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## Parents with Mental Disabilities: The Legal Landscape

Dale Margolin Cecka, JD

*"It is better for all the world, if . . . society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough." (Justice Holmes, Buck v. Bell, 1927)*

In the first part of the twentieth century, individuals with mental disabilities were sterilized by institutions to prevent them from having offspring (Downey & Skuse, 1993). Although we have abandoned this as public policy, parents with mental disabilities still lose custody of their children at much higher rates than their non-disabled peers (National Technical Assistance for State Mental Health Planning, 2000).

### The Americans with Disabilities Act of 1990 (ADA)

The ADA was enacted in 1990 to remedy discrimination against individuals with disabilities (ADA, 2006). Over 54 million Americans are protected under the ADA (Office on Disability, 2005). Title II of the ADA prohibits discrimination on the basis of disability by a public entity, which includes (1) any state or local government, and (2) any department, agency, special purpose district, or other instrumentality of a state or states or local government. According to its regulations, the ADA applies to "all services, programs, and activities provided or made available by public entities."

The ADA requires that "a public entity . . . make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability." Title II of the ADA does not require public entities to make "fundamental alterations" to the nature of their programs or services.

A state's department of social services is a public entity and when it initiates a termination of parental rights (TPR) proceeding, it should be considered state activity. Reunification and family preservation services should also be considered services, programs, or activities which may need to be "reasonably modified" in order for states to provide equal access to parents with disabilities.

Federal and state courts, however, have consistently held that the ADA does not apply to parents facing TPRs. The reasons include: (1) TPR proceedings are not a "service, program or activity" within the meaning of the ADA (see *In re Adoption of Gregory*, 2001; *In the Matter of Terry*, 2000; *In re Antony B*, 1999; *In the Interest of B. K.*



*F.*, 1997; and *In re B. S.*, 1997); (2) a juvenile court's jurisdiction cannot interpret a federal law or conduct "an open-ended inquiry into how the parents might respond to alternative services and why those services have not

*Dependency of C. C.*, 1999; *J. T. v. Arkansas Department of Human Services*, 1997; *In re Karrlo K.*, 1994; and *In the Matter of K. D. W.*, 1994). Still, those courts have ruled that sufficient reasonable modifications in

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been provided" (see *In re B. S.*, 1997; *In the Interest of Torrance P.*, 1994; and *In re Maryia R.*, 1997); and (3) Title II provides plaintiffs with a private right of action against a public entity but cannot be used as a legal defense (*In re Doe*, 2002; *In the Matter of Rodriguez*, 1999).

A handful of courts have allowed the ADA to be a defense to a TPR (see *In the Matter of John D.*, 1997), some without specifically ruling on its applicability (e.g. *In the Matter of J. B.*, 1996; *In re Caresse B.*, 1997; *In the Interest of C. C.*, 1995; *In re*

family preservation services were made to accommodate individuals' mental disabilities, and therefore no ADA violations occurred. One exception was *In the Interest of K. K. W.* (1995), where the courts found that the state violated the ADA by failing to modify its reunification services to assure equally effective services to a parent with schizophrenia: the state provided only services that are offered to parents without disabilities.

According to a few courts, the ADA can be raised in child welfare proceedings but only prior to a TPR proceeding. *In the interest of S.*

*L. P.* (1999) held that the issues of adequate services and reasonable accommodations for parents with disabilities need to be addressed at review hearings or when they are offered, and that it is too late to challenge the service plan at the TPR proceeding. (See also *In the Matter of Terry*, 2000; *In the Interest of A. M.*, 1999; *Stone v. Daviess*, 1995; *In re Antony B.*, 1999; *In re B. S.*, 1997; *In re M. J. M.*, 2002; and *In the Matter of Terry*, 2000). But at least one court has held that the ADA may not be raised in dependency proceedings either: *In M. C. v. Department of Children & Families* (2000), the court found that dependency proceedings are held for the benefit of the child, not the parent, and therefore the ADA may not be used as a defense in such proceedings.

Thus far, courts that find the ADA applicable to child welfare cases usually do not hold agencies accountable for offering unique services to parents with mental disabilities (see *In the Matter of Terry*, 2000; *In the Matter of the Welfare of H. S.*, 1999; *In re Caresse B.*, 1997; and *Bartley v. State*, 1996). Courts seem to have made the assumption that this would fundamentally alter a state's child welfare program, presumably because of financial or other burdens. However, advocates for parents can counter this argument (Margolin, 2007). Many alternative services actually save the state money in the long run. The question of an undue financial burden is a fact-specific inquiry; under the ADA, there is no justification for a total absence of services that actually help parents with mental disabilities. Parents with disabilities are entitled to services that have the same potential, with or without reasonable modification, for facilitating reunification as parents without disabilities.

### The Adoption and Safe Families Act (ASFA) & "Reasonable Efforts" Requirements Under State Law

In addition to the ADA's reasonable modification requirement, the federal Adoption and Safe Families Act (ASFA) requires states to make "reasonable efforts" to preserve and reunify families in order to prevent or eliminate the removal of a child (ASFA, 1997). State child welfare laws require reasonable efforts in order to comply with ASFA. ASFA does not provide a private right of action for parents to enforce these "reasonable efforts" laws (*Suter v. Artist M.*, 1992). The state laws also do not specifically require the reasonable efforts to be tailored to meet the needs of parents with disabilities. Arkansas is the only exception: its statute does require the state to make reasonable accommodations in accordance with the ADA to parents with disabilities (Ark Code Ann. § 9-27-341). Advocates can attempt to argue that services are not "reasonable" if they do

not take into account a parent's disability. However, most courts, including most cited in this article, "rubber stamp" reasonable efforts even when they appear to be ill-suited to a particular parent.

There have been some exceptions (see *In re Adoption/Guardianship*, 2002; *Mary Ellen C. v. Arizona Department of Economic Security*, 1999; *In re the Dependency of H. W. & V. W.*, 1998; and *In re Victoria M.*, 1989). These courts have examined whether the "reasonable efforts" were appropriate to the needs of parents with disabilities. The decisions also required child welfare agencies to work with the developmental disabilities or mental health service system. In *In re P. A. B.* (1990), the court reversed a termination order because the bond between parents with mental disabilities and their children had not been considered by the trial court before terminating rights. In *Division of Family Services v. Murphy* (2000), the court allowed two parents with mental disabilities to regain custody of their children because, by working together, they could adequately address the needs of their children. The court also noted that even though parents might require agency assistance from time to time, their children should not be placed in foster care.

Some appeals courts have also reversed TPRs where courts made decisions based on stereotypes about individuals with disabilities. For example, *In re C. W.* (2007) found that the trial court inappropriately relied on an outdated psychiatric assessment when terminating a mother's rights. Without expert testimony about the mother's current mental health status or the child's needs, the court's decision emanated from assumptions and speculation. (See also *In re Adoption/Guardianship*, 2002.)

### Conclusion

The ADA, coupled with federal and state child welfare laws, provides broad brush strokes for advocates of parents with mental disabilities and their children. To effectuate parents' rights, child welfare professionals must work with the parents themselves, as well as with other state departments, to form service plans that are tailored for the success of each individual family.

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