

**AMERICAN BAR ASSOCIATION**  
**COMMISSION ON DISABILITY RIGHTS**  
**SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE**  
**SECTION OF FAMILY LAW**  
**COMMISSION ON YOUTH AT RISK**

**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

1 RESOLVED, That the American Bar Association urges all federal, state, territorial, and  
2 tribal governments to enact legislation and implement public policy providing that  
3 custody, visitation, and access shall not be denied or restricted, nor shall a child be  
4 removed or parental rights be terminated, based on a parent’s disability, absent a  
5 showing—supported by clear and convincing evidence—that the disability is causally  
6 related to a harm or an imminent risk of harm to the child that cannot be alleviated with  
7 appropriate services, supports, and other reasonable modifications.

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9 FURTHER RESOLVED, That the American Bar Association urges all federal, state,  
10 territorial, and tribal governments to enact legislation and implement public policy  
11 providing that a prospective parent’s disability shall not be a bar to adoption or foster  
12 care when the adoption or foster care placement is determined to be in the best interest of  
13 the child.

## REPORT

### I. INTRODUCTION

The U.S. Supreme Court has long recognized that the fundamental right of parents to make decisions concerning the care, custody,<sup>1</sup> and control of their children is protected under the Due Process Clause of the Fourteenth Amendment.<sup>2</sup> Nevertheless, people with disabilities have been, and continue to be, denied full enjoyment of this right based on discriminatory assumptions, generalizations, biases, stereotypes or misconceptions about disabilities and the ability to parent, instead of individualized determinations supported by objective evidence. The individuals most likely to report a parent with a disability to a child welfare agency are neighbors, family members, and medical personnel, frequently based on a belief that a parent with a disability cannot be a safe parent.<sup>3</sup> These reports start the family's dependency proceedings and often lead to termination of parental rights. Co-parents or extended family members sometimes move for custody solely on the basis of the custodial parent's disability.<sup>4</sup> Social workers, officers of the court, child welfare and health care workers, adoption and foster care personnel, and other professionals are not immune from these biases.<sup>5</sup> As a result, many parents with disabilities lose custody of their children, and prospective parents with disabilities are denied the right to foster or adopt children.

Many parents with disabilities are denied access to appropriate family-based services, supports, and other reasonable modifications that would provide them with a full and equal opportunity to keep or reunify with their child. This denial is often based on the presumption that, because of their disabilities, parents are unable to benefit from these services and supports. Parents with disabilities may need adaptive equipment to maintain, increase, or strengthen their parenting capabilities, such as a changing table modified to allow a wheelchair user to roll the wheelchair beneath the surface, or an alarm or prompting system to remind a parent with an intellectual disability to give a child medication.<sup>6</sup> They may also need accommodations and adapted services, such as an interpreter at a parenting class for a deaf parent, or more frequent and longer parenting sessions with some work inside the family's home for a parent with a developmental disability.<sup>7</sup>

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<sup>1</sup> Some states use the term "parental responsibility" or "parental decision-making responsibility" instead of the term "custody." This report will use the term "custody."

<sup>2</sup> See *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Smith v. Org. of Foster Families*, 431 U.S. 816 (1977); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

<sup>3</sup> Ella Callow, Kelly Buckland, and Shannon Jones, *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. ON C.L. & C.R. 9, 17 (Fall 2011).

<sup>4</sup> *Id.* at 18.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 19.

<sup>7</sup> *Id.*

Twenty-six years ago, Congress enacted the Americans with Disabilities Act (ADA) “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”<sup>8</sup> Congress recognized “that physical and mental disabilities in no way diminish a person’s right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination.”<sup>9</sup> Accordingly, Congress found that “the Nation’s proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency”<sup>10</sup> and that “the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous.”<sup>11</sup> Title II of the ADA prohibits a public entity from excluding persons, by reason of their disabilities, from participating in services, programs, or activities, and from denying them the benefits of these services, programs, or activities.<sup>12</sup>

## II. NEED FOR RESOLUTION

It is estimated that in the United States there are at least 4.1 million parents with disabilities who have minor children, representing approximately 6.2 percent of the parenting population.<sup>13</sup> Also, approximately 6.1 million children under the age of 18 (nearly one in 10) have a parent with a disability.<sup>14</sup> At least 19 percent of children in foster care have a parent with a disability.<sup>15</sup>

Many parents with disabilities encounter significant discrimination in child custody litigation occurring in family, probate, and dependency courts. Although no national study has identified the total number of parents with disabilities who have been involved in the child welfare system, the National Center on Parents with Disabilities and their Families, analyzing data from 19 states, found that 12.9 percent of children removed by child welfare had a caregiver with a disability.<sup>16</sup>

Research has consistently revealed significantly heightened levels of child welfare system involvement and loss of children for this parenting population. Multiple studies have revealed that 30 to 50 percent of parents with intellectual developmental disabilities lose custody of their children.<sup>17</sup> Also, one study found that mothers with serious mental illness

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<sup>8</sup> 42 U.S.C. § 12101(b)(1).

<sup>9</sup> *Id.* § 12101(a)(1).

<sup>10</sup> *Id.* § 12101(a)(7).

<sup>11</sup> *Id.* § 12101(a)(8).

<sup>12</sup> *Id.* § 12132.

<sup>13</sup> Stephen H. Kaye, *Population Estimates and Demographics of Parents with Disabilities in the United States* (Berkeley, CA: Through the Looking Glass, 2011).

<sup>14</sup> *Id.*

<sup>15</sup> Elizabeth Lightfoot and Sharyn DeZelar, *The Experiences and Outcomes of Children in Foster Care Who Were Removed Because of a Parental Disability*, 62 CHILD YOUTH SERV. REV. 22 (2016).

<sup>16</sup> Alison Gemmill, *Summary of the 2008 National Child Abuse and Neglect Data System (NCANDS) Child File: Victims of Maltreatment and Their Caregivers’ Disabilities* (Berkeley, CA: Through the Looking Glass, 2011).

<sup>17</sup> David McConnell et al., *Parental Cognitive Impairment and Child Maltreatment in Canada*, 35(8) CHILD ABUSE & NEGLECT 621-32 (Aug. 2011); Tim Booth, Wendy Booth, and David McConnell, *Care*

are three times as likely as those without serious mental illness to have had involvement with the child welfare system or to have children who had an out-of-home placement.<sup>18</sup> According to several studies, as many as 70 to 80 percent of parents with a psychiatric disability have lost custody.<sup>19</sup> The blind and deaf communities also report heightened rates of child removal and loss of parental rights.<sup>20</sup> In a study of more than 1,200 parents with predominantly physical disabilities, 12.6 percent reported experiencing discriminatory treatment related to custody litigation.<sup>21</sup> Persons with disabilities who seek to become foster or adoptive parents also encounter barriers based on biases and stereotypes about their parenting abilities.<sup>22</sup>

Removing a child from their parents, whether in the dependency or family law context, is devastating and traumatizing for all involved. In fact, a secure attachment to a sensitive, responsive, and reliable caregiver is the most significant issue for a child's development.<sup>23</sup> Researchers in the fields of psychology and cognitive science have documented the severe emotional and psychological damage experienced by infants and young children when they are separated from their primary caregivers.<sup>24</sup> They go through various emotional phases: first, protesting and doing everything possible to try to get back to the caregiver; next, despair due to the child's fears of not being reunited with the caregiver; and finally, detachment as the child gives up hope, with many children losing hope of ever having that security and love again.<sup>25</sup>

As to long-term effects, children who are separated from caregivers have an increased risk of conduct disturbances, disruptive behavioral problems, and attention and mood

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*Proceedings and Parents with Learning Difficulties: Comparative Prevalence and Outcomes in an English and Australian Court Sample*, 10(4) CHILD FAM. SOC. WORK 353-60 (Nov. 2005); Tim Booth and Wendy Booth, *Findings from a Court Study of Care Proceedings Involving Parents with Intellectual Disabilities*, 1(3-4) J. POL'Y PRACT. INTELLECT. DISABILITY 179-81 (Sept. 2004); Gwynnyth Llewellyn, David McConnell, and Luisa Ferronato, *Prevalence and Outcomes for Parents with Disabilities and Their Children in an Australian Court Sample*, 27(3) CHILD ABUSE & NEGLECT 235-51 (Mar. 2003); Brigit Mirfin-Veitch et al., *Supporting Parents with Intellectual Disabilities*, 6 NEW ZEALAND J. DISABILITY STUD. 60-74 (1999); Maurice Feldman, Bruce Sparks, and Laurie Case, *Effectiveness of Home-Based Early Intervention on the Language Development of Children of Mothers with Mental Retardation*, 14(5) RES. DEVELOPMENTAL DISABILITIES 387-408 (Sept.-Oct.1993).

<sup>18</sup> Jung Min Park, Phyllis Solomon, and David S. Mandel, *Involvement in the Child Welfare System Among Mothers with Serious Mental Illness*, 57(4) PSYCHIATRIC SERV. 493, 496 (2006).

<sup>19</sup> Loran B. Kundra and 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(2) PSYCHIATRIC REHAB. J. 144-45 (Fall 2009).

<sup>20</sup> Elizabeth Lightfoot, Katharine Hill, and Traci LaLiberte, *The Inclusion of Disability as a Condition for Termination of Parental Rights*, 34 CHILD ABUSE & NEGLECT 927, 928 (2010).

<sup>21</sup> Linda Toms Barker and Vida Maralani, *Final Report: Challenges and Strategies of Disabled Parents: Findings from a National Survey of Parents with Disabilities* (Berkeley, CA: Through the Looking Glass, 1997), available at

[http://www.lookingglass.org/store/product\\_info.php?manufacturers\\_id=10&products\\_id=33](http://www.lookingglass.org/store/product_info.php?manufacturers_id=10&products_id=33) .

<sup>22</sup> Elizabeth Bartholet, *What's Wrong with Adoption Law?* 4 INT'L J. OF CHILDREN'S RIGHTS 265-66 (1996), available at <http://www.law.harvard.edu/faculty/bartholet/pdfs/wrong.pdf>.

<sup>23</sup> See generally *Handbook of Attachment: Theory, Research, and Clinical Applications* (Jude Cassidy and Philip R. Shaver eds., 1999)

<sup>24</sup> *Id.*

<sup>25</sup> John Bowlby, *A Secure Base: Parent-Child Attachment and Healthy Human Development* 32 (1988).

disorders.<sup>26</sup> They are less able to cope with psychological trauma, self-regulate their behavior, handle social interactions, and build positive self-esteem and self-reliance.<sup>27</sup> Children who are placed in foster care are two times more likely to die of abuse, two to four times more likely to be sexually abused, and three times more likely to be physically abused than children not placed in foster care.<sup>28</sup>

In 2012, the National Council on Disability (NCD) published a comprehensive report, *Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children*, detailing the “persistent, systemic, and pervasive discrimination” against parents and prospective parents with disabilities within the child welfare and family law systems.<sup>29</sup> Four years later, NCD and the Christopher & Dana Reeve Foundation jointly published *Parenting with a Disability: Know Your Rights Toolkit* to protect both parents and prospective parents with disabilities from discrimination by providing them with information about their legal rights with respect to custody, visitation,<sup>30</sup> access,<sup>31</sup> adoption, family law, and the child welfare system.<sup>32</sup>

The release of *Rocking the Cradle* marked the first time the federal government focused attention on parents with disabilities and their children, and it set in motion a surge of activity by federal agencies to address issues facing these families. In January 2015, the U.S. Department of Health and Human Services (HHS) and the U.S. Department of Justice (DOJ) issued a joint letter of findings following an investigation of the Massachusetts Department of Children and Families’ (DCF) handling of a case involving a 21-year-old mother with an intellectual disability.<sup>33</sup>

The agencies found that DCF violated Title II and Section 504 by: (1) acting based on assumptions about the mother’s ability to care for her daughter, instead of conducting an

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<sup>26</sup> L. Alan Sroufe et al., *Relationships, Development, and Psychopathology*, in HANDBOOK OF DEVELOPMENTAL PSYCHOPATHOLOGY 75, 80 (Arnold J. Sameroff, Michael Lewis, and Suzanne M. Miller eds., 2d ed., Kluwer Academic/Plenum Publishers 2000).

<sup>27</sup> Douglas F. Goldsmith, David Oppenheim, and Hanine Wanlass, *Separation and Reunification: Using Attachment Theory and Research to Inform Decisions Affecting the Placements of Children in Foster Care*, 55 JUV. & FAM. CT. J. 1, 2 (2004).

<sup>28</sup> Kurt Mundorff, *Children as Chattel: Invoking the Thirteenth Amendment to Reform Child Welfare*, 1 CARDOZO PUB. L. POL’Y & ETHICS J. 131, 150 (2003).

<sup>29</sup> NATIONAL COUNCIL ON DISABILITY, *ROCKING THE CRADLE: ENSURING THE RIGHTS OF PARENTS WITH DISABILITIES AND THEIR CHILDREN 2* (Sept. 27, 2012), available at <http://www.ncd.gov/publications/2012/Sep272012>.

<sup>30</sup> Some states use the term “parenting time” instead of the term “visitation.” This report will use the term “visitation.” Parenting time issues include what the regular parenting time schedule should be for the children. This means day-to-day visitations schedules, pick-up and drop-off arrangements, as well as holiday and vacation schedules.

<sup>31</sup> Note that a right of access is much broader than a right of visitation. Rights of access may encompass the right to open communication with the child by means of Skype, Facetime, telephone, emails, letters, and physical visitation.

<sup>32</sup> NATIONAL COUNCIL ON DISABILITY & CHRISTOPHER & DANA REEVE FOUNDATION, *PARENTING WITH A DISABILITY: KNOW YOUR RIGHTS TOOLKIT* (May 5, 2016), available at [http://www.ncd.gov/sites/default/files/Documents/Final%20508\\_Parenting%20Toolkit\\_Plain%20Language\\_0.pdf](http://www.ncd.gov/sites/default/files/Documents/Final%20508_Parenting%20Toolkit_Plain%20Language_0.pdf).

<sup>33</sup> LETTER FROM U.S. DEP’T. OF JUSTICE, CIVIL RIGHTS DIVISION & U.S. DEP’T OF HEALTH & HUMAN SERV., OFFICE FOR CIVIL RIGHTS, TO INTERIM COMM’R ERIN DEVENNEY, MASS. DEP’T OF CHILDREN & FAMILIES (Jan. 29, 2015), available at [http://www.ada.gov/ma\\_docf\\_lof.pdf](http://www.ada.gov/ma_docf_lof.pdf).

individualized assessment of the mother's needs; (2) failing to provide the mother with supports and services in support of reunification; (3) refusing to recognize her continued engagement and progress; and (4) failing to develop and implement appropriate policies and practices concerning the agency's legal obligations vis-à-vis disability civil rights laws. Title II of the ADA<sup>34</sup> and Section 504 of the Rehabilitation Act<sup>35</sup> seek to ensure parents with disabilities are free from discrimination in the provision of services, programs, and activities of child welfare agencies. This includes a prohibition on making child custody decisions on the basis of generalized assumptions about disability, relegating parents with disabilities to lesser services and opportunities, imposing overprotective or unnecessarily restrictive rules, and failing to reasonably modify policies, practices, and procedures.<sup>36</sup>

Seven months later, in August 2015, HHS and DOJ issued joint technical assistance to state and local child welfare agencies and courts "to help ensure that parents and prospective parents with disabilities are not discriminatorily deprived of custody of their children, or denied the opportunity to adopt or serve as foster parents, because of stereotypes and unfounded assumptions about persons with disabilities, which we have seen in our complaints."<sup>37</sup> The assistance was developed in response to the rising number of disability discrimination complaints from parents with disabilities who have had their children taken away, their visitation and access rights restricted, or who have been denied reasonable accommodations, as well as from prospective parents with disabilities who have not been given equal opportunities to become foster or adoptive parents.

In December 2015, HHS' Office for Civil Rights (OCR) entered into a settlement agreement with the Georgia Department of Human Services' (DHS) Division of Family and Children Services (DFCS) following OCR's investigation of a complaint alleging that DFCS discriminated against the complainant by denying her application to become a Foster-Adopt parent based on her disabilities.<sup>38</sup> OCR determined that DHS violated Title II and Section 504 by: improperly using disability as a criterion to make placement decisions, instead of making an individualized assessment of the complainant's ability to be a Foster-Adopt parent; treating her differently on the basis of disability in determining whether she could adequately parent; affording her different opportunities on the basis of disability; failing to consider whether supportive services offered to other foster parents would have addressed the agency's concerns and allowed the complainant to participate in the program; and failing to make reasonable modifications to its policies, practices, and procedures. As part of the settlement, DHS and DFCS agreed, among other things,

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<sup>34</sup> 42 U.S.C. § 12131 *et seq.*

<sup>35</sup> 29 U.S.C. § 794.

<sup>36</sup> *See* 42 U.S.C. § 12101(a)(5).

<sup>37</sup> 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 (Aug. 10, 2015), *available at* [http://www.ada.gov/doj\\_hhs\\_ta/child\\_welfare\\_ta.pdf](http://www.ada.gov/doj_hhs_ta/child_welfare_ta.pdf).

<sup>38</sup> U.S. DEP'T OF HEALTH AND HUMAN SERV., OFFICE FOR CIVIL RIGHTS, ADMIN. FOR CHILDREN & FAMILIES & GEORGIA DEP'T OF HUMAN SERV., DIVISION OF FAMILY & CHILDREN SERV., SETTLEMENT AGREEMENT, OCR TRANSACTION NO. 09-102792 (Dec. 15, 2015), *available at* <http://www.hhs.gov/sites/default/files/dfcs-revised-settlement-agreement.pdf>.

to: designate a qualified staff person for each DFCS region to serve as the ADA/Section 504 Coordinator; submit to OCR for its review and approval a foster care policy that includes language regarding reasonable modifications for qualified individuals with disabilities who request a reasonable accommodation/modification; and submit to OCR standard operating procedures for documenting and assessing DFCS foster care and adoption program applicants and participants with disabilities.<sup>39</sup>

### III. ABA POLICY

The American Bar Association (ABA) has an extensive record of opposing discrimination in the context of family and child welfare law, wholly irrespective of an individual's parenting abilities and the well-being of the child. In August 1995, the ABA adopted policy supporting the enactment of legislation and implementation of public policy that would ensure that child custody or visitation is not denied or restricted on the basis of a parent's sexual orientation.<sup>40</sup> In February 1999, the ABA supported "the enactment of laws and implementation of public policy that provide that sexual orientation shall not be a bar to adoption when the adoption is determined to be in the best interest of the child."<sup>41</sup> The ABA adopted a policy in August 2003 supporting state laws and court decisions permitting second-parent adoptions by same-sex and other unmarried couples when such adoptions are in the best interest of the child.<sup>42</sup> In February 2006, the ABA "opposed legislation and policies that prohibit, limit, or restrict placement into foster care of any child on the basis of the sexual orientation of the proposed foster parent when such foster care placement is otherwise appropriate under the applicable law of the state, territory, or tribe."<sup>43</sup>

Addressing racial disparities in the child welfare system, the ABA adopted a policy in 2008 urging:

State, local, territorial and tribal child welfare agencies, dependency courts and judges, and children's and parents' advocates to help racial and ethnic minority families readily access needed services and to help ensure that removal of children from their homes is based on objective child safety criteria so that all families in the child welfare system are treated fairly and equitably.<sup>44</sup>

The proposed resolution would build upon this record by protecting parents and prospective parents from unlawful discrimination on the basis of disability in child welfare, family law, adoption, and foster care proceedings, and safeguarding the best

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<sup>39</sup> U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES OFFICE FOR CIVIL RIGHTS & STATE OF GEORGIA DEPARTMENT OF HUMAN SERVICES, SETTLEMENT AGREEMENT, OCR TRANSACTION NO. 09-102792 (Dec. 15, 2015), available at <http://www.hhs.gov/sites/default/files/dfcs-revised-settlement-agreement.pdf>.

<sup>40</sup> ABA Resolution 95A107.

<sup>41</sup> ABA Resolution 99M109(b), [http://www.americanbar.org/content/dam/aba/directories/policy/1999\\_my\\_109b.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/directories/policy/1999_my_109b.authcheckdam.pdf).

<sup>42</sup> ABA Resolution 03A112, [http://www.americanbar.org/content/dam/aba/directories/policy/2003\\_am\\_112.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/directories/policy/2003_am_112.authcheckdam.pdf).

<sup>43</sup> ABA Resolution 06M102, [http://www.americanbar.org/content/dam/aba/directories/policy/2006\\_my\\_102.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/directories/policy/2006_my_102.authcheckdam.pdf).

<sup>44</sup> ABA Resolution 08A107, [http://www.americanbar.org/content/dam/aba/directories/policy/2008\\_am\\_107.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/directories/policy/2008_am_107.authcheckdam.pdf).

interest of the child. Rather than relying on stereotypical assumptions about disabilities, this recommendation requires use of a nondiscriminatory, evidence-based standard to evaluate parental fitness and best interest of the child. Specifically, in order for a disability to constitute a reason for denial or restriction of custody, visitation or access, removal of the child, or termination of parental rights, there must be a showing—supported by clear and convincing evidence—that the disability is causally related to an alleged significant harm or an imminent risk of harm to the child that cannot be alleviated with appropriate services, supports, and other reasonable modifications.

A clear and convincing evidence standard is appropriate in dependency and family law cases. The standard of proof in cases involving individual rights, whether criminal or civil, “reflects the value society places on individual liberty.”<sup>45</sup> The U.S. Supreme Court has mandated a clear and convincing evidence standard when the individual interests at stake in a state proceeding are both “particularly important” and “more substantial than mere loss of money.”<sup>46</sup> As previously discussed, the fundamental liberty interest of parents to make decisions concerning the care, custody, and control of their children is protected by the Fourteenth Amendment. Removals of children, whether in the family law or dependency context, threaten parents with a significant deprivation of liberty, and have a devastating and traumatizing effect on parents and children.

The U.S. Supreme Court has ruled that the clear and convincing standard—not the preponderance of the evidence standard—applies in parental rights termination proceedings.<sup>47</sup> The state’s *parens patriae* interest favors preservation, not severance of natural familial bonds.<sup>48</sup> Because the possible injury to the parent is significantly greater than any possible harm to the state, the parent should not be asked to share equally with society the risk of error.<sup>49</sup>

## **IV. THE LAW AND ITS APPLICATION**

### **A. Child Welfare and Public Adoptions**

#### *(i) State Law*

Child welfare agencies are systems of “services designed to promote the well-being of children by ensuring safety, achieving permanency, and strengthening families to care for their children successfully.”<sup>50</sup> The states are primarily responsible for the system, despite federal funding, and cases in these systems are governed by state law. However, these laws must not run afoul of constitutional and federal laws. The freedom to parent without interference from the state is protected by the Fourteenth Amendment.<sup>51</sup> This right is

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<sup>45</sup> *Addington v. Texas*, 441 U.S. 418, 425 (1979).

<sup>46</sup> *Id.* at 424.

<sup>47</sup> *Santosky v. Kramer*, 455 U.S. 745 (1982).

<sup>48</sup> *Id.* at 766-67.

<sup>49</sup> *Id.* at 768.

<sup>50</sup> CHILD WELFARE INFORMATION GATEWAY, FACTSHEET: HOW THE CHILD WELFARE SYSTEM WORKS (2013), <http://www.childwelfare.gov/pubs/factsheets/cpswork.cfm>.

<sup>51</sup> *Santosky*, 455 U.S. at 753; *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Moore v. City of E. Cleveland*,



balanced against the right of the state to protect its children from harm.<sup>52</sup>

When a state child welfare agency believes that a child is abused or neglected, it may seek to take custody of the child. A dependency court can grant the request, remove the child, order the agency to find appropriate placements, provide reunification services, and ultimately terminate parental rights. In termination of parental rights proceedings, most states require a court to find: (1) by preponderance of the evidence, that reunification efforts were reasonable; (2) by clear and convincing evidence, that the parent is unfit;<sup>53</sup> and (3) that severing the parent-child relationship is in the child's best interest. Each state is responsible for establishing its own statutory grounds for termination, and these vary by state. Remarkably, roughly two-thirds of dependency statutes (35 states and the District of Columbia) include disability—mostly intellectual/developmental and psychiatric—as a factor for terminating parental rights if the state perceives the disability renders the parent unable to care for the child.<sup>54</sup>

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431 U.S. 494, 499 (1977).

<sup>52</sup> *Reno v. Flores*, 507 U.S. 292, 303 (1993); *Santosky*, 455 U.S. at 766 (observing that the state has an “urgent interest in the welfare of the child”) (quoting *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 27 (1981) (internal quotations omitted)); *Prince v. Mass.*, 321 U.S. 158, 166 (1944).

<sup>53</sup> *Santosky*, 455 U.S. 745.

<sup>54</sup> See ALA. CODE 1975 § 12-15-319(a)(2) (2016) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability); ALASKA STAT. ANN. § 47.10.011(11) (2016) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability); ARK. CODE ANN. § 9-27-341(b)(3)(B)(vii)(c) (2015) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability); ARIZ. REV. STAT. § 8-533 (b)(3) (2014); CAL. WELF. & INST. CODE § 300(b)(1) (2016) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability); COLO. REV. STAT. § 19-3-604(b)(I) (2012) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability); 13 DEL. CODE § 1103(a)(3) (2009) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability); D.C. CODE § 16-2353(b)(2) (2016) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability & Physical Disability); GA. CODE ANN. §§ 15-11-310, 15-11-26(9) (2014) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability & Physical Disability); HAW. REV. STAT. § 571-61(b)(1)(F) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability); 750 ILL. COMP. STAT. ANN. 50/1(D)(p) (2016) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability); IOWA CODE ANN. § 232.116(1)(k)2, (2)(a) (2016) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability); KAN. STAT. ANN. ART. 22, § 38-2269(b)(1) (2016) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability & Physical Disability); KY. REV. STAT. § 625.090(3)(A) (2012) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability); MD. CODE ANN., FAM. LAW § 5-323(d)(2)(iii) (2009) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability & Physical Disability); MASS. GEN. LAWS ANN. 210 § 3(c)(xii) (2012) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability); MISS. CODE ANN. § 93-15-121(a), (b) (2016) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability & Physical Disability); MO. REV. STAT. § 211.447(5)(2)(A), (10) (2014) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability); MONT. CODE ANN. § 41-3-609(2)(a) (2015) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability); NEB. REV. STAT. § 43-292(5) (2016) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability); NEV. REV. STAT. ANN. § 128.106(1)(a) (2015) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability); N.H. REV. STAT. ANN. § 170-C:5(IV) (2016) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability); N.J. STAT. ANN. §§ 9:2-19, 9:2-13(e) (2013) (Intellectual/Developmental Disability); N.M. STAT. ANN. §§ 32A-4-28(B)(2), 32A-4-2(F)(4) (2016) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability & Physical Disability); N.Y. SOC. SERV. § 384-b 4(c) (2016) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability); N.C. GEN. STAT. § 7B-1111(A)(6) (2013) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability); N.D. CENT. CODE § 27-20-44(1)(b) (2016) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability & Physical Disability); OHIO. REV. STAT. ANN. § 2151.414(E)(2) (2016) (Mental Illness/Emotional Disability

Child welfare statutes in seven states<sup>55</sup> allow child welfare agencies to bypass reasonable efforts to provide family support services to parents with disabilities—designed to prevent out-of-home placement of the child or to enable the child’s safe return to the home (also called reunification services). This occurs when the parent’s mental illness, mental deficiency, mental or emotional condition, intellectual disability, or developmental disability renders him or her incapable of utilizing the services, or of caring for the child without placing him or her at substantial risk of physical or emotional injury, even if appropriate and available services were provided for twelve months.<sup>56</sup>

(ii) *Federal Law — ADA & Section 504*

Title II of the ADA provides that “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 such entity.”<sup>57</sup> Title II applies to the services, programs, and activities of all state and local governments, including child welfare agencies and court systems.<sup>58</sup> The “services, programs, and activities” include, but are not limited to, investigations, witness interviews, assessments, provision of in-home services, removal of children from their homes, case planning and service planning, visitation, guardianship, adoption, foster care, reunification services, and family court proceedings.<sup>59</sup> “Services, programs, and activities” also extend to child welfare and custody hearings, as well as to proceedings to terminate parental rights.<sup>60</sup> Private entities involved in the child welfare system may also be independently covered by Title III of the ADA, which prohibits any public accommodation from discriminating against people with disabilities by denying access to

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& Intellectual/Developmental Disability & Physical Disability); OKLA. STAT. ANN. § 1-4-904(B)(13) (2016) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability & Physical Disability); OR. REV. STAT. § 419B.504(1) (2016) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability); S.C. CODE ANN. § 63-7-2570(6) (2014) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability & Physical Disability); TENN. CODE ANN. § 36-1-113(g)(8)(A) (2016) (Intellectual/Developmental Disability); TEX. FAM. CODE § 161.003(a)(1) (2015) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability); VA. ANN. CODE § 16.1-283(B)(2)(a) (2012) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability); WASH. REV. CODE § 13.34.180(1)(e)(ii) (2013) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability); WIS. STAT. ANN. § 48.415(3) (2016) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability). *See also* ELIZABETH LIGHTFOOT, SHARYN DEZELAR, AND ANDREA BRUBAKER, THE INCLUSION OF PARENTAL DISABILITY IN STATE TERMINATION OF PARENTAL RIGHTS STATUTES: A STATE OF THE STATES ( UNIVERSITY OF MINNESOTA, SCHOOL OF SOCIAL WORK, CENTER FOR ADVANCED STUDIES IN CHILD WELFARE, 2015) <http://cascw.umn.edu/portfolio-items/disability-map/> (providing a state-by-state analysis of state dependency statutes and the inclusion of parental disability).

<sup>55</sup> ALA. CODE § 12-15-312(c)(1)(e) (2016); ALASKA STAT. § 47.10.086(c)(5) (2015); ARIZ. REV. STAT. § 8-846(D)(1)(b) (2016); CAL. WELF. & INST. CODE § 361.5(a), (b)(2) (2016); KY. REV. STAT. § 610.127(6) (2016); S.C. CODE ANN. § 63-7-1640(C)(7) (2016); UTAH CODE ANN. § 78A-6-312(20), (21)(a) (2016).

<sup>56</sup> Susan Stefan, *Accommodating Families: Using the Americans with Disabilities Act to Keep Families Together*, 2 ST. LOUIS U. J. HEALTH L. & POL’Y 135, 168 (2008).

<sup>57</sup> 42 U.S.C. § 12132.

<sup>58</sup> *Id.* § 12131(1)(A), (B).

<sup>59</sup> U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES & U.S. DEPARTMENT OF JUSTICE, *supra* note 37.

<sup>60</sup> *Id.*

goods and services.<sup>61</sup> “Adoption agency” is included in the list of public accommodations.<sup>62</sup>

Section 504 of the Rehabilitation Act provides that “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 any entity that receives Federal financial assistance, or be subjected to discrimination by such entity.”<sup>63</sup> Federal financial assistance includes assistance provided to child welfare agencies and the courts.<sup>64</sup>

Individualized treatment and full and equal opportunity are fundamental to both Title II and Section 504. Persons with disabilities must be treated on a case-by-case basis consistent with facts and objective evidence, and not on the basis of generalizations or stereotypes.<sup>65</sup> In their joint technical assistance, HHS and DOJ state that prohibited treatment would include removing a child from a parent with a disability based on the stereotypical belief—unsupported by an individual assessment—that people with disabilities are incapable of safely parenting their children, and denying a person with a disability the opportunity to become a foster or adoptive parent based on stereotypical beliefs about how the disability may affect the individual’s ability to parent.<sup>66</sup>

- Reasonable Modification

Under Title II and Section 504, child welfare agencies and courts must make reasonable modifications to policies, practices, and procedures to accommodate the individual needs of a qualified person with a disability, unless doing so would result in a fundamental alteration to the nature of the service, program, or activity.<sup>67</sup> For instance, a child welfare agency that holds a parenting skills class once a week may need to modify the training to allow more frequent, longer, or more meaningful trainings for a parent who requires individualized assistance in learning new skills because of his or her disability.<sup>68</sup>

- Auxiliary Aids & Services

Both child welfare agencies and courts are required to provide appropriate auxiliary aids and services, such as qualified sign language interpreters, assistive listening devices and

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<sup>61</sup> 42 U.S.C. §§ 12181-189.

<sup>62</sup> *Id.* § 12181(7)(K).

<sup>63</sup> 29 U.S.C. § 794(a).

<sup>64</sup> *See, e.g.*, 28 C.F.R. § 42.105; 45 C.F.R. § 84.5.

<sup>65</sup> *See, e.g.*, 28 C.F.R. § 35.130(b); *see also* 28 C.F.R. pt. 35, App. B (explaining in the 1991 Section-by-Section guidance to the Title II regulation that, “[t]aken together, the provisions [in 28 C.F.R. § 35.130(b)] are intended to prohibit exclusion . . . of individuals with disabilities and the denial of equal opportunities enjoyed by others, based on, among other things, presumptions, patronizing attitudes, fears, and stereotypes about individuals with disabilities. Consistent with these standards, public entities are required to ensure that their actions are based on facts applicable to individuals and not presumptions as to what a class of individuals with disabilities can or cannot do.”); *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 285 (1987).

<sup>66</sup> U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES & U.S. DEPARTMENT OF JUSTICE, *supra* note 37.

<sup>67</sup> *See* 45 C.F.R. §§ 84.12(a), 84.22(a) & (f), 84.52(d); 28 C.F.R. § 35.130(b)(7).

<sup>68</sup> U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES & U.S. DEPARTMENT OF JUSTICE, *supra* note 37.

systems, captioning, and large print or Braille materials, where necessary to ensure that individuals with disabilities can communicate as effectively as those without disabilities.<sup>69</sup> For example, a qualified sign language interpreter may be necessary for home visits or assessments, while real-time captioning may be appropriate for family team meetings or in court.<sup>70</sup> Child welfare agencies and courts must give primary consideration to the auxiliary aid or service requested by the person.<sup>71</sup> If provision of the requested aid or service would result in a fundamental alteration in the nature of the service, program, or activity or in undue financial and administrative burdens, aids or services that do not result in any alteration or burdens must be provided to the maximum extent possible.<sup>72</sup>

- Equal Opportunity

Persons with disabilities must be afforded an opportunity to benefit from and participate in child welfare programs, services, and activities that is equal to the opportunity afforded to individuals without disabilities.<sup>73</sup> This may require providing auxiliary aids and services or making reasonable modifications to policies, practices, and procedures in child welfare proceedings. Child welfare agencies may be required under Title II and Section 504 to arrange for available services from outside sources, such as social service agencies and disability organizations, as a reasonable modification so long as doing so would not constitute a fundamental alteration.<sup>74</sup> In situations where providing the same services and resources to an individual with a disability that are provided to individuals without disabilities does not provide an equal opportunity to the individual with a disability, Title II and Section 504 may require agencies to provide additional, individually tailored services.<sup>75</sup> For instance, in parental trainings agencies may need to incorporate visual modeling or other individualized techniques for persons with disabilities.<sup>76</sup>

- Direct Threat to Safety & Health

Child welfare agencies have an obligation to ensure the health and safety of children. Neither the ADA nor Section 504 cover individuals with disabilities who pose a direct threat to the health or safety of others.<sup>77</sup> Direct threat means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services.<sup>78</sup> In some cases, a parent or prospective parent with a disability may pose a significant risk to the health or safety of the child.<sup>79</sup> In making this determination, child welfare agencies and courts

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<sup>69</sup> 28 C.F.R. § 35.160; 45 C.F.R. § 84.52(d).

<sup>70</sup> U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES & U.S. DEPARTMENT OF JUSTICE, *supra* note 37.

<sup>71</sup> 28 C.F.R. § 35.160(b)(2).

<sup>72</sup> *Id.*

<sup>73</sup> See 28 C.F.R. § 35.130(b)(1)(ii)–(iv), (vii), (b)(7); 45 C.F.R. § 84.4(b)(1)(ii)–(iii); *see also* 28 C.F.R. § 42.503(b)(1)(ii), (iii).

<sup>74</sup> U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES & U.S. DEPARTMENT OF JUSTICE, *supra* note 37.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> 28 C.F.R. § 35.139; *see School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987).

<sup>78</sup> *Id.*

<sup>79</sup> 28 C.F.R. § 35.139(a)-(b); *Arline*, 480 U.S. at 287.

must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.<sup>80</sup>

Despite these federal protections, state dependency courts have overwhelmingly resisted ADA defenses in termination of parental rights proceedings.<sup>81</sup> Hence, “[t]he case law concerning the ADA and parental rights has overwhelmingly favored states and rejected the claims of parents with disabilities.<sup>82</sup> Some courts have refused to apply the ADA, based on the finding that termination of parental rights proceedings are not a “service, program, or activity” within the meaning of the ADA.<sup>83</sup> Other courts have found that the ADA does not apply in these cases because the court’s jurisdiction is limited to interpreting the state child welfare law (i.e., determining the best interest of the child or reasonable efforts) rather than conducting “an open-ended inquiry into how the parents might respond to alternative services and why those services have not been provided.”<sup>84</sup> Lastly, several courts have determined that the ADA provides no defense to termination of parental rights proceedings because Title II requires only affirmative action on the part of the injured party rather than defenses against a legal action by a public entity.<sup>85</sup>

In October 2006, a certiorari petition was filed in the U.S. Supreme Court seeking review of a Rhode Island court’s decision that a termination of parental rights proceeding “does not constitute the sort of service, program or activity that would be governed by the dictates of the ADA.”<sup>86</sup> Unfortunately, the petition was denied, and to date the U.S. Supreme Court has declined to rule on the applications of the ADA in these cases.

However, ADA claims have been successful when rooted in the parent’s claim of inadequate services by a child welfare agency.<sup>87</sup> An agency that does not make reasonable modifications for a parent with a disability fails to fulfill its duty to make

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<sup>80</sup> 28 C.F.R. § 35.139(b); *Arline*, 273 U.S. at 288.

<sup>81</sup> See *ROCKING THE CRADLE*, *supra* note 29, at 93-94 (comprehensively reviewing court decisions).

<sup>82</sup> *Id.* at 93.

<sup>83</sup> See, e.g., *In re Adoption of Gregory*, 747 N.E.2d 120, 125 (Mass. 2001); *In re Terry*, No. 214617, 2000 WL 244425, at \*5 (Mich. Ct. App. Feb. 29, 2000); *In re Antony B.*, 54 A.2d 893, 899 (Conn. App. Ct. 1999); *In re B.K.F.*, 704 So. 2d 314, 317 (La. Ct. App. 1997); *In re B.S.*, 693 A.2d 716, 720 (Vt. 1997).

<sup>84</sup> *In re B.S.*, 693 A.2d at 721. See also *In re Torrance P.*, 522 N.W.2d 243, 244-45 (Wis. Ct. App. 1994) (duty to make diligent effort to provide court-ordered services is defined by dependency statute and not ADA; ADA does not increase those responsibilities or dictate how they must be discharged); *In re Maryia R.*, 1997 WL 178082, at \*5 (Conn. Super. Ct. Apr. 1, 1997) (although father’s developmental disability must be considered in determining reasonableness of county’s efforts, neither his disability nor ADA changes inquiry or burden of proof).

<sup>85</sup> See, e.g., *In re Doe*, 60 P.3d 285, 293 (Haw. 2002); *In re Rodriguez*, No. 98CA007073, 1999 WL 568115, at \*8 (Ohio Ct. App. Aug. 4, 1999).

<sup>86</sup> *Irving N. v. R.I. Dep’t of Children, Youth & Families*, 900 A.2d 1202 (R.I. 2006), *cert. denied*, 127 S. Ct. 1372 (2007).

<sup>87</sup> Joshua B. Kay, “Representing Parents with Disabilities, in *Representing Parents in Child Welfare Cases: Advice and Guidance for Family Defenders* 259 (Martin Guggenheim and Vivek S. Sankaran eds., Chicago: ABA Publishing, 2015). See 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, 1473-74 (1995).

reasonable efforts towards reunification.<sup>88</sup> Such a failure delays initiation of termination of parental rights proceedings and allows the parent additional time to complete the case plan.<sup>89</sup> For instance, the Michigan Court of Appeals vacated a circuit court’s order terminating the parental rights of a mother with cognitive disabilities to her two minor children, and remanded for reconsideration following the provision of necessary accommodated services.<sup>90</sup> The Department of Health and Human Services’ case plan did not include reasonable accommodations to provide the mother with a meaningful opportunity to benefit. Absent accommodations, the court found that the child welfare agency failed in its statutory duty to make reasonable efforts to reunify the family unit.

(iii) *Adoption and Safe Families Act (ASFA)*

Pursuant to the Adoption and Safe Families Act of 1997 (ASFA),<sup>91</sup> states must provide preventive services before terminating parental rights.<sup>92</sup> When designing a case plan, caseworkers should adapt a “functional” perspective to identify the parent’s skills and deficits and to tailor services.<sup>93</sup> The agency must make reasonable efforts to provide high quality, individualized case services that fit the parent’s needs and abilities.<sup>94</sup> There are limited circumstances where an agency is not required to make reasonable efforts, including “aggravating circumstances” such as chronic abuse, sexual abuse, or causing serious bodily injury to the child, or if the parent has committed murder, voluntary manslaughter, or felony assault of a sibling of the child, or if a parent’s rights to a sibling have been terminated.<sup>95</sup> The proposed resolution is consistent with the ASFA in that it recognizes and does not limit the right of the state to protect children from neglect and abuse.

## **B. Custody and Visitation/Access**

When parents are unable to reach a custody or visitation agreement, family law courts are left to decide. Family law cases are governed by individual state statutes relying on the “best interest of the child” standard. The ultimate goal is to meet the child’s physical, emotional, intellectual, and basic health and safety needs. Most states have developed their own factors to determine which custody arrangement is in the best interest of the child. Typical factors include: (1) which parent best meets the physical, emotional, and intellectual needs of the child and will preserve his or her health and safety; (2) what the child wants (if the child is mature and has a preference); (3) who has been the primary caretaker; (4) which parent is more likely to promote the child’s contact or relationship with the other parent; (5) whether there is any history of domestic violence or substance abuse; (6) whether there is evidence that either parent has lied to the court; and (7) what

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 263.

<sup>90</sup> *In re Hicks/Brown*, No. 328870, 2016 WL 1650104 (Mich. Ct. App. Apr. 26, 2016).

<sup>91</sup> PUB. L. NO. 105–89, 111 STAT. 2115 (1997).

<sup>92</sup> 42 U.S.C. § 671(a)(15)(A) & (B).

<sup>93</sup> *Kay*, *supra* note 87, at 256; 45 C.F.R. § 1355.34(c)(5)(vi).

<sup>94</sup> *Id.*

<sup>95</sup> 42 U.S.C. § 671(a)(15)(D)(i)–(ii).

the duration and quality of the current custody arrangement is.<sup>96</sup> Particularly noteworthy, all states allow—and a number mandate—consideration of a parent’s physical and mental health.

To date, only a handful of state statutes expressly prohibit denial of custody or visitation solely on the basis of a parent’s disability. For example, Idaho law provides that where the court finds a parent’s disability to be relevant to a custody award, the court must “make specific findings concerning the disability and what effect, if any, the court finds the disability has on the best interest of the child.”<sup>97</sup> Particularly noteworthy, the court must advise a parent with a disability that he or she has “the right to provide evidence and information regarding the manner in which the use of adaptive equipment or supportive services will enable the parent to carry out the responsibilities of parenting the child.” Further, parental fitness evaluations must “take into account the use of adaptive equipment and supportive services for parents with disabilities” and “be conducted by, or with the assistance of, a person who has expertise concerning such equipment and services.”<sup>98</sup>

Maryland law provides that in custody or visitation proceedings, a party’s disability is relevant only to the extent that the court finds, based on evidence in the record, that the disability affects the best interest of the child.<sup>99</sup> The party alleging that the disability affects the best interest of the child bears the burden of proof.<sup>100</sup> If the burden of proof is met, the party who has a disability has the opportunity to prove that supportive parenting services would prevent a finding that the disability affects the best interest of the child.<sup>101</sup> If a court finds that the party’s disability affects the best interest of the child and therefore denies or limits custody or visitation, it must specifically state in writing the basis for the finding<sup>102</sup> and why the provision of supportive parenting services is not a reasonable accommodation to prevent the finding.<sup>103</sup>

Oregon law provides that the court may not consider a party’s disability in determining custody unless it finds that behaviors or limitations related to the party’s disability are endangering or will likely endanger the health, safety, or welfare of the child.<sup>104</sup> In Tennessee, “[t]he disability of a parent seeking custody shall not create a presumption for or against awarding custody to such a party but may be a factor to be considered by the court.”<sup>105</sup>

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<sup>96</sup> See, e.g., CAL. FAM. CODE § 3011 (2013); CONN. GEN. STAT. ANN. § 46b *et seq.* (2016); FLA. STAT. ANN. § 61.13(2)(c) (2016); MINN. STAT. § 518.17 (2015); N.Y. DOM. REL. LAW § 70 (2016) (as interpreted in *Miller v. Pipia*, 297 A.D.2d 362, 364-65 (N.Y. App. Div. 2002) and *Eschbach v. Eschbach*, 436 N.E.2d 1260 (N.Y. 1982)); OKLA. STAT. tit. 43, § 112 (2016); TEX. FAM. CODE § 153.002 (2015).

<sup>97</sup> IDAHO STAT. § 32-717(5) (2016).

<sup>98</sup> *Id.* § 32-717(2).

<sup>99</sup> MD. CODE ANN., FAM. LAW § 9-107(b)(1) (2016).

<sup>100</sup> *Id.* § 9-107(b)(2).

<sup>101</sup> *Id.* § 9-107(b)(3).

<sup>102</sup> *Id.* § 9-107(b)(4)(i).

<sup>103</sup> *Id.* § 9-107(b)(4)(ii).

<sup>104</sup> OR. REV. STAT. § 107.137(3) (2016).

<sup>105</sup> TENN. CODE ANN. § 36-106(e).

## V. CONCLUSION

The proposed recommendation would build upon the handful of state laws and the federal policies that shift the focus from a parent or prospective parent's disability to a parent's behavior or conduct. It would do so by requiring a showing, by clear and convincing evidence, of a causal nexus between the disability and a harm or an imminent risk of harm to the child that cannot be alleviated with appropriate services and supports and other reasonable modifications. This would raise consciousness to and remedy the unspoken presumption that a parent with a disability is not a fit parent, or has the burden to prove fitness that parents without disabilities are not required to meet.

Twenty-six years after the enactment of the ADA, it is time to ensure that individuals with disabilities and their children have a right to live free from discriminatory state actions that can result in traumatic separations of parents and their children. The ADA generation, who have grown up assuming a right to live in the world,<sup>106</sup> have new expectations: that they will be able to exercise their fundamental right to make decisions concerning the care, custody, and control of their children subject to the same legal limitations and interventions on the same grounds as all other American citizens. While nothing in this proposal will limit the right of the state to protect abused or neglected children, it will help ensure that decision-making is driven by child-centered devotion to their well-being and the law, not the disability biases or assumptions of another era.

Respectfully submitted,

Robert T. Gonzales, Chair  
Commission on Disability Rights  
February 2017

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<sup>106</sup> Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CAL. L. REV. 841 (1966).



## **GENERAL INFORMATION FORM**

Submitting Entity: Commission on Disability Rights

Submitted By: Robert T. Gonzales, Chair, Commission on Disability Rights

1. **Summary of Resolution(s).**

This resolution urges federal, state, territorial, and tribal governments to enact legislation and implement public policy providing that custody, visitation, and access shall not be denied or restricted, nor shall a child be removed or parental rights terminated, based on a parent's disability, absent a showing—supported by clear and convincing evidence—that the disability is causally related to a harm or an imminent risk of harm to the child that cannot be alleviated with appropriate services, supports, and other reasonable modifications. This resolution further urges all federal, state, territorial, and tribal governments to enact legislation and implement public policy providing that a prospective parent's disability shall not be a bar to adoption or foster care when the adoption or foster care placement is determined to be in the best interest of the child.

2. **Approval by Submitting Entity.**

The Commission on Disability Rights approved the resolution by vote on November 15, 2016.

3. **Has this or a similar resolution been submitted to the House or Board previously?**

Yes: ABA Resolution 95A107; ABA Resolution 99M109(b); ABA Resolution 03A112; ABA Resolution 06M102; ABA Resolution 08A107.

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?**

In August 1995, the ABA adopted policy supporting the enactment of legislation and implementation of public policy that would ensure that child custody or visitation is not denied or restricted on the basis of a parent's sexual orientation. (ABA Resolution 95A107). In February 1999, the ABA supported "the enactment of laws and implementation of public policy that provide that sexual orientation shall not be a bar to adoption when the adoption is determined to be in the best interest of the child." (ABA Resolution 99M109(b)). The ABA adopted a policy in August 2003 supporting state laws and court decisions permitting second-parent adoptions by same-sex and other unmarried couples when such adoptions are in the best interest of the child. (ABA Resolution 03A112). In February 2006, the ABA "opposed legislation and policies that prohibit, limit, or restrict placement into foster care of any child on the basis of the sexual orientation of the proposed foster parent when such foster care placement is otherwise appropriate under the applicable law of the state, territory, or tribe." (ABA Resolution 06M102). Finally, addressing racial disparities in the child

welfare system, the ABA adopted a policy in 2008 urging:

State, local, territorial and tribal child welfare agencies, dependency courts and judges, and children's and parents' advocates to help racial and ethnic minority families readily access needed services and to help ensure that removal of children from their homes is based on objective child safety criteria so that all families in the child welfare system are treated fairly and equitably. (ABA Resolution 08A107).

Although these policies would not be affected by adoption of this resolution, the ABA's policies of non-discrimination in family law and child welfare cases based on sexual orientation, race, and ethnicity would be expanded to include disability.

5. If this is a late report, what urgency exists which requires action at this meeting of the House?

N/A

6. Status of Legislation. (If applicable)

Only a handful of state statutes, including Idaho, Maryland, Oregon, and Tennessee, expressly prohibit denial of custody or visitation solely on the basis of a parent's disability. There is currently no pending legislation.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

Adoption of this policy will enable the Association to urge federal, state, territorial, and tribal governments to enact legislation and implement public policy that prohibits discrimination against parents and prospective parents in family law and child welfare cases based solely on their disability status.

8. Cost to the Association. (Both direct and indirect costs)

None

9. Disclosure of Interest. (If applicable)

N/A

10. Referrals.

Section of Family Law  
Section of Civil Rights and Social Justice  
Judicial Division  
Solo, Small Firm and General Practice Division  
Young Lawyers Division  
Commission on Youth at Risk  
Center on Children and the Law

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

Commission on Disability Rights

Amy L. Allbright  
1050 Connecticut Avenue, NW Suite 400  
Washington, DC 20036  
(202) 662-1575  
[amy.allbright@americanbar.org](mailto:amy.allbright@americanbar.org)

12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

Commission on Disability Rights:  
Robert T. Gonzales  
Law Offices of Hylton & Gonzales  
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## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

This resolution urges federal, state, territorial, and tribal governments to enact legislation and implement public policy providing that custody, visitation, and access shall not be denied or restricted, nor shall a child be removed or parental rights terminated, based on a parent's disability, absent a showing—supported by clear and convincing evidence—that the disability is causally related to a harm or an imminent risk of harm to the child that cannot be alleviated with appropriate services, supports, and other reasonable modifications. This resolution further urges all federal, state, territorial, and tribal governments to enact legislation and implement public policy providing that a prospective parent's disability shall not be a bar to adoption or foster care when the adoption or foster care placement is determined to be in the best interest of the child.

### 2. Summary of the Issue that the Resolution Addresses

This resolution responds to the rising number of disability discrimination complaints from parents with disabilities who have had their children taken away, their visitation and access rights restricted, or have been denied reasonable accommodations, as well as from prospective parents with disabilities who have not been given equal opportunities to become foster or adoptive parents.

### 3. Please Explain How the Proposed Policy Position will address the issue

This resolution will address the issue by calling on governments to enact legislation and implement public policy that protects parents and prospective parents with disabilities from discrimination and requires objective, evidence-based determinations in family law and child welfare cases.

### 4. Summary of Minority Views

At this time, we are unaware of any opposition.