in any valid manner.[103] In the case of mentally ill parents, experts often make judgments of dangerousness without adequate evidence.[104] These approaches fall far below professional norms, failing to come anywhere near best practices.[105] Psychologists frequently testify about parents and children based on evaluations that occur in a single session, using test

---

[97] FIELD & SANCHEZ, *supra* note 53, at 244.

[98] Hayman, *supra* note 14, at 1237–38.

[99] *See* Duffy Dillon, Comment, *Child Custody and the Developmentally Disabled Parent*, 2000 WIS. L. REV. 127, 149 (2000).

[100] *Id.* at 146.

[101] *Id.* at 148.

[102] Sackett, *supra* note 32, at 272. *See also* Spreng, *supra* note 39, at 195 (noting that juvenile court judges often accept expert opinions without challenge, and these diagnosis-driven opinions can lead to an assumption of parental unfitness).

[103] Sackett, *supra* note 32, at 296. *See also* Spreng, *supra* note 39, at 196; McConnell & Llewellyn, *supra* note 1, at 308 (experts too often infer parental functioning merely from diagnosis, often on the basis of a single interview, and are highly reliant on IQ tests); Wasow, *supra* note 40, at 212–13 (noting psychologists' tendency to rely on tests that are unrelated to parenting and fail to observe parents and children together). Wasow also points out that controlling for symptoms, psychologists tend to give lower income people more severe diagnoses and poorer prognoses. *Id.* at 212.

[104] Glennon, *supra* note 23, at 276; Wasow, *supra* note 40, at 212 (noting that psychologists tend to over-predict dangerousness).

[105] *See* Wasow, *supra* note 40, at 213–14.

results and clinical impressions to explain and predict behavior and what action will be in the best interests of the children.[106] The predictive abilities of mental health professionals have been proven highly suspect, so predictions regarding best interests and most parenting behaviors should be met with a great deal of skepticism.[107] Instead, courts and even parents' counsel often ask simply about the qualifications of the expert and not the scientific basis for opinions.[108]

> By virtue of their qualifications alone, experts do not provide any assurance that their opinions rest on reliable methods and procedures. Instead, relying on experts without testing the reliability of their methods and procedures cloaks experts' value judgments under the veil of science and risks that their personal and professional characteristics bias the evaluation and the importance of information learned.[109]

If not based on sound research, expert opinions may be based on flawed heuristics, personal values, and subjective beliefs, in which case no court deference is warranted.[110] Yet courts and agencies often simply adopt expert determinations of parental inadequacy.[111] In the face of such a strong presumption that expert testimony is valid and relevant, a parent's counsel must obtain and present contrary evidence and, at the very least, use vigorous cross-examination to call into question the expert testimony against their client.[112] Doing so requires a well-trained, knowledgeable lawyer who has adequate time and resources to devote to the case.

---

[106] Watkins, *supra* note 35, at 1442.

[107] Daniel W. Shuman, *What Should We Permit Mental Health Professionals to Say About "The Best Interests of the Child"?: An Essay on Common Sense,* Daubert, *and the Rules of Evidence*, 31 FAM. L.Q. 551, 567 (1997).

[108] *Id.* at 564–65.

[109] Daniel W. Shuman, *The Role of Mental Health Experts in Custody Decisions: Science, Psychological Tests, and Clinical Judgment*, 36 FAM. L.Q. 135, 160 (2002).

[110] Shuman, *supra* note 107, at 566.

[111] Sackett, *supra* note 32, at 296; Wasow, *supra* note 40, at 212 (noting that judges tend to readily accept expert opinion about parenting capacity despite there being little evidence that such opinions are empirically valid).

[112] Shuman, *supra* note 107, at 559. Shuman's critiques of the use of expert testimony by the family court in custody actions and best interest determinations provide a particularly

(*continued*)

5. Biases and Preconceptions Among Judges

Family court judges may also harbor biases that affect case outcomes for parents with disabilities. Courts often lack knowledge about disability and fail to perform an adequate, individualized appraisal of needs and abilities.[113] Judges should focus on a parent's actual capabilities rather than on the mere fact of disability itself.[114] Perhaps the most serious problem in family courts is the tendency to rubber stamp agency determinations regarding child removal, parental fitness, and visitation.[115] In addition, judges generally do not attend to social service quality issues.[116] A judge must find that the agency has made reasonable efforts to prevent child removal or reunify the family.[117] These reasonable efforts findings must be "detailed."[118] If the findings are negative, insufficient, late, or missing, the state loses eligibility for federal funding for the duration of the child's stay in foster care.[119] Despite the requirement that reasonable efforts findings be detailed, the reasonable efforts inquiry tends not to be thorough, instead too often accomplished simply by checking boxes on a preprinted form.[120] With federal funding at stake, courts may

---

cogent and thorough overview of this serious and common problem. *See generally id.*; Shuman, *supra* note 109.

[113] *See* 1 ANN M. HARALAMBIE, HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES § 8.16 (3d ed. 2009 & Supp. 2017) (suggesting courts should not "snatch away the child" and that expert medical and social work testimony, as well as lay testimony, be used to determine when a parent's disability precludes personal care of the child).

[114] *Id.* § 8.18 at 474 (suggesting judges may fail to adequately assess a parent's ability by overemphasizing intellectual aspects and underestimating values like love and family affiliation).

[115] *See* Sackett, *supra* note 32, at 296.

[116] Glennon, *supra* note 23, at 274.

[117] AM. BAR ASSOC., MAKING SENSE OF THE ASFA REGULATIONS 9 (Diane Boyd Rauber ed., 2001) (citing 45 C.F.R. § 1356.21(b) (2018)), https://www.americanbar.org/content/dam/aba/administrative/child_law/MakingSenseoftheASFARegulations2.authcheckdam.pdf.

[118] *Id.* at 33 (citing 45 C.F.R. § 1356.21(d)).

[119] *Id.* at 39 (citing 45 C.F.R. 1356.21(b)(2)). Title IV-E of the Social Security Act provides for a substantial federal funding contribution to foster care. However, its requirements are rarely enforced.

[120] David J. Herring, *Inclusion of the Reasonable Efforts Requirement in Termination of Parental Rights Statutes: Punishing the Child for the Failures of the State Child Welfare System*, 54 U. PITT. L. REV. 139, 153–54 (1992).

be reluctant to find that reasonable efforts have not been made.[121] Furthermore, case loads are high, and real inquiries into reasonable efforts take time.[122] These problems cause family courts to give a pass to shoddy services.

Compounding the problems of over-reliance on experts and pressure from federal funding requirements are the preconceptions that judges themselves may harbor about parents with disabilities.[123] For example, since there is often a belief that people with intellectual disability cannot possibly be good parents and cannot change, a judge may well assume that it is not in a child's best interest to live with a parent with an intellectual disability.[124] This assumption effectively shifts the burden of proof so that the parent must prove his or her fitness or potential for fitness, rather than the state being required to prove parental unfitness.[125] In many states, disability can trigger a termination of parental rights if the disability is found to preclude adequate parenting ability.[126] If intellectual disability is *assumed* to preclude adequate parenting ability, and if it is believed to be unchangeable, the finding of unfitness would appear to follow automatically.[127] In other words, categorical thinking about parents with intellectual disabilities may render perfunctory any consideration of actual parenting ability and contribute directly to termination of parental rights.[128]

Similarly, a judge's negative assumptions about mental illness may color the perception of progress by parents with mental illness.[129] Most parents with mental illness who experience parenting problems need no more than services and support to provide adequate care for their children.[130] Instead, the assumption that people with mental illness are dangerous and inherently unfit to be parents results in agencies and courts anticipating neglect or abuse such that mentally ill parents have their rights

---

[121] *Id.* at 154.

[122] *See id.* (discussing the lack of guidance from states about when reasonable effort determinations must be made in the multi-phase process).

[123] *See* Gwillim, *supra* note 4, at 342 (calling on "courts to discard stereotyped notions of individuals with disabilities as inherently incapable of being good parents").

[124] Hayman, *supra* note 14, at 1232.

[125] *Id.* at 1237, 1239.

[126] *Id.* at 1235–36.

[127] *Id.* at 1236.

[128] *See* Kerr, *supra* note 34, at 403.

[129] Brunt & Goodmark, *supra* note 16, at 300.

[130] *See id.* (attorneys can ensure that parents actually receive the services and support).

terminated not because of what they have done but "because of what they might do."[131] Moreover, the stress of litigation combined with poor support may make parents with mental illness relapse or be symptomatic, making it even more difficult for them to rebut what amounts to a presumption of unfitness.[132]

"When courts allow presumptions of inadequacy to replace individual inquiry, they erect insurmountable hurdles for [disabled] parents . . . ."[133] Thanks to categorical assumptions that parents with mental disabilities are unfit and will not benefit from services, disability serves as a "dual liability: her disability first leads to initial intervention, and then precludes her from an opportunity to regain custody of her child."[134] The same may be true for parents with physical disabilities, especially if they require substantial assistance to care for their children and lack financial or family resources:

> The discriminatory belief that physically disabled parents can never be normal parents because of their physical limitations underlies the courts' focus on physical limitations and unwillingness to address the natural, logical solution: better support services.[135]

The fact that removal and termination of parental rights statutes in many states highlight parental disability *per se* as a concern only compounds these problems.[136]

---

[131] *Id.* at 301.

[132] *See id.*

[133] Watkins, *supra* note 35, at 1444.

[134] *Id.*

[135] Julie Odegard, Comment, *The Americans with Disabilities Act: Creating "Family Values" for Physically Disabled Parents*, 11 LAW & INEQ. 533, 549 (1993) (footnotes omitted).

[136] *See* Gwillim, *supra* note 4, at 346 (for Missouri TPR proceedings); Lightfoot et al., *supra* note 50, at 933 (noting that inclusion of disability in the grounds for termination of parental rights shifts the focus of inquiry from the parent's actual behavior to the mere existence of disability as a condition). *See also* Robyn M. Powell, *Safeguarding the Rights of Parents with Intellectual Disabilities in Child Welfare Cases: The Convergence of Social Science and Law*, 20 CUNY L. REV. 127, 138 (2016) (noting that many states include intellectual disability as a ground for termination in their statutes, and this inclusion itself probably violates the Americans with Disabilities Act). Several states even allow the agency to forgo reasonable efforts if a parent's intellectual disability is deemed to make

(*continued*)

IV. RESEARCH FINDINGS ON PARENTS WITH DISABILITIES AND THEIR CHILDREN

There have been a number of studies of parents with disabilities and their children, and they overwhelmingly contradict the biases and preconceptions detailed in Part III of this Article. Specifically, research indicates that parents with disabilities generally provide good care for their children, and disability alone is a poor predictor of parenting ability.[137] Such studies are crucial, because without further empirical data, the authorities and general population will be left to their fears that parents with disabilities lack the capacity to protect their children, provide appropriate discipline, or stimulate their children's development.[138] Research also reveals some areas of difficulty for parents with disabilities, which should be viewed as focal points for intervention.

Studies of mothers with intellectual disabilities have found that poverty and social isolation are frequent challenges.[139] Those with higher degrees of social support and greater satisfaction with their social support have lower stress levels, including stress related to parenting.[140] Assistance with childcare is a particularly helpful form of social support.[141] These findings

---

service provision futile, though as noted in Section III.B.4, *supra*, there is no reason to believe these assessments of futility are valid. *See id.* at 139.

[137] Intellectual disability by itself is not a good predictor of parenting ability, and evidence indicates that parenting deficiencies in this population are remediable. Collentine, *supra* note 23, at 544; McConnell & Llewellyn, *supra* note 15, at 883; McConnell et al., *supra* note 12, at 622. Note that most parents with mental illness do not abuse or neglect their children. *See* Kaiser, *supra* note 48, at 22; Rachmilovitz, *supra* note 52, at 797 (regarding parents with mental illness). Kaiser also reminds us that any discussion of risks in a group of people could easily be applied to foster parents, as children are disproportionately abused and neglected in foster care while also facing broken attachments, educational and social disruption, and other perils. *Id.*; Kaiser, *supra* note 48, at 23. *See also* Callow et al., *supra* note 15, at 24–25 (arguing that foster care carries its own considerable risks to children's well-being).

[138] *See* FIELD & SANCHEZ, *supra* note 53, at 20–21.

[139] Ehlers-Flint, *supra* note 53, at 35, 47; Maurice A. Feldman et al., *Relationships Between Social Support, Stress and Mother-Child Interactions in Mothers with Intellectual Disabilities*, 15 J. APPLIED RES. IN INTELL. DISABILITIES 314, 320–21 (2002); Biza S. Kroese et al., *Social Support Networks and Psychological Well-Being of Mothers with Intellectual Disabilities*, 15 J. APPLIED RES. IN INTELL. DISABILITIES 324, 326, 337 (2002).

[140] Feldman et al., *supra* note 139, at 320; Kroese et al., *supra* note 139, at 336.

[141] Kroese et al., *supra* note 139, at 337.

call for targeted supportive services. Mothers with intellectual disabilities are capable of identifying their difficulties and should be allowed to do so without fear of child removal.[142] That fear may undermine a parent's willingness to identify problems and seek help solving them. In theory, the agency should view these parents' ability to identify areas in which they require assistance as a benefit, because it could guide service development. If professionals were to listen to them and program services accordingly, perhaps these cases would progress more successfully. Research shows that adapted services can be effective.[143]

A leading researcher in this field, Professor Maurice Feldman, has developed successful home-based interventions to address childrearing deficiencies in parents with intellectual disabilities.[144] He has found that weekly training visits of 1-2 hours using "simple instructions, task analysis, pictorial prompts, modeling, feedback, role-playing, and positive reinforcement" were effective to enhance child-care skills, and the gains were maintained by the experimental group and subsequently replicated in what had been a control group earlier in the study.[145] Perhaps the most striking result was that of the 82% of parents who had previously lost parental rights to a child, after training, only 19% lost their target child. Parents comprising the 19% left the program early and against the advice of the researchers.[146]

In another study, Professor Feldman found that parent training focused on fostering children's language development resulted in increases in desired parenting behaviors such that the parents with intellectual

---

[142] *Id.* at 338.

[143] *Id.* at 325.

[144] Feldman, *supra* note 6, at 406. This is not to suggest that all parents with intellectual disabilities have childrearing difficulties. Collentine, *supra* note 23, at 545, notes that these parents generally are able to meet children's emotional, health, and safety needs. When there are parenting difficulties, Feldman has demonstrated that specialized programming—that is, services that reasonably accommodate disability—is effective at improving parenting skills. Feldman, *supra* note 6, at 406–07. More recently, Feldman showed that self-directed learning based on specially designed manuals and audio recordings was effective for improving parenting skills in parents with intellectual disabilities, with results comparable to other specialized training programs. Maurice A. Feldman, *Self-Directed Learning of Child-Care Skills by Parents with Intellectual Disabilities*, 17 INFANTS & YOUNG CHILD. 17, 28 (2004).

[145] Feldman, *supra* note 6, at 410, 412.

[146] *Id.* at 412–13.

disabilities no longer were different in these behaviors than the nondisabled comparison group.[147] Child vocalizations and verbalizations increased significantly in the training group and ended up comparable to the comparison group.[148] Once again, the author found that the rate of child removal dropped considerably for the comparison group from 78% who experienced a termination of rights to a previous child to 20% losing custody of the target child.[149] More recently, Professor Feldman showed that self-directed learning based on specially designed manuals and audio recordings was effective for improving parenting skills in parents with intellectual disabilities, with results comparable to other specialized training programs.[150] This breakthrough may increase the availability of these services.

An English study of parents with intellectual disabilities demonstrated that participation in a group parent training program improved the parents' self-concept.[151] All who participated made new friendships both outside and within the group.[152] Many made positive life changes, such as improvements in their living situation, relationships, and awareness of their children's needs.[153] The authors found that single parents were particularly vulnerable to negative self-concept and lower relationship quality with their children and significant others.[154] Given that "lack of support from an adult without an intellectual disability is one of the main predictors of child removal from the care of a parent with intellectual disability" and social isolation is pervasive among parents with intellectual disabilities, the formation of new friendships outside the group was an especially important finding.[155]

Another study found that ten weekly, 60-90 minute home visits by specialized workers were ideal for context-specific learning about

---

[147] *Id.* at 413–14.

[148] *Id.* at 414.

[149] *Id.* at 415.

[150] Feldman, *supra* note 144, at 28.

[151] S. McGaw et al., *The Effect of Group Intervention on the Relationships of Parents with Intellectual Disabilities*, 15 J. APPLIED RES. IN INTELL. DISABILITIES 354, 362 (2002).

[152] *Id.* at 364.

[153] *Id.*

[154] *Id.*

[155] *Id.* at 355 (citation omitted).

parenting.[156] Many of the parents also needed concrete support, such as assistance with finances, housing, and other problems of poverty, stigma, and stress, and the threat of child removal significantly distracted the parents.[157] The authors found that essential elements of the program were well-trained parent educators and the fact that services were provided in the home.[158]

The links between intellectual disability and inadequate parenting are inconsistent and often weak, and it has been proven repeatedly that deficiencies can be remedied.[159] Furthermore, findings indicate that children of mothers with intellectual disabilities tend to have mid-to-high secure attachment to their mothers.[160] Similar findings in parents with mental illness suggest that many of the problems identified by child protective services can be remedied if case workers offer appropriate services.[161] Advocates can help their clients obtain services that reasonably accommodate their disabilities by demanding these services under the Americans with Disabilities Act.

V. THE APPLICATION OF THE AMERICANS WITH DISABILITIES ACT IN CHILD PROTECTION PROCEEDINGS

A. Overview

Title II of the Americans with Disabilities Act of 1990 declares that "no qualified individual with a disability shall, by reason of such disability,

---

[156] Gwynnyth Llewellyn et al., *Home-Based Programmes for Parents with Intellectual Disabilities: Lessons from Practice*, 15 J. APPLIED RES. IN INTELL. DISABILITIES 341, 347 (2002).

[157] *Id.* at 348.

[158] *Id.* at 352.

[159] Hayman, *supra* note 14, at 1219; Catherine Wade et al., *Review of Parent Training Interventions for Parents with Intellectual Disability*, 21 J. APPLIED RES. IN INTELL. DISABILITIES 351, 353, 360, 362 (2008) (reviewing research that shows gains in parenting skills in response to interventions, that these gains were maintained, that parenting gains are associated with improved child health and behavior, and that various training approaches are effective).

[160] Tiffany S. Perkins et al., *Children of Mothers with Intellectual Disability: Stigma, Mother-Child Relationship and Self-Esteem*, 15 J. APPLIED RES. IN INTELL. DISABILITIES 297, 305 (2002).

[161] Brunt & Goodmark, *supra* note 16, at 295; Kaiser, *supra* note 48, at 13 (noting that parenting skills across parents with mental illness vary, as they do in the general population, and many of their children do well).

be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[162] Child protection agencies must give parents with disabilities an equal opportunity to participate in and benefit from their programs and services.[163] Agencies may not discriminate against people with disabilities, and they must make reasonable modifications (i.e., reasonable accommodations) in their policies, practices, and/or procedures to avoid doing so.[164] Agencies must treat parents with disabilities "on a case-by-case basis consistent with facts and objective evidence" and not on the basis of "generalizations or stereotypes."[165] Individualized treatment and full and equal opportunity are core principles of the ADA.[166] The ADA does not require agencies or courts to lower their standards for safe parenting.[167] Rather, it requires meaningful and equal access to the benefits provided by the agency.[168] Despite being a useful tool for parents with disabilities in child protection proceedings, ADA claims are rarely raised.[169]

Disability is defined as "a physical or mental impairment that substantially limits one or more major life activities."[170] Major life activities include many physiological, motoric, and cognitive functions as well as a wide variety of tasks and skills, such as reading, thinking, learning, and concentrating.[171] "Qualified individual" means that the person with a disability "meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity" regardless of whether they receive "reasonable modifications," "auxiliary aids and services," or "the removal of

---

[162] 42 U.S.C. § 12132 (2018).

[163] TECHNICAL ASSISTANCE, *supra* note 11, at 6.

[164] *Id.*

[165] *Id.* at 4.

[166] *Id.*

[167] *Id.* at 5.

[168] *Id.* at 5.

[169] *See* Kate Duncan Butler, *Dramatic Leaps in the Right Direction: Protecting Physically Disabled Parents in Child Welfare Law*, 47 FAM. L.Q. 437, 442 (2013); Gwillim, *supra* note 4, at 354; Smith, *supra* note 12, at 206.

[170] 42 U.S.C. § 12102(1)(A) (2018).

[171] § 12102(2)(A). The statutory list of major life activities is extensive but not exhaustive.

architectural and communication barriers."[172] Child protection agencies and the private agencies that they use to provide services to families are public entities and are required to comply with the ADA.[173]

B. The ADA as a Defense to Termination of Parental Rights

The ADA has been invoked by parents in several states as a defense in termination of parental rights proceedings with little success, though there are recent signs of progress on this front. In ruling that the ADA is not a defense in a termination proceeding, some courts have decided that termination is not a service, program, or activity within the meaning of the ADA.[174] Others have decided that ADA violations may only be remedied in a separate proceeding brought under the ADA, so the ADA does not provide a defense, but rather a separate cause of action addressing the discriminatory provision of services and not termination of parental rights.[175] Still others have declared that allowing an ADA defense would improperly elevate the rights of parents over those of children in child protection proceedings.[176] If pressed as a separate claim, even in a timely

---

[172] § 12131(2).

[173] TECHNICAL ASSISTANCE, *supra* note 11, at 8, 10.

[174] HARALAMBIE, *supra* note 113 § 8.30, at 1055; *see, e.g.*, *In re* B.S., 693 A.2d 716, 720 (Vt. 1997); *In re* B.K.F., 704 So. 2d 314, 317 (La. Ct. App. 1997); *In re* Antony B., 735 A.2d 893, 899 (Conn. App. Ct. 1999); *In re* Anthony P., 84 Cal. App. 4th 1112, 1116 (2000); Adoption of Gregory, 747 N.E.2d 120, 121 (Mass. 2001); *In re* Chance Jahmel B., 187 Misc. 2d 626, 633 (N.Y. Fam. Ct. 2001); *In re* La'Asia S., 191 Misc. 2d 28, 41–42 (N.Y. Fam. Ct. 2002); *In re* Kayla N., 900 A.2d 1202, 1208 (R.I. 2006), *cert. denied*, Irving N. v. R.I. Dep't of Children, Youth, & Families, 127 S. Ct. 1372 (2007). *But see In re* Doe, 60 P.3d 285, 297 (Haw. 2002) (Moon, C.J., dissenting in part).

[175] HARALAMBIE, *supra* note 113 § 13.13, at 18. *See, e.g., In re* Torrance P., 522 N.W.2d 243, 246 (Wisc. Ct. App. 1994); *In re B.S.*, 693 A.2d at 721 (noting that juvenile court is of limited jurisdiction and may not consider claim under ADA); *In re B.K.F.*, 704 So. 2d at 318; *In re Antony B.*, 735 A.2d at 899 n.9; *In re Anthony P.*, 84 Cal. App. 4th at 1116; *In re* E.E., 736 N.E.2d 791, 796 (Ind. Ct. App. 2000); *In re* Harmon, No. 00 CA 2693, 2000 WL 1424822, *54 (Ohio Ct. App. Sept. 25, 2000); *In re Chance Jahmel B.*, 187 Misc. 2d at 633; *In re Doe*, 60 P.3d at 291, 293. The gist of this argument is that the ADA does not provide a defense and should not be used as such, but rather provides the vehicle for affirmative claims of discrimination.

[176] HARALAMBIE, *supra* note 107 § 13.13, at 18. *See, e.g.*, J.T. v. Ark. Dep't Human Servs., 947 S.W.2d 761, 768 (Ark. 1997); *In re* T.B., 12 P.3d 1221, 1224 (Colo. Ct. App.

(*continued*)

manner, it is not clear that an ADA case would proceed quickly enough to affect the child protection proceedings. Given the realities of the child protection system, including the tendency to remove children from parents with disabilities and the short timeline prior to termination proceedings, this approach by the courts has amounted to requiring that parents suffer discrimination, lose their children, and seek a remedy under the ADA in a separate action—which will not include getting their children back—in that order.[177]

Another assertion by courts is that the ADA was not meant to change obligations imposed by unrelated statutes.[178] Yet nothing in the ADA suggests that actions under such statutes are spared; if they are discriminatory, they must be brought into conformance with the ADA.[179] Logic would suggest that if a court finds that the agency has violated the ADA by providing inadequate services, it would fatally undermine the state's ability to demonstrate that a parent is unfit and will remain so beyond a reasonable time, since a court cannot determine if a parent will remain unfit without the parent failing to benefit from *appropriate* services.[180] Furthermore, DOJ and DHHS have stated that termination of

---

2000); *In re Anthony P.*, 84 Cal. App. 4th at 1116; *In re* Guardianship of R.G.L., 782 A.2d 458, 472–73 (N.J. Super. Ct. App. Div. 2001); *Gregory*, 747 N.E.2d at 121.

[177] Shade, *supra* note 77, at 214.

[178] *See, e.g.*, *Torrance P.*, 522 N.W.2d at 246 (ADA does not change obligations imposed by unrelated statutes); *In re Antony B.*, 735 A.2d at 899 (finding ADA does not create special obligations in termination cases); *T.B.*, 12 P.3d at 1224 (finding nothing in ADA indicates that a violation of the statute would interfere with the right of the state to terminate parental rights); *In re Doe*, 60 P.3d at 291 (finding nothing in ADA or legislative history suggesting it was intended to be grafted onto state statutes for purpose of supplementing remedies already provided for in such statutes).

[179] Shade, *supra* note 77, at 216.

[180] Dale Margolin, *No Chance to Prove Themselves: The Rights of Mentally Disabled Parents Under the Americans with Disabilities Act and State Law*, 15 VA. J. SOC. POL'Y & L. 112, 121-22 (2007) (pointing out that if the ADA applies to services, and the adequacy of services is examined at termination of parental rights proceedings, then properly interpreted, the ADA does apply to termination proceedings). *See also In re* Hicks/Brown, 893 N.W.2d 637 (Mich. 2017) (reversing termination of parental rights based on the failure to provide services that reasonably accommodate disabilities as required by the ADA). Termination statutes often require a finding of current parental unfitness and that the parent is likely to remain unfit. *See, e.g.*, MICH. COMP. LAWS ANN. § 712A.19b(3)(g) (West 2012).

(*continued*)

parental rights proceedings "are state activities and services for purposes of Title II."[181] Nevertheless, many courts have remained steadfast in rejecting the ADA defense to termination of parental rights.[182]

C. The ADA and Provision of Family Services.

Despite repeated rejections of the ADA as a defense to termination of parental rights, the law remains a useful tool for parents in child protection proceedings. There is broad agreement that the ADA requires that family services provided in these cases reasonably accommodate parents' disabilities.[183] This type of ADA claim targets the agency's provision of inadequate services and seeks a court order to provide appropriate services rather than attacking the termination of parental rights.[184] If services are less effective for parents with disabilities than for those without disabilities, such that the same results tend not to be achieved, they may be considered discriminatory.[185] Services that fail to accommodate a parent's

---

It is difficult to see how courts can accurately determine future risk if appropriate services to address parenting deficiencies have not been provided.

[181] TECHNICAL ASSISTANCE, *supra* note 11, at 9. This assertion may mainly apply to ensuring that the proceedings are accessible and reasonable modifications are made such that people with disabilities have an equal opportunity to participate. *Id.*

[182] Margolin, *supra* note 180, at 121; Butler, *supra* note 169, at 444; *In re Antony B.*, 735 A.2d at 899.

[183] Margolin, *supra* note 180, at 120; Butler, *supra* note 169, at 444; Watkins, *supra* note 35, at 1473; TECHNICAL ASSISTANCE, *supra* note 11, at 13, 14; *see, e.g.*, *In re Hicks/Brown*, 893 N.W.2d at 642 (requiring the child protection agency to modify its services to accommodate parent's disability in order for reunification efforts to be found reasonable); Stone v. Saviees Co. Div. Child Serv., 656 N.E.2d 824, 830 (Ind. Ct. App. 1995); *In re* E.E., 736 N.E.2d 791, 796 (Ind. Ct. App. 2000); J.H. v. State Dep't of Health & Soc. Servs., 30 P.3d 79, 86 n.11 (Alaska 2001) (noting that "reasonable efforts" requirement in state law is identical to ADA reasonable accommodation requirement); R.G. NJ DYFS v. A.G., 782 A.2d 458, 473 (N.J. Super. Ct. App. Div. 2001); *In re La'Asia S.*, 191 Misc. 2d at 42 (noting ADA guidelines are helpful supplement to state's diligent efforts standard); *In re* the Welfare of Angelo H., 102 P.3d 822 (Wash. Ct. App. 2004).

[184] *See, e.g., In re* E.E., 736 N.E.2d at 796 (finding termination cannot be attacked due to failure to provide services).

[185] Odegard, *supra* note 135, at 558–59.

disability cannot be deemed to fulfill the requirement that the agency make reasonable efforts to reunify parent and child.[186]

The ADA "may require services different from or in addition to those provided to nondisabled . . . parents."[187] ADA claims generally will relate to modifying the specific services themselves or the duration of service provision.[188] Services at issue may include individual assessment and reunification programs for parents when children are removed from their custody.[189] Short timelines in child protection cases are problematic for parents with disabilities because they may need additional time to obtain housing, benefit from services, or arrange ongoing support.[190] Utilizing the protections of the ADA may get these timeframes extended.[191]

Perhaps the most fundamental service that must be provided to parents in child protection cases is an assessment to determine what strengths and challenges exist and how to address them. In cases involving parents with disabilities, the ADA requires that assessments be individualized.[192] "An individualized assessment is a fact-specific inquiry that evaluates the strengths, needs, and capabilities of a particular person with disabilities based on objective evidence, personal circumstances, demonstrated competencies, and other factors that are divorced from generalizations and stereotypes regarding people with disabilities."[193]

D. Defenses to ADA Claims

Agencies may defend against ADA claims by showing that the parent poses a direct safety threat or that the requested accommodation is unduly burdensome or would require a fundamental alteration to the nature of the program.[194] A "direct threat" is defined as a significant health or safety

---

[186] *In re Hicks/Brown*, 893 N.W.2d at 640 (equating a failure to make reasonable accommodations with a failure to make reasonable efforts); TECHNICAL ASSISTANCE, *supra* note 11, at 14.

[187] Shade, *supra* note 77, at 202. *See also* TECHNICAL ASSISTANCE, *supra* note 11, at 4–5.

[188] Shade, *supra* note 77, at 204.

[189] Kerr, *supra* note 34, at 388.

[190] Smith, *supra* note 12, at 214.

[191] TECHNICAL ASSISTANCE, *supra* note 11, at 13–14.

[192] *Id.* at 14.

[193] *Id.*

[194] *See* Margolin, *supra* note 180, at 139, 142; TECHNICAL ASSISTANCE, *supra* note 11, at 10, 15.

risk that cannot be eliminated by a reasonable modification.[195] If the direct-threat defense is used, the burden is on the defendant to make an individualized determination and prove the threat by a preponderance of the evidence.[196] Mere parental unfitness cannot sustain the direct-threat defense, since all parents in child protection cases are allegedly unfit, but the agency does not deny all of them services.[197] Most importantly, decisions on whether a parent is a direct threat "must be based on an individualized assessment and objective facts," not "stereotypes or generalizations."[198] Furthermore, if the threat can be eliminated by a reasonable accommodation, then the agency must do so.[199]

The "fundamental alteration" defense is not well defined by the courts.[200] However, there is a tendency for courts to define "reasonable modifications" narrowly.[201] That said, it is clear that depending on the needs of the parent, the ADA may require relaxation of time constraints, services from sources outside the agency or its usual contracted providers, and the development of new services, with none of these representing a fundamental alteration to the nature of the program.[202] "Undue burden" is somewhat more straightforward: if financial resources are unavailable for the modification or additional service, this defense may be effective.[203] However, if an agency pleads that the service provision would be unduly burdensome, the court should require a comparison of those burdens against the burden of removal, foster care services, termination of parental rights, and placement for adoption.[204] In that light, the burden of services might seem much less arduous, and the evidence of burden may be insufficient as a defense.

---

[195] TECHNICAL ASSISTANCE, *supra* note 11, at 16 (quoting 28 C.F.R. § 35.139(b)(2018)).

[196] Shade, *supra* note 77, at 196.

[197] Margolin, *supra* note 180, at 142.

[198] TECHNICAL ASSISTANCE, *supra* note 11, at 16. *See also* Odegard, *supra* note 135, at 557.

[199] TECHNICAL ASSISTANCE, *supra* note 11, at 5.

[200] Glennon, *supra* note 23, at 312.

[201] *Id.*

[202] TECHNICAL ASSISTANCE, *supra* note 11, at 13–15.

[203] Odegard, *supra* note 135, at 561.

[204] Shade, *supra* note 77, at 207. *See also* Margolin, *supra* note 180, at 139.

E. Progress in the Application of the ADA in Child Protection Proceedings.

While the ADA has had a rocky history in child protection courts, particularly as a defense to termination of parental rights, there are signs of progress in state statutes and court decisions. For example, as discussed by Callow et al., Idaho enacted a series of laws to address disability discrimination and improve parenting evaluations in all child custody-related cases.[205] Parenting evaluations now must consider adaptive equipment and supportive services for parents with disabilities, and the evaluator is required to have, or to be assisted by someone who has, expertise in these areas.[206] Kansas followed suit in its dependency law, and Rhode Island removed disability language from its termination statute.[207]

Most recently, South Carolina passed the Persons with Disabilities Right to Parent Act.[208] Its first section includes definitions of adaptive parenting equipment, adaptive parenting techniques, and supportive services.[209] It also adopts the ADA definitions of covered entities and disability.[210] The Act requires the agency and courts to comply with the ADA and ensure that reasonable efforts to prevent removal and reunify a family be individualized and based on a parent's specific disability.[211] It also specifically mandates that the agency make reasonable accommodations.[212]

Finally, the Act amends the state's termination statute to require an explicit nexus between any condition that the parent may have and the parent's ability to care for the child, and it prohibits termination of parental rights based solely on disability.[213]

There has been some progress in case law as well. In a unanimous opinion that casts doubt on the logic of state court decisions holding that the ADA is not a defense to termination, the Michigan Supreme Court

---

[205] Callow et al., *supra* note 15, at 28–30.

[206] *Id.* at 29–30.

[207] *Id.* at 31–32 (regarding the Kansas law); Lightfoot et al., *supra* note 50, at 933 (regarding the Rhode Island law).

[208] Persons with Disabilities Right to Parent Act, S.C. CODE ANN. § 63-21-10 (2017).

[209] *Id.*

[210] *Id.*

[211] S.C. CODE ANN. § 63-21-20; S.C. CODE ANN. § 63-7-720; S.C. CODE ANN. § 63-7-1640(A).

[212] S.C. CODE ANN. § 63-21-20.

[213] S.C. CODE ANN. § 63-7-2570(6).

recently reversed a termination decision due to ADA violations in a case involving a mother with intellectual and psychiatric disabilities.[214] The mother's attorney first requested individualized services to accommodate the mother's disability over a year into the case and made at least five such requests over the 11 months prior to the termination of parental rights hearing.[215] The trial court eventually ordered the agency to refer the mother to a program with expertise in serving parents with intellectual disabilities, but the agency failed to do so.[216] The trial court proceeded to terminate her parental rights.[217]

The Michigan Supreme Court held that the agency must make reasonable efforts in most child protection cases, and its obligations under Title II of the ADA "dovetail" with this requirement.[218] Specifically, the court declared:

> Absent reasonable modifications to the services or programs offered to a disabled parent, the Department has failed in its duty under the ADA to reasonably accommodate a disability. In turn, the Department has failed in its duty . . . to offer services designed to facilitate [reunification] . . . and has, therefore, failed in its duty to make reasonable efforts toward reunification.[219]

The court held that "efforts at reunification cannot be reasonable . . . unless the Department modifies its services as reasonably necessary to accommodate a parent's disability. And termination is improper without a finding of reasonable efforts."[220]

The *Hicks/Brown* decision comports with those of other courts that found the ADA applies to the reasonable efforts requirement, but clarifies that once the agency is aware of disability, it has an "affirmative duty to make reasonable efforts at reunification" and is forbidden from being passive in providing accommodations.[221] The court also pointed out that

---

[214] *In re* Hicks/Brown, 893 N.W.2d 637 (Mich. 2017). This author was co-counsel for the respondent-mother in this case before the Michigan Supreme Court.

[215] *Id.* at 638–39, 641.

[216] *Id.* at 639, 641–42.

[217] *Id.* at 639.

[218] *Id.* at 639–40.

[219] *Id.* at 640.

[220] *Id.* at 642.

[221] *Id.* at 640–41.

awareness of disability can be imputed to the agency by way of its own verbal and written statements, evaluations and other reports it may have received, statements made by the trial court, or the obviousness of the disability.[222] Perhaps most importantly, the opinion overturned a termination of parental rights decision based on a failure to comply with the ADA, because termination is improper without reasonable efforts, and efforts cannot be reasonable without required, reasonable accommodations.[223] The *Hicks/Brown* decision tracks the DOJ/DHHS Technical Assistance guidance about the application of the ADA in child protection proceedings,[224] and together these resources may provide persuasive authority for advocates nationwide.

VI. ADVOCACY FOR PARENTS WITH DISABILITIES IN CHILD PROTECTION PROCEEDINGS

In most child protection cases that go to court, parents will face at least a judge, a child protective services worker who is both investigator and service coordinator (or whose foster care worker colleague coordinates services), a prosecuting attorney, and an attorney for the child.[225] In many states, the court will appoint counsel for an indigent parent from the outset, which often means the parent will meet the lawyer minutes before the hearing that will determine whether the petition can go forward and the children will be removed by the court.[226]

Rothstein and Rothstein, in their treatise on disabilities and the law, suggest that counsel for a person with a disability ask the client what accommodations the client may need in various settings including court, ask about the disability itself and what kinds of impact the disability might have on the issue at hand, and maintain contacts in fields like psychology, social work, and rehabilitation counseling.[227] In addition, Rothstein and Rothstein stress that it is helpful for the attorney to have clinical

---

[222] *Id.* at 640–641 n.5.

[223] *Id.* at 642.

[224] TECHNICAL ASSISTANCE, *supra* note 11, at 4.

[225] In some jurisdictions, a referee, magistrate, or other surrogate will hear at least some phases of the case. Depending on the jurisdiction, the child may be represented by an attorney, a guardian ad litem (who may or may not be a lawyer), a lawyer-guardian ad litem, a law guardian, etc.

[226] *See* Glennon, *supra* note 23, at 281.

[227] LAURA ROTHSTEIN & JULIA ROTHSTEIN, DISABILITIES AND THE LAW § 9:12, at 666–67 (3d ed. 2006).

knowledge, such as a working understanding of mental health issues and services, medical services, or social services and rehabilitation.[228] It is critical that the attorney work closely with other professionals, such as social service providers, and understand their perspective.[229] Often, language in agency petitions or reports, or testimony by case workers, indicates that agency personnel recognize some sort of disability in the parent.[230] Advocates should be alert for this language and cite it in discussions with case workers so that the agency, too, acknowledges disability.[231] Attorneys should press for functional, not categorical, evaluations and press the court to order the child protection agency to communicate and work with other providers, such as the mental health system.[232]

Unfortunately, advocacy for parents in child protection proceedings tends to be poor.[233] Depending on the parent's disability, it can be difficult to explain termination of parental rights in concrete terms, so there may be a communication breakdown between attorney and client.[234] This disruption may result in relinquishment of rights because the attorney thinks the client has no objections.[235] In addition, parents' counsel may

---

[228] *Id.* *See also* Callow, *supra* note 5, at 134–137, for excellent advice to advocates, including communicating directly and extensively with the client and case workers about what the client's disability is, needed accommodations, and finding resources.

[229] THEODORE J. STEIN, THE ROLE OF LAW IN SOCIAL WORK PRACTICE AND ADMINISTRATION 7 (2004). Stein also notes that it is important to have clinically knowledgeable lawyers. *Id.* at 15.

[230] Callow, *supra* note 5, at 135.

[231] *Id.* This approach has proven effective in my own advocacy. It has negated the need to litigate the question of disability and led to fruitful discussions about possible accommodations, effectively settling certain questions, and advancing the case more quickly.

[232] *Id.* at 136 (urging advocates to seek appropriate evaluations and fight against inappropriate ones); Gwillim, *supra* note 4, at 360 (individualized assessment is crucial); TECHNICAL ASSISTANCE, *supra* note 11, at 14 (discussing individualized assessment); Pannella, *supra* note 22, at 1186 (arguing that advocates must push for individualized, functional assessments); Aunos & Pacheco, *supra* note 38, at 660 (urging an ecological, i.e., functional, approach to assessment); Kaiser, *supra* note 48, at 30 (noting that the child protection and mental health systems need to work together).

[233] Hayman, *supra* note 14, at 1242.

[234] *Id.* at 1243.

[235] *Id.*

harbor the same biases as others against parents with disabilities and thus provide inadequate representation.[236] The ADA, if it is invoked at all, is too often first raised on appeal, suggesting that trial counsel did not think to raise it when there was an opportunity to obtain reasonable accommodations.[237]

Various commentators have made suggestions for improving parent representation, particularly for lawyers serving parents with disabilities.[238] In court, a parent's attorney should direct the court's focus to how much the parent can do, the actual relationship and interaction between the parent and child, and the love and guidance provided by the parent to the child.[239] The attorney should demand a proper, thorough evaluation of the parent that focuses on the parent's ability to meet the child's basic needs.[240] The attorney also should pursue adapted training for the parent to bolster parenting skills and, if needed, seek others who might assist with caretaking duties.[241] To counteract bias, the attorney must educate the court about the client's disability.[242] It is also important to ensure that the court understand that the responsibility to accommodate a parent's disabilities falls squarely on the agency.[243] Filing disability discrimination complaints with the DOJ and DHHS is another avenue to induce ADA compliance.[244]

---

[236] *Id.*

[237] *See, e.g.*, Interest of C.M., 526 N.W.2d 562, 566 (Iowa Ct. App. 1994); *In re* Jessica S., 723 A.2d 356, 360 (Conn. App. Ct. 1999); *In re* Antony B., 735 A.2d 893, 897 n.3 (Conn. App. Ct. 1999).

[238] *See* Glennon, *supra* note 23, at 295–96; Butler, *supra* note 169, at 454; Smith, *supra* note 12, at 229; Powell, *supra* note 136, at 145–46; Smith, *supra* note 12, at 229; Margolin, *supra* note 180, at 148; Hayman, *supra* note 14, at 1269–70; Dillon, *supra* note 99, at 149.

[239] Glennon, *supra* note 23, at 295–96.

[240] Joshua Kay, *Representing Parents with Disabilities in Child Protection Proceedings*, 13 MICH. CHILD WELFARE L.J. 27, 29 (2009).

[241] *Id.* at 31.

[242] Butler, *supra* note 169, at 454 (urging advocates to overcome stereotypes through introducing contrary evidence and educating the court); Powell, *supra* note 136, at 145–46 (calling on lawyers to use social science findings in their advocacy to counter biases and assumptions in the courts and agency).

[243] *See* Smith, *supra* note 12, at 229.

[244] Margolin, *supra* note 180, at 148. This 2007 recommendation was prescient. Years later, a DOJ/DHHS complaint about disability discrimination in a Massachusetts child protection case led to findings against the state and the subsequent release of the Technical

(*continued*)

When faced with expert testimony, the attorney should insist that the expert show that any assessments are actually relevant.[245] As a corollary, the attorney should keep the expert from testifying about behavior unrelated to parenting or test results for which the connection to parenting is not empirically supported.[246] "The advocate for the parent has a particular responsibility to elicit the evidence that has formed the basis for the witness's decision."[247] The attorney should also scrutinize the length and frequency of contact the expert has had with the client.[248] When examining case plans, the attorney should ensure that they are sufficiently concrete, behavior-centered, and include appropriate measures for evaluating the outcome.[249] If needed, the attorney may call for hearings as frequently as possible so that inaction will not persist and lead to termination of parental rights.[250] In other words, hearings are a way to keep an eye on the agency. The attorney must also evaluate educational and other materials given to parents and their ability to understand them.[251]

Brunt and Goodmark make several points about what lawyers for parents with mental illness should do in child protection cases: educate their clients about their rights, shield them from pressure by child protection workers and mental health professionals to voluntarily relinquish their rights, educate child protection workers about their clients' strengths and commonly-held biases against people with mental illness, and assist with service plan development in order to keep the parent and child together.[252] Attorneys for parents with mental illness also can advocate for changes in the system, such as calling for intensive case management services and for models of an integrated service provision that

---

Assistance document, *supra* note 11. *See* Letter from the U.S. Department of Justice, Civil Rights Division and U.S. Department of Health and Human Services, Office for Civil Rights to the Massachusetts Department of Children and Families (Jan. 29, 2015), at www.ada.gov/ma_docf_lof.pdf [https://perma.cc/7R2Y-7STP].

[245] Hayman, *supra* note 14, at 1269–70.

[246] *See* Dillon, *supra* note 99, at 149.

[247] Sackett, *supra* note 32, at 272.

[248] Teri L. Mosier, Note, *"Trying to Cure a Seven-Year Itch": The ADA Defense in Termination of Parental Rights Actions*, 37 BRANDEIS L.J. 785, 804 (1999).

[249] Hayman, *supra* note 14, at 1271.

[250] *Id.*

[251] Mosier, *supra* note 248, at 804.

[252] Brunt & Goodmark, *supra* note 16, at 298.

will meet the needs of parents in the context of their families.[253] They can also develop trainings about parents with mental illness.[254] Similar advice would apply to representing parents with other disabilities.

In short, "parents need experienced counsel to guide them through this process. Their lack of knowledge about legal proceedings could have permanent repercussions. They need counsel to protect themselves and the integrity of the family."[255] To be truly effective, parents' counsel must be well-trained, familiar with various relevant disciplines, have contacts across these disciplines, have manageable case loads, and be aware of their own biases and how they might interfere in the provision of high-quality legal services. They must be comfortable with discussing disability with their clients and others involved in the case, and advocate early and often for reasonable accommodations. The protections of the ADA are most potent not as a last-ditch defense but as an affirmative, ongoing requirement that the agency not engage in disability discrimination. Elements of this may include a thorough, individualized assessment of a client's capabilities and needs in light of the needs of the child, a detailed request for accommodations, and ongoing efforts to ensure that appropriate services are being provided.

VII. CONCLUSION

Parents with disabilities are disproportionately represented in the child protection system, and once involved in the system, they are more likely than other parents to suffer termination of their parental rights.[256] These parents face many challenges that make child protection involvement more likely, and they face bias from the child protection agency, the courts, experts, and service providers.[257] In order for the entire system to improve and the adversary system to function properly, improvement in the representation of parents with disabilities is urgently needed. There is some recent progress in statutory and case law toward realizing the potential of the ADA to combat discrimination against parents with disabilities,[258] but it will amount to little if advocates do not effectively invoke ADA protections on behalf of their clients.

---

[253] Glennon, *supra* note 23, at 297.

[254] *Id.* at 298.

[255] Mabry, *supra* note 28, at 654.

[256] Hayman, *supra* note 14, at 1242.

[257] *Id.* at 1238–41.

[258] Brunt & Goodmark, *supra* note 16, at 302.