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Disabilities Project Newsletter

Child Welfare Cases Involving Parents With Disabilities By Joshua B. Kay, J.D., Ph.D., Clinical Assistant
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Introduction

Many families include at least one parent with a disability.¹ These parents become involved in the child welfare system more frequently than nondisabled parents, and their child protection cases are more likely to end in termination of parental rights.² Parents with cognitive and/or psychiatric disabilities³ are particularly at risk of child welfare involvement.⁴ Cases involving parents with disabilities present special challenges and opportunities in child protection litigation, and strong advocacy is needed to ensure that these parents' needs are met by the child welfare system and their rights are fully protected. With appropriate services, many parents with disabilities can provide the care that their children need.⁵

Disproportionate involvement in the child protection system may be especially pronounced among parents with intellectual disabilities, whose cases tend to involve actual or potential neglect rather than abuse.⁶ Parents with such disabilities are more likely than others to be receiving state services and therefore subject to close monitoring by various professionals who are mandated reporters of child abuse and neglect.⁷ When a report is received by the Children's Protective Services (CPS) division of the Department of Human Services (DHS) from a professional, it is especially likely to be deemed credible and therefore lead to intervention.⁸ Rates of CPS referral and intervention are also high among parents with psychiatric disabilities.⁹

In addition to the fact that parents with disabilities often access state services, these parents are far more likely than nondisabled parents to be living in poverty.¹⁰ In contrast to parents with the financial means to purchase private services to address family problems, parents living in poverty are more vulnerable to state involvement because they access public assistance programs, including cash assistance, food assistance, and Community Mental Health services.¹¹ Family issues that may pass unnoticed by the state in many cases are



more readily spotlighted in impoverished families. State scrutiny and access to the family combine with the potential for negative assumptions among CPS case workers about whether people with disabilities are fit to be parents,¹² large court case loads, a relative lack of appropriate family services to address the needs of parents with disabilities and their children,¹³ and the short time frames of child protection proceedings¹⁴ to make these cases relatively likely to go to court and to end in termination of parental rights.

Legal Framework Overview

There is a legal framework for advocates to use to try to move these cases in a different direction. Barring some exceptions, the DHS must make “reasonable efforts” to prevent removal of a child from a parent’s custody or to reunify the family.¹⁵ Reasonable efforts are embodied in a “case service plan” that is supposed to address the identified needs of the family in order to facilitate the return of the child to the parent.¹⁶ If the agency fails to make reasonable efforts, a court is not required to order the agency to seek termination of parental rights even if the statutory time frame that usually requires such an order has been exceeded.¹⁷

In *In re Terry*, the Michigan Court of Appeals found that Title II of the Americans with Disabilities Act (ADA) applies to child protection cases, and it tied the “reasonable accommodations” requirement of the ADA to the reasonable efforts requirement in child welfare law.¹⁸ The ADA says “no qualified individual with a disability shall, by reason of such disability, 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.”¹⁹ Although the Court of Appeals decided that the ADA is not a defense against termination of parental rights, the holding of the court was more nuanced than that and presents advocacy opportunities.²⁰ The court stated that if the agency fails to reasonably accommodate a parent’s disability in the services provided, then the trial court cannot find that reasonable efforts were made by the agency as required by law.²¹ Notably, however, the court did not describe exactly how to reasonably accommodate a disability, saying only that the ADA does not go so far as to require the agency to provide full-time, live-in assistance for the parent.²² Clearly, there is a lot of room for services that may exceed the usual scope of those provided in child protection cases but come in well short of the court’s stated outer limit. It is important to remember that all parents,

regardless of disability, must demonstrate that they can meet the basic needs of their children in order for their children to be returned to their care.²³

Under *Terry*, parents must not wait until a termination of parental rights petition has been filed—or ordered—before raising an ADA claim. Instead, the ADA claim must be raised when the family services offered are inadequate in light of the parent's disability.²⁴ Parents must make the ADA claim as early as possible in the case, preferably at the time of initial disposition, when the case plan is presented to the court.²⁵ It is important that parents and their counsel inform the agency as soon as possible about the need for accommodation so that any ADA issues can be put before the court early in the case.

How to Prepare and Raise an ADA Claim

Effective client interviewing and counseling are essential in these cases and provide the foundation for a successful ADA claim. Counsel for parents with disabilities should ask their clients whether any special accommodations are needed from the agency, other service providers, and the court.²⁶ Eliciting specifics about the disability itself, its effects on the parent, and needed accommodations will help the lawyer better understand the case. The lawyer in turn can educate the agency and the court about the disability and required accommodations. Clients may be able to describe in great detail what might be helpful to them, whether it is one-on-one or small-group learning opportunities, the use of visual aids, multiple exposures to information, in-home vs. in-class interventions, hands-on learning, or communication aids such as sign language translation. Clients with cognitive disabilities may require that the attorney also accommodate the disability by taking longer than usual to explain the legal situation and assessing the client's understanding of legal advice.

Once a complete understanding of the parent's disabilities and needs is gained, the lawyer can sometimes negotiate with the agency to establish a case service plan that is compliant with the ADA while making sure that the applicability of the ADA is preserved on the record as early as possible in the case. However, more significant court intervention is sometimes necessary due to a lack of appropriate services, resistance or misunderstanding on the part of the agency, or any number of barriers that may arise.

The starting point for raising an ADA claim in a child protection case is citing *In re Terry*, as described above, for the proposition that the ADA applies in such cases.²⁷ Once the applicability of the ADA to child welfare cases is established on the record, the advocate can turn to the ADA itself. First, the lawyer must show that the parent has a disability and therefore qualifies for ADA protection.²⁸ This step generally is not difficult in child protection matters, because often the agency itself claims that the parent is cognitively, psychiatrically, or physically impaired.²⁹ In addition, the parent may have medical and mental health records, Social Security findings, and educational records that support the claim of disability. Agency court reports also may raise concerns about disability.³⁰

ADA protections apply to “qualified” individuals with disabilities.³¹ Since parents are eligible to receive the services that constitute required reasonable efforts, parents with disabilities qualify for ADA protections regarding how those services are provided. In some cases, however, the severity of the abuse and neglect allegations renders a parent ineligible for reunification services, and the mere fact that a parent has a disability does not make the parent eligible for services.

After the parent’s eligibility for ADA protection is established, reasonable accommodations should be requested. Counsel must be able to describe how the services presently offered fail to reasonably accommodate the disability. Almost inevitably, the court will ask how the services should be changed in order to reasonably accommodate the parent’s disability, and counsel should be prepared to answer that question. Often, clients can be very helpful in describing to counsel what will help them succeed in a case. Indeed, clients may be their own best experts. In the end, however, it is the agency that is responsible for reasonably accommodating a parent’s disability, even if the parent is unsure how the agency can do so.

Conclusion

Disability issues often arise in child protection proceedings, but they are not raised frequently enough, explicitly enough, and early enough in cases. Counsel for parents with disabilities must understand that their clients are for more likely than other parents to face termination of their parental rights if their disabilities are not reasonably accommodated. The ADA provides key protections for parents with disabilities, and ADA

claims must be raised as early as possible in a case in order for parents to get these protections and have the best chance of a successful outcome.

Author's Note

A longer version of this article previously appeared in the Michigan Child Welfare Law Journal, Volume 13(1).

1. Disabilities may be cognitive, psychiatric, or physical. There are over 8 million parents with disabilities in the United States. 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).
2. 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). Termination of parental rights is the total severance of the legal relationship between parent and child. In Michigan, it is irreversible.
3. "Cognitive disability" may apply where a person has been diagnosed with an intellectual impairment and/or developmental disability. "Psychiatric disability" applies where a person has moderate to severe mental illness.
4. Feldman, *supra* note 2, at 401.
5. See, e.g., 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, 291 (2003).
6. Feldman, *supra* note 2, at 401.
7. Martha A. Field & Valerie A. Sanchez, Equal Treatment for People with Mental Retardation: Having and Raising Children 20 (1999); Susan Kerr, *The Application of the Americans 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).
8. Kerr, *supra* note 11, at 402.
9. See, e.g., 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 (2002).
10. Olkin, *supra* note 1, at 44.
11. Rosemary Shaw Sackett, *Terminating Parental Rights of the Handicapped*, 25 Fam. L.Q. 253, 290 (1991).
12. Glennon, *supra* note 5, at 278; Robert L. Hayman, Jr., *Presumptions of Justice: Law, Politics, and the Mentally*

- Retarded Parent*, 103 Harv. L. Rev. 1202, 1211 (1990).
13. Glennon, *supra* note 5, at 283.
 14. A permanency planning hearing must be held within 12 months of a child's removal from the home, M.C.L. 712A.19a(1), at which the court may be required to order the agency to file a petition to terminate the parent's rights. M.C.L. 712A.19a(6). If the child has been in foster care for 15 of the most recent 22 months, the court is required to issue such an order unless one of the enumerated exceptions applies.
 15. M.C.L. 712A.18f(4), 712A.19a(2).
 16. M.C.L. 712A.18f(2) & (3).
 17. M.C.L. 712A.19a(6)(c).
 18. *In re Terry*, 240 Mich. App. 14, 25, 26, 610 N.W.2d 563 (2000); Americans with Disabilities Act of 1990, as amended in 2008, 42 U.S.C. § 12101 *et seq.*
 19. 42 U.S.C. § 12132.
 20. *Terry*, 240 Mich. App. at 25.
 21. *Id.* at 26.
 22. *Id.* at 27-8.
 23. *Id.* at 28.
 24. *Id.* at 26.
 25. *Id.*
 26. Laura Rothstein & Julia Rothstein, *Disabilities and the Law* § 9:12, at 667 (3d ed. 2006).
 27. *Terry*, *supra* notes 20-25.
 28. The ADA definition of "disability" is at 42 U.S.C. § 12102(1) and is to "be construed in favor of broad coverage." 42 U.S.C. § 12102(4)(A).
 29. Therefore, the agency regards the parent as having a disability, triggering ADA protections. 42 U.S.C. § 12102(1)(C) & (3).
 30. See M.C.L. 712A.18f for requirements regarding court reports and service plans. It is critical to read these documents very closely, since statements embedded deep within those documents may provide important evidence that the agency regards the parent as having a disability.
 31. 42 U.S.C. § 12131(2). Qualification under the ADA hinges on the person's eligibility to receive the services in question.

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