PLI PRACTISING LAW INSTITUTE SM

26th Annual Children's Law Institute

July 21, 2023

Co-Chairs:

Christine Bruno
Litigation and Training Supervisor
Center for Family Representation
New York City

Kelley Burns
Director of Training, Legal Support and Training Unit, Family Court Legal Services
NYC Administration for Children's Services
New York City

Melissa Friedman
Director of Child Welfare Training
The Legal Aid Society, Juvenile Rights Practice
New York City

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CONTENTS:

8. American Public Human Services Association, ICPC Regulations
Submitted by:
Melissa Friedman
The Legal Aid Society, Juvenile Rights Practice
Katherine Tedeschi
NYC Administration for Children's Services

9. Americans with Disabilities Act, 42 U.S.C.A. §§12131-12134 (2009)
Submitted by:
Katherine Aquino
Angela Medina-Braddox
NYC Administration for Children's Services
Sheneka Mckenzie-Sage
The Legal Aid Society, Juvenile Rights Practice
Sarah H. Lorr
Brooklyn Law School

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10. Unaccommodated: How the ADA Fails Parents (March 2022)
Sarah H. Lorr
Brooklyn Law School

11. U.S. Dep't. of Justice and U.S. Dep't. of Health and Human Services, Investigation of the Massachusetts Department of Children and Families by the United States Departments of Justice and Health and Human Services Pursuant to the Americans with Disabilities Act and the Rehabilitation Act (DJ No. 204-36-216 and HHS No. 14-182176) (Jan. 29, 2015)
Submitted by:
Katherine Aquino
Angela Medina-Braddox
NYC Administration for Children's Services
Sheneka Mckenzie-Sage
The Legal Aid Society, Juvenile Rights Practice
Sarah H. Lorr
Brooklyn Law School

12. U.S. Dep't. of Health and Human Services and U.S. Dep't. of Justice, 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 (2015)
Submitted by:
Katherine Aquino
Angela Medina-Braddox
NYC Administration for Children's Services
Sheneka Mckenzie-Sage
The Legal Aid Society, Juvenile Rights Practice
Sarah H. Lorr
Brooklyn Law School

13. Working with Clients with Disabilities: Selected Cases

a. In re Xavier Blade Lee Billy Joe S., 187 A.D.3d 659 (N.Y. App. Div. 2020)
b. In re Jose F., 70 Misc.3d 1211(A) (N.Y. Fam. Ct. 2020)
c. In re Lacee L., 32 N.Y.3d 928 (N.Y. 2018)
d. In re Hicks, 500 Mich. 79 (Mich. 2017)
e. In re La'Asia Lanae S., 803 N.Y.S.2d 568 (N.Y. App. Div. 2005)

Submitted by:
Katherine Aquino
Angela Medina-Braddox
NYC Administration for Children's Services
Sheneka Mckenzie-Sage
The Legal Aid Society
Sarah H. Lorr
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INDEX

Director, Programs: Krista M. Gundersen

26th Annual Children's Law Institute 2023
July 21, 2023
New York and Live Webcast, www.pli.edu

AGENDA

Morning Session:

9:00
Opening Remarks
Christine Bruno, Kelley Burns, Melissa Friedman

9:15
Legal Updates in Child Welfare and Juvenile Justice Law
This session will review recent case law relevant to Family Court practitioners. After completing this session, participants will be able to:

- Summarize recent case law in neglect/abuse, custody, and termination of parental rights cases
- Understand important legislative, regulatory, and administrative developments impacting juvenile delinquency proceedings

Vineet Chawla, Randy A. Hertz, Jennifer Sadaka

10:30
Networking Break

10:45
The Parental Equity Act: New Laws for Fathers in Termination of Parental Rights and Adoption Cases in Family Court
This session will address recent changes in the law governing the rights of fathers whose children have been placed in foster care with regard to potential termination of parental rights and adoption proceedings. After completing this session, participants will be able to:

- Understand the changes made to the Domestic Relations and Social Services Law by the Parental Equity Act.
- Identify those fathers whose consent may be required for a child's adoption, i.e. "consent fathers."
- Counsel parents and foster care agencies about the steps they should take prior to the filing of a termination of parental rights petition.
- Prepare for and litigate termination of parental rights cases using legally sound strategies incorporating the new law.

Lindsey Ferioli, Hon. Robert Hettleman, Amy Mulzer

12:00
Lunch

Afternoon Session:

1:00
The ICPC: Understanding How It works and Relevant Legal Updates
This session will explain the requirements of the Interstate Compact on the Placement of Children and discuss its practical application. After completing this session, participants will be able to:

- Learn the different elements of the ICPC
- Distinguish between articles and regulations
- Differentiate what regulation applies in different scenarios
- Understand the ICPC process
- Explain recent legal updates, including the recent Court of Appeals case *Matter of D.L.*
- Understand the ongoing New York/New Jersey border agreement

Melissa Friedman, Katherine Tedeschi

2:30
Networking Break

2:45
Working with Clients with Disabilities: Inclusive Practice Tips
This session will discuss how to appropriately and effectively represent clients with disabilities in Family Court. After completing this session, participants will be able to:

- Identify child or adult clients with known or suspected Intellectual or Developmental Disabilities (I/DD)
- Identify and overcome barriers to working with clients with I/DD, including mitigating against communication barriers and environmental barriers (e.g. stigma)
- Apply a strength-based focus to serving child and adult clients with known/suspected I/DD
- Understand the role of the Americans with Disabilities Act (ADA) in child protective proceedings and be prepared to advocate for their respective clients in these proceedings including:
- Understanding how ACS is providing services specifically tailored to the needs of parents with known/suspected intellectual developmental disabilities

- Advocating (e.g. by motion practice) for parents/children clients when you feel these needs are not being met

Katherine Aquino, Sarah Lorr, Sheneka Mckenzie-Sage, Angela Medina-Braddox

3:45
Networking Break

4:00
Working with Clients with Disabilities: Professional Obligations
This session will lay out an attorney's ethical responsibilities specific to representing clients with disabilities.
After completing this session, participants will be able to:

- Use appropriate and inclusive language when speaking with clients with known/suspected I/DD
    - Understand how to reasonably consult with a client with I/DD about their objectives (Rule 1.4 - Communication)
- Engage with children and parents with known/suspected I/DD
    - Maintain an attorney/client relationship with a client with diminished capacity (Rule 1.14 – Client with Diminished Capacity)
- Refer clients to services specifically tailored to their needs, including services offered through ACS's Developmental Disabilities Unit (DDU), such as the Essential Parenting Skills Program
    - Consider legal and non-legal factors in rendering advice (Rule 2.1 – Advisor)

Katherine Aquino, Sarah H. Lorr, Sheneka Mckenzie-Sage, Angela Medina-Braddox

5:00
Adjourn

Co-Chairs:

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Program Attorney: Krista M. Gundersen

Christine Bruno
Litigation and Training Supervisor
Center for Family Representation

Christine Bruno is a Litigation and Training Supervisor at the Center for Family Representation (CFR). She started at CFR in 2007 as a staff attorney, became a Litigation Supervisor in 2012, and the Litigation and Training Supervisor in 2016. At CFR, she coordinates and conducts internal and external Family Defense training on interdisciplinary parent representation. She was active in the development of self-care routines for the staff. She also participates in the DEIB Training Committee and the Hiring Committee. Before CFR, she worked as a law clerk in the Bergen County Justice Center in New Jersey to the Hon. Laura Koblitz. She graduated from the CUNY School of Law in 2006, where she participated in the Battered Women's Rights Clinic and several internships at non-profit organizations, including at the Welfare Law Center, NYLAG and CONNECT. She holds a BA and MA from Montclair State University in Practical Anthropology.

Kelley Burns

NYC Administration for Children's Services

Kelley Burns is the Director of Training in the Legal Support and Training Unit at Family Court Legal Services, a division of the Administration for Children's Services. Family Court Legal Services provides legal representation for Children's Services in the five Family Courts of New York City in child abuse and neglect proceedings, custody and juvenile delinquency proceedings. The Legal Support and Training Unit provides litigation support and legal training to attorney and casework staff as well as other types of support to the Division. Prior to joining the Legal Support and Training Unit, Ms. Burns practiced in the Administration for Children's Services, Family Court Legal Services in Queens Family Court as a staff attorney since 2001. Ms. Burns received her undergraduate degree from Fordham University and received her Juris Doctorate from Cardozo School of Law.

Melissa Friedman

The Legal Aid Society Juvenile Rights Practice

Melissa Friedman is the Director of Child Welfare Training at The Legal Aid Society's Juvenile Rights Practice where she trains and oversees staff representing children in family court across New York City. Ms. Friedman also serves as the Chair of the Children & the Law Committee of the New York City Bar Association. Ms. Friedman started her career as a Skadden Fellow and later a Staff Attorney at the Legal Aid Society's Juvenile Rights Practice representing children in both child welfare and juvenile delinquency proceedings. She then joined the law firm WilmerHale as a Senior Associate in the Business Trial Group before returning to Legal Aid. Ms. Friedman earned her bachelor's degree in Latin American Studies and Spanish at Washington University in St. Louis and her J.D. at Harvard Law School.

Katherine Aquino, Esq.

Director, Legal Compliance, Division of Family Court Legal Services
New York City Administration for Children's Services

New York, NY

Katherine is the Director of the Legal Compliance unit within the Division of Family Court Legal Services at New York City Administration for Children's Services (ACS).

Katherine received a Bachelor of Arts degree from Tufts University in 2005, and a Juris Doctor degree from Boston University School of Law in 2010. Katherine joined ACS as a staff attorney in Bronx Family Court in 2011. Prior to her re-joining the Division of Family Court Legal Services in 2022, she served as Chief of Staff in the Office of Child and Family Health.

Vineet Chawla, Esq.

Attorney/Assistant Director of Legal Training

New York City Administration for Children's Services

New York, NY

Vineet is an attorney and Assistant Director of Legal Training with the New York City Administration for Children's Services. Prior to his work in the Legal Training Unit, Vineet was a staff attorney and then team leader in the Manhattan FCLS office over 9 years. He also subsequently assisted with cases in Brooklyn and Staten Island's FCLS offices over the years while part of the training team.

Vineet received a Bachelor of Arts in Psychology from NYU, and a Juris Doctor degree from Cardozo School of Law in 2003. Vineet is admitted as an attorney in the State of New York and in Texas.

Lindsey Ferioli

Director of Legal Services

HeartShare St. Vincent's Services

Brooklyn, New York

Lindsey is the Director of Legal Services at HeartShare St. Vincent's Services. Her primary legal role is to review cases and assess permanency options, including filing and litigating the agency's termination of parental rights cases and surrenders. Lindsey also leads the adoption and diligent search units at HeartShare St. Vincent's.

Lindsey received her Bachelor's degree from Susquehanna University in 2006, and a Juris Doctor from Rutgers University School of Law-Newark in 2010. Prior to joining HeartShare St. Vincent's Services in 2020, Lindsey worked for the New York City Administration for Children's Services, Division of Family Court Legal Services as a staff attorney and then as a supervisor. While with FCLS she spent three years working at the Bronx Child Advocacy Center, assisting and providing legal consultation to ACS, the NYPD and the Bronx District Attorney's Office on multidisciplinary child abuse investigations.

Randy Hertz
Professor of Clinical Law
Vice Dean
New York University School of Law

Randy Hertz is the Fiorello LaGuardia Professor of Clinical Law and Vice Dean of N.Y.U. School of Law. He has been at the law school since 1985, and teaches the Juvenile Defender Clinic, first-year Criminal Law, Criminal Procedure, and a simulation course titled "Criminal Litigation." He served as the director of the law school's clinical program for two decades. Before joining the N.Y.U. faculty, he worked at the Public Defender Service for the District of Columbia, in the juvenile, criminal, appellate and special litigation divisions. He writes in the areas of criminal and juvenile justice and is the co-author, with Professor James Liebman of Columbia Law School, of a two-volume treatise titled "Federal Habeas Corpus Law and Practice"; the co-author, with Professor Anthony G. Amsterdam of N.Y.U. Law School, of "Trial Manual for the Defense of Criminal Cases"; and the co-author, with Professor Amsterdam and N.Y.U. Law Professor Martin Guggenheim, of "Trial Manual for Defense Attorneys in Juvenile Delinquency Cases." He is an editor-in-chief of the *Clinical Law Review*. In the past, he has served as the Chair of the Council of the ABA's Section of Legal Education and Admissions to the Bar; a consultant to the MacCrate Task Force on Law Schools and the Profession: Narrowing the Gap; a reporter for the Wahl Commission on ABA Accreditation of Law Schools; a reporter for the New York Professional Education Project; and the chair of the AALS Standing Committee on Clinical Legal Education. He received the New York State Bar Association's Howard Levine Award for Excellence in Juvenile Justice and Child Welfare in 2020; NYU Law School's Podell Distinguished Teaching Award in 2010; the Equal Justice Initiative's Award for Advocacy for Equal Justice in 2009; the Association of American Law Schools' William Pincus Award for Outstanding Contributions to Clinical Legal Education in 2004; the NYU Award for Distinguished Teaching by a University Professor in 2003; and the American Bar Association's Livingston Hall award for advocacy in the juvenile justice field in 2000.

Hon. Robert Hettleman
New York State Family Court Judge

Judge Hettleman is a Family Court Judge in New York City, primarily hearing (1) child welfare cases, where ACS makes allegations of child abuse and neglect against parents and guardians; and (2) juveniles delinquency cases, where teenagers are accused of crimes.

He served as a prosecutor in the Manhattan District Attorney's Office for almost 17 years, focusing on cases of child abuse, sex crimes, domestic violence, and murder. He was Chief of the Child Abuse Unit for his last four years in that office. In 2014, he was appointed as a Family Court Judge. He left the bench in 2018 to live abroad with his family, and he was re-appointed as a Judge in 2021.

Throughout his career, Judge Hettleman has worked with and helped train law enforcement, attorneys, medical and mental health providers, child welfare workers, computer and technology experts, schools, community groups and the courts. He taught law school courses at Cardozo Law School for many years, and he has taught and consulted nationally and abroad in the areas of child abuse, child welfare, criminal law, domestic violence, sex crimes, international war crimes and human rights violations, and wildlife trafficking.

Judge Hettleman attended Dartmouth College, became a high school teacher for two years before going to law school, and then went to NYU Law School. He and his wife have two daughters.

Sarah H. Lorr
Associate Professor of Clinical Law
Co-Director, Disability & Civil Rights Clinic
Brooklyn Law School
Brooklyn, New York

Professor Sarah Lorr co-directs the Disability and Civil Rights Clinic. Her scholarship focuses on the rights of adults with disability to have and raise families, alternatives to guardianship, and the right of adults with disabilities to be free from unwarranted intrusion in private spheres of decision making.

Prior to joining the faculty at Brooklyn Law School, Professor Lorr was a Supervising Attorney at Brooklyn Defender Services Family Defense Practice, providing free legal representation to parents at risk of losing their children to foster care. In that capacity, she represented parents in a wide range of matters related to family law, including termination of parental rights, custody, and family offense proceedings. She focused on keeping families together and protecting her clients' fundamental right to parent. Professor Lorr served as a law clerk to the Honorable Joan N. Ericksen in the United States District Court for the District of Minnesota and the Honorable Boyce F. Martin in the United States Court of Appeals for the Sixth Circuit.

Professor Lorr's scholarship has appeared in multiple law reviews, including the *California Law Review*, the *Columbia Journal of Race & the Law*. She has trained judges, lawyers, parents, and other stakeholders on the application of the Americans with Disabilities Act to the family regulation system, best practices for working with adults with disabilities, and alternatives to guardianship. She is a member of the Academic Advisory Board of the Family Justice Law Center and the New York City Bar Association's Committee on Mental Health Law, and the Secretary of the AALS Section on Disability Law.

Sheneka Mckenzie-Sage, LMSW
Director of Social Work
The Legal Aid Society
Juvenile Rights Practice

Sheneka Mckenzie-Sage, LMSW, Director of Social Work, The Legal Aid Society, Juvenile Rights Practice (JRP). She has over 20 years of experience working in the field and has worked with JRP for 18 years thus far. Sheneka is currently responsible for the overall administration, management, case management, and therapeutic practices of the social work program in all five borough offices in New York City. She is passionate about integrating macro and micro-level analysis into the social work practice, by naming all forms of structural bias as it directly impacts the lived experience of clients involved in social systems. Sheneka has served as faculty and presented on national platforms at the National Juvenile Defender Center and the National Association of Counsel for Children. Sheneka is an active member of both the National Organization of Forensic Social Work and the Association of Black Social Workers. Sheneka received her Master's Degree with a clinical concentration in Children and Families from Fordham University's Graduate School of Social Service in NYC. Prior to that, Sheneka received her Bachelor of Arts degree in Psychology, from Norfolk State University in Norfolk, VA.

Angela Medina-Braddox, MPA

Developmental Disabilities Unit
Office of Children and Family Health
Office of the First Deputy Commissioner
NYC Administration for Children's Services

New York City

Angela Medina-Braddox, Executive Director, NYC ACS Developmental Disabilities Unit- is a qualified health and human services executive with more than 25 years of experience in the human service industry with an exemplary record of working well with diverse populations. Consistently recognized as an effective team leader, implementing evidence- based models, responsible for creating integrated strategies to operate, develop and expand new and existing programs with an expertise in Medicaid Redesign, Health Home Care Management (HH/CM), Care Coordination for individuals diagnosed with Intellectual Disabilities, Developmental Disabilities (ID/DD), and/or chronic complex medical conditions. In addition to, Home and Community- Based Services/supports (HCBS) programs under both designations with the New York State Department of Health (DOH) and the New York State Office for People with Developmental Disabilities (OPWDD).

Amy Mulzer

Senior Attorney for Law & Appeals, Family Defense Practice
Brooklyn Defender Services
Brooklyn, NY

Amy Mulzer is a Senior Staff Attorney for Law and Appeals in the Family Defense Practice at Brooklyn Defender Services, which represents parents in Article 10 and related proceedings in Kings County Family Court. Prior to joining Brooklyn Defender Services, she was a clinical instructor in Brooklyn Law School's Disability and Civil Rights Clinic, where she supervised students in their representation of low-income New Yorkers with intellectual and developmental disabilities. She was also a fellow in the NYU School of Law's Family Defense Clinic, with a focus on systemic appellate advocacy.

Amy previously represented parents at the trial level as a staff attorney at the Brooklyn Family Defense Project and the Bronx Defenders, and on appeal as a member of the 18B appellate panel for the Appellate Division, Second Department. She began her legal career as an Equal Justice Works Fellow at the Legal Aid Society's Homeless Rights Practice, where she represented families seeking access to the NYC shelter system.

Amy clerked for the Hon. Jack B. Weinstein of the United States District Court for the Eastern District of New York.

Amy's publications include *Adoption Cannot Be Reformed*, 12 COLUM. J. RACE & L. 1 (2022) (with Ashley Albert); *However Kindly Intentioned: Structural Racism and Volunteer Casa Programs*, 20 CUNY L. REV. 23 (2016) (with Tara Urs); and the chapter on Appellate Advocacy in the 4th edition of the National Association of Counsel for Children's Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse, Neglect, and Dependency Cases (2022).

Amy received a JD from Columbia University School of Law and a BA in philosophy and medieval studies from Bard College.

Jennifer Sadaka, Esq.

Senior Team Leader / Legal Trainer

New York City Administration for Children's Services

New York, NY

Jennifer is a Senior Team Leader and Legal Trainer with the New York City Administration for Children's Services. Prior to her work in the Legal Training Unit, Jennifer was a staff attorney in the Brooklyn ACS FCLS office and a supervisor in the Bronx ACS FCLS office,

Jennifer received a Bachelor of Business Administration degree from Hofstra University in 2000, and a Juris Doctor degree from Quinnipiac University School of Law in 2003. Prior to joining ACS in 2012, Jennifer worked in private practice at various law firms in Connecticut, concentrating in matrimonial matters, real estate and bankruptcy matters.

Katherine Tedeschi

Administration for Children's Services

New York, NY

Katherine (Kay) Tedeschi has worked in the Legal Compliance Unit of Family Court Legal Services, a division of the Administration for Children's Services, since 2018. In her current role she advises front line FCLS attorneys on an array of issues that arise in court, and reviews new legislation and policy. Ms. Tedeschi started her legal career in the Manhattan FCLS office in 2012 where she later became a Team Leader before transitioning to Legal Compliance.

Ms. Tedeschi received her Juris Doctor from Brooklyn Law School and her undergraduate degree from Amherst College.

DEVELOPMENTS IN CRIMINAL AND JUVENILE DELINQUENCY LAW AND PROCEDURE
(Jan. 2022 – June 2023)

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June 30. 2023

DEVELOPMENTS IN CRIMINAL AND JUVENILE DELINQUENCY LAW AND PROCEDURE (Jan. 2022 – June 2023)

[The following outline covers significant decisions of the U.S. Supreme Court, Court of Appeals, and the Appellate Divisions, and some decisions of the New York Supreme Court and Family Court. Within each subject matter category, the cases are arranged by the level of the court and then by chronological order.]

I. Competency to Stand Trial

People ex rel. Molinaro v. Warden, 39 N.Y.3d 120, 203 N.E.3d 1194, 183 N.Y.S.3d 338 (2022): Resolving "a matter of apparent first impression," the Court of Appeals holds that "when a [criminal] defendant is not in custody," "[t]he court may not remand a defendant into custody solely because a[ ] [competency] examination has been ordered." "[A] court only has the authority to either order a competency examination on an out-patient basis or to direct that the defendant be confined in a hospital pending completion of the examination upon proper medical recommendation that such confinement is necessary." The Court explains that "there are other measures available to ensure completion of a defendant's competency examination. For example, the court may order supervised release with non-monetary conditions (see CPL 510.10[3]; 530.20[1][a]), revoke the defendant's release status if they fail to appear for a scheduled examination and fail to appear in court (see CPL 530.60[1]), and, in appropriate cases, order a psychiatric evaluation to determine whether civil confinement is necessary (see Mental Hygiene Law § 9.43; see also CPL 500.10[3–c][a]-[b]). Courts retain the authority to craft orders necessary to the specific factual circumstances of each case. What the law does not permit is what occurred here: remanding a defendant otherwise entitled to release under the law, solely because the court ordered a CPL article 730 competency examination."

II. Discovery

A. *Brady*

People v. Flores, 2023 WL 3588225 (1st Dept. 2023): The prosecution violated *Brady v. Maryland* by "failing to disclose to the defense . . . that the Bronx District Attorney's Office . . . , through its Crime Victims Assistance Unit . . ., was helping the complainant . . . obtain an immigration benefit known as a U visa." The withholding of this information was "material" because "a jury could find that the U visa was an important benefit to the complainant – so important that it could potentially cause him to fabricate his testimony," and "[t]he credibility of the complainant's testimony was crucial in determining the outcome of this case."

People v. Wilkins, 2023 WL 3632154 (3d Dept. May 25, 2023): The prosecution improperly failed to disclose a "substantiated allegation" that a "forensic scientist who testified for the People . . . had cheated on her TruAllele qualification exam and subsequently lied to state investigators about her actions." "[S]uch material was required to be turned over as impeachment evidence pursuant to *Brady*." But the court nonetheless upholds the conviction because "the forensic scientist's testimony concerning the identification of the victim's blood on defendant's shirt was not central to the verdict."

People v. Ramunni, 203 A.D.3d 1076, 166 N.Y.S.3d 27 (2d Dept. 2022): The prosecution violated *Brady* by denying defense counsel the name of and contact information for a 911 caller who witnessed the incident and described the perpetrator in a way that did not match the defendant. Although the prosecution disclosed the contents of the 911 call, which "may have provided some clues as to the identity of the caller, the defendant should not be forced to guess as to the identity of this caller."

B. *Rosario*

People v. Matthews, 212 A.D.3d 512, 181 N.Y.S.3d 258 (1st Dept. 2023): The trial court "should have conducted an in camera review of the memo book of each of the responding officers, because defense counsel articulated a factual basis for believing that statements of the victim were recorded therein." "The victim testified that she spoke to two police officers who arrived at the scene following a 911 call, and that the officers wrote down what the victim said had occurred." The Appellate Division holds the appeal in abeyance and remands the matter to the trial court for "an in camera review of the memo books of two police officers to determine whether they contain *Rosario* material to which the defense was entitled at trial."

C. Preclusion of Statement for Lack of Timely Notice

People v. Weathers, 213 A.D.3d 466, 183 N.Y.S.3d 391 (1st Dept. 2023): The Appellate Division reverses a conviction and orders a new trial because the trial court improperly denied preclusion of an incriminating statement of the defendant's that "was first revealed during trial testimony." Although the prosecution had disclosed other statements the defendant made in response to police interrogation – which defense counsel moved to suppress – this statement was not disclosed by the prosecution before trial. When the additional statement emerged at trial, defense counsel "moved for preclusion on the ground of lack of notice."

D. Defense Discovery of Misconduct Records of Non-Testifying Officers

In the Matter of E.S., 188 N.Y.S.3d 412, 2023 N.Y. Slip Op. 23135 (N.Y. Fam. Ct., N.Y. Co. 2023) (Kingo, J.): The court grants the respondent's motion for discovery of "police records of officers who will not testify." The court rejects the Presentment Agency's "conten[tion] that it is not required to turn over records of non-testifying officers where Respondent has no reason to believe, and has made no offer of proof, that the records would impeach the credibility of any officer it would call to testify."

The court explains:

(1) The equal protection analysis of *In the Matter of Jayson C.*, 200 A.D.3d 447, 159 N.Y.S.3d 40 (1st Dept. 2021), demonstrates that it would violate equal protection to deny juvenile respondents the benefit of C.P.L. § 245.20(1)(k), which "mirrors and broadens the constitutional protections developed in case law, including the obligation of the state to disclose all evidence or information which is 'favorable to the defense, material either to guilt or punishment, or affecting the credibility of prosecution witnesses.'"

(2) The court agrees with those Criminal Court decisions that have held that "the disclosure of police records for non-testifying officers is required under C.P.L. 245.20(1)(k) or the state or United States constitution" because "they tend to be favorable to the defense, [and] could tend to negate a defendant's guilt, or support a potential defense."'As expounded in the[se] cases," the defense can use such records in "'defense investigation into how an officer interacts with complainants or witnesses in their cases,'" "'undermin[ing] the integrity of the investigation that led to the arrest,'" and/or "'impeach[ing] hearsay declarants if testifying officers recount statements by other officers at a suppression hearing.'"

(3) "[L]imiting the disclosure obligation in the manner advocated by the Presentment Agency would allow the Presentment Agency to avoid disclosure of disciplinary records for officers who participated in an arrest, collected evidence and witness statements, or were otherwise assigned to a case, simply by declining to call those officers to testify," with the result that "the Presentment Agency could withhold the records for officers that it deemed unfavorable or problematic, even where those officers played a major role in the investigation."

The court rejects the Presentment Agency's argument that "Respondent is not entitled to the records in question because Respondent has not made no offer of proof that the records would contain materials that would impeach the credibility of any officer it would call to testify." The court explains that this "argument overlooks the obvious fact that Respondent is unable to glean such information from records that he does not have access to."

III. Suppression Motions: Law and Procedure

A. Procedural Issues

(1) Summary Denial of a Suppression Motion

People v. Finn, 215 A.D.3d 1179, 187 N.Y.S.3d 447 (3d Dept 2023): The Appellate Division upholds the trial court's summary denial of a *Mapp* motion on the ground that it "raised no issue of fact." The motion stated that the stop of the defendant's car "was premised on defendant not properly using his turn signal on two occasions" but the motion "did not deny or dispute such conduct."

People v. Patterson, 215 A.D.3d 561, 187 N.Y.S.3d 221 (4th Dept. 2023): The Appellate Division upholds the trial court's summary denial of a *Mapp* motion because it "failed to allege facts supporting a finding that the store employee who detained and searched [the defendant] was a state actor." The court points out that "[t]he felony complaint and voluntary disclosure form disclosed sufficient information about the security guard, including his specific job title ('loss prevention agent'), the name and location of the store, and the precise date and time at which the guard encountered defendant, to have enabled defendant to subpoena records and learn the guard's status." The Appellate Division notes that the trial judge "offered defendant the opportunity to renew the motion if new facts were discovered, but defendant pleaded guilty immediately after the court rendered its decision."

People v. Vargas, 214 A.D.3d 609, 184 N.Y.S.3d 603 (1st Dept. 2023): The Appellate Division upholds the trial court's summary denial of a *Mapp* motion which stated merely that the defendant "had not engaged in any observable unlawful behavior when a police officer approached him or in the period before he was arrested" and did not address allegations – which were in the felony complaint and thus the defendant was on notice of them – that the defendant and an "undercover officer had arranged the [drug] sale on the phone beforehand" and that the transaction took place thereafter. The Appellate Division points out that the motion "did not specifically deny [those allegations or that the defendant] participat[ed] in the drug sale." "While defendant also challenged the sufficiency of the description upon which he claimed to have been arrested, he did so only in general and conclusory terms, without providing the type of details called for in [*People v.*] *Jones*, 95 NY2d at 729." On the latter issue, the Appellate Division contrasts the case of *People v. Fleming*, 201 A.D.3d 552, 160 N.Y.S.3d 45 (1st Dept. 2022), which is discussed below.

People v. Boateng, 209 A.D.3d 448, 174 N.Y.S.3d 837 (1st Dept. 2022): The trial court did not abuse its discretion in summarily denying a *Mapp* hearing on the ground that the defense "'failed to allege facts supporting a finding that the store employee [a security guard] was a state actor.'" The Appellate Division explains that "[t]he felony complaint and voluntary disclosure form 'disclosed sufficient information about the guard,' including his name, the 'name and location of the store, and the precise date and hour at which the guard encountered defendant, to have enabled defendant to subpoena records and ascertain the guard's status.'"

People v. Esperanza, 203 A.D.3d 124, 160 N.Y.S.3d 47 (1st Dept. 2022): The trial court improperly denied the *Mapp*/*Dunaway* motion on the papers. Significant "circumstances surrounding the drug sale and arrest of defendant were only expounded at trial and were not available to defendant at the time the motion to suppress was made." "[T]he People, in the prosecution of this case, had a pattern of omitting these key pieces of information concerning the pre-warrant police entry into defendant's apartment. Namely, neither the application for a search warrant, the criminal complaint, nor the People's opposition to defendant's omnibus motion mentioned that the search warrant was requested only after officers had already been inside defendant's apartment and had conducted a protective sweep of the premises." Although trial testimony normally cannot be considered by the court when evaluating a suppression ruling, here "trial testimony is being used solely to determine the context of defendant's motion, the extent of her lack of access to information . . . , and the extent of information withheld from the motion court prior to making its decision to summarily deny defendant's motion."

People v. Fleming, 201 A.D.3d 552, 160 N.Y.S.3d 45 (1st Dept. 2022): The trial court improperly denied the *Mapp* motion on the papers. Although "defendant's allegations did not contradict the People's allegations regarding the facts of the drug transaction itself," the "motion challenged the constitutional adequacy of 'any transmitted description on which the seizing officers relied in detaining and arresting the defendant.'" "[T]he absence of factual allegations regarding the content of a transmission from the undercover to the arresting officer did not render defendant's motion deficient" because "the People in this case did not disclose 'by either voluntary discovery or otherwise, . . . the description radioed by the purchasing officer to the arresting officer'" and "a defendant cannot be expected 'to allege facts about which he had no knowledge.'" "[I]t was still incumbent on defendant 'to supply the motion court with any relevant facts he did possess for the court's consideration

on the suppression motion," and he did so by stating that "he was a 44-year-old black man, and that there was nothing 'particularly distinctive about his appearance' that would tend to 'preclude the possibility of misidentification.' This description allowed for a comparison between defendant's self-description and the transmitted description, once that description was disclosed [by the prosecution]. Similarly, defendant's allegation that he was not the only black man in the area at the time he was arrested was relevant to his claim that the description communicated to the arresting officer was too general to establish probable cause for the arrest."

(2) Untimely Raising of Additional Basis for Suppression

People v. Flowers, 213 A.D.3d 692, 182 N.Y.S.3d 237 (1st Dept. 2023): At the conclusion of a *Huntley* hearing, defense counsel "argued for the first time that [the defendant's] statements should be suppressed [on *Payton* grounds] based upon the fact the police entered his room and arrested him therein without a warrant." The trial court rejected the argument as "untimely and without merit." The Appellate Division affirms, stating that the trial court "providently exercised its discretion in rejecting [the claim] as untimely" because defense counsel "failed to explain why he did not seek suppression of his statements on this ground prior to the suppression hearing, or why this ground for suppression could not have been raised sooner."

(3) Prosecution's Burden of Production

People v. Watkins, 213 A.D.3d 467, 183 N.Y.S.3d 85 (1st Dept. 2023): The Appellate Division suppresses a post-arrest statement because the prosecution failed to satisfy its burden of production at the suppression hearing. A detective testified at the hearing that he took "a statement from a codefendant in the robbery who implicated defendant, ostensibly prompting the arrest of defendant" by other police officers. The detective was not present at defendant's arrest "and had no knowledge of the facts of defendant's arrest." "There [was] no direct evidence that the statement implicating defendant was communicated to the officers arresting him." Thus, the testimony "was insufficient to permit the inference that information constituting probable cause was transmitted by the detective to the officers effectuating the arrest of defendant, as required to meet the People's prima facie burden of establishing the legality of the challenged police conduct and shift the burden of persuasion to defendant."

B. *Mapp* Motions

(1) Standing

People v. Boyd, 206 A.D.3d 1350, 170 N.Y.S.3d 681 (3d Dept. 2022): The Appellate Division upholds the trial court's finding at a suppression hearing that the defendant lacked standing to challenge the search of an apartment pursuant to an arrest warrant. Although the trial court was presented with an affidavit by the defendant asserting that lived at the apartment, the trial court "rejected the affidavit" because "the court had before it defendant's grand jury testimony, wherein defendant was asked where he lived on the date that the apartment was searched and gave two different addresses, neither of which was the address of the subject apartment," and, despite being "given multiple opportunities when testifying to clarify whether he lived at the subject apartment, . . . he did not do so." The Appellate Division explains further that the trial court "appeared to take note of the self-serving nature of the affidavit, as well as the fact that it was not submitted until months after defendant had filed his suppression motion and a week after the [suppression] hearing had begun."

(2) *DeBour* Levels I and II

People v. Diallo, 213 A.D.3d 472, 181 N.Y.S.3d 888 (1st Dept. 2023): The fruits of a police chase and seizure are suppressed because the facts known to the police did not justify anything more than a Level I request for information. The officer testified that "he saw defendant walking along the street toward a marked police van, with what appeared to be a heavy object in his pocket, while clinching that pocket and appearing nervous." The defendant thereafter fled. "Defendant's flight, when accompanied by nothing more than the presence of an unidentifiable object in his pocket and his nervousness in the presence of a marked police van, did not create reasonable suspicion, because there was no founded suspicion of criminality before the flight."

(3) *Terry* Stops and Frisks

People v. Johnson, 2023 WL 3510428 (N.Y. Ct. App. May 18, 2023): Suppression is granted because the police did not have a *Terry* basis for a stop and frisk of the defendant who had been inside a parked car when the police pulled their vehicle behind his car, whereupon the defendant exited his car. The Court of Appeals explains: "Here, Mr. Johnson's actions, as observed by Officer Pike, do not meet the minimum standard required to

justify a stop and frisk under *De Bour*. Prior to the frisk, Officer Pike observed Mr. Johnson: (1) move from the driver's seat to the passenger seat of his parked car; (2) move his upper torso back toward the driver's seat; (3) pull up his pants and attempt to buckle his belt; and (4) appear nervous while being questioned. These circumstances do not support a reasonable view that Mr. Johnson was armed or that he had committed or was about to commit a crime. These actions 'constituted [nothing] other than "innocuous behavior," sole reliance on which would impermissibly reduce the foundation for [this] intrusion to nothing but 'whim or caprice.'" In a concurring opinion, Judge Rivera says that she has concluded that the four-tiered "*De Bour* legal framework in practice does not serve the ends of justice," and she expresses the view that the Court of Appeals should replace it with "a rule that requires reasonable suspicion of criminality for all police-initiated encounters" (i.e., replacing Levels I and II of *De Bour* with a *Terry* standard).

People v. Miller, 212 A.D.3d 735, 182 N.Y.S.3d 185 (2d Dept. 2023): The court suppresses two guns and post-arrest statements as fruits of an unlawful *Terry* pursuit. The defendant had been a passenger in a car that was pulled over by the police for "multiple traffic violations." Upon the stopping of the car, "the defendant, a passenger in the backseat, exited the vehicle and began to flee." He was tackled by an officer, who found two guns on him. After arrest and administration of *Miranda* warnings, the defendant made a statement. The Appellate Division suppresses all of the evidence because there was "no reasonable suspicion that the defendant was involved in criminal activity solely because he attempted to flee from the backseat of a vehicle that had been stopped for a traffic violation."

People v. Lewis, 208 A.D.3d 595, 172 N.Y.S.3d 116 (2d Dept. 2022): Even assuming that the police had a sufficient basis for a *Terry* frisk of the defendant, the police exceeded the lawful bounds of a *Terry* frisk by reaching into the defendant's pants pocket and removing a wallet. "There was no evidence presented at the suppression hearing that, during his frisk of the defendant, [the officer] felt anything in the defendant's pocket that seemed to be a weapon or that could have posed a danger to the officers at the scene." Accordingly, the wallet, which was found to have belonged to a victim of a robbery, should have been suppressed. "The officers committed an additional constitutional violation when, after retrieving the wallet from the defendant's pocket, they opened it and conducted a warrantless search of its contents."

People v. Thorne, 207 A.D.3d 73, 169 N.Y.S.3d 63 (1st Dept. 2022): The police did not have the requisite *Terry* basis for a Level III stop of the

defendant based on a radio run description of a "black male" wearing "dark clothing," which was too "vague" and "general" to "give rise to reasonable suspicion," especially given that "defendant had distinctive features that were not part of the description, including a goatee and tattoos, and he was wearing a backpack." "Although defendant was walking at a fast pace and hiding his face from the officers, such equivocal behavior was just as susceptible to an innocent interpretation and may not increase the level of suspicion so as to justify a forcible stop . . . . Defendant's desire not to make eye contact with the officers was equally consistent with an innocent desire as a black male to avoid interactions with the police."

(4) Arrests and Searches Incident to Arrest

People v. Arevalo, 203 A.D.3d 943, 161 N.Y.S.3d 819 (2d Dept. 2022): The trial court "erred in concluding that the defendant was not under arrest when he was removed from his vehicle by police at gunpoint, handcuffed, and placed into the back of the police vehicle."

In the Matter of Alfred B., 77 Misc.3d 602, 180 N.Y.S.3d 470 (N.Y. Fam. Ct. 2022) (Goldstein, J.): The court suppresses a firearm because the police violated C.P.L. § 150.20 by arresting respondent Alfred B. for jaywalking and then searching him incident to that arrest. When the officer stopped the respondent for jaywalking and asked for an ID, the respondent "was cooperative," said that he did not have ID on him, gave his name, age (16), "father's name, and his address and repeatedly asked the officer to 'check out' the information he provided." Instead of doing so, "the officer placed respondent in handcuffs and searched him," finding a firearm in the respondent's jacket pocket." As the court explains, C.P.L. § 150.20 requires the issuance of "a summons or appearance ticket . . . in lieu of arrest, for a violation or a low-level crime where the accused makes his verifiable identity known to the officer." The court holds that "where, as here, identification information is provided by the accused, the officer must take reasonable steps to verify that information before proceeding to make an arrest and, in the instant case, no such steps were taken." Observing that "[i]t is hard to escape the conclusion that the officers' goal was to frisk the two young men, rather than issuing them summonses for jaywalking," the court explains that nonetheless *Whren v. United States*, 517 U.S. 806 (1996) and *People v. Robinson*, 97 N.Y.2d 341, 741 N.Y.S.2d 147 (2001) permit a stop that is based on lawful grounds even if the police had a different motivation for stopping the individual and used the lawful grounds as a pretext. The court therefore makes clear that the basis for its suppression ruling is not the pretextual nature of the stop and

arrest but the C.P.L. § 150.20 violation that rendered the arrest unlawful. But the court expresses the hope that "the New York City Police Department will closely examine its policies regarding when and under what circumstances the jaywalking ordinance is to be enforced in order to avoid its discriminatory use."

(5) Automobile Stops and Searches

People v. Scott, 216 A.D.3d 552, __ N.Y.S.3d __ (1st Dept. 2023): Although the police conducted a valid traffic stop of the vehicle in which the defendant had been a passenger, the officers' subsequent "warrantless sweep of the car," including the seizure of the purse found on the back seat of the vehicle, were unlawful and required suppression of a gun found in the purse. "Absent probable cause [of the existence of contraband in a specific portion of the car], the police are allowed to conduct a limited intrusion into the vehicle [during a stop of the car] only if the totality of the information available supports a reasonable conclusion that there is a substantial likelihood of a weapon within the vehicle that poses an actual and specific threat to the officers' safety." "No such actual and specific danger was shown to exist in this case. The officers did not testify to seeing a bulge suggestive of a weapon, to seeing defendant reach for his waistband, or any other act of concealment."

People v. Tyler, 215 A.D.3d 884, 187 N.Y.S.3d 305 (2d Dept. 2023): The Appellate Division upholds the trial court's ruling that "the People failed to meet their burden of establishing the legality of the [traffic] stop [of the defendant's car] through the officer's testimony" that he "observ[ed] [the defendant] driving at what the officer estimated to be a high rate of speed, and cross a double yellow line." The Appellate Division points out that "[t]here was no evidence that the officer had been trained in visual speed estimation prior to the stop, or that the defendant's speed was imprudent or unreasonable under the conditions then existing" and "[m]oreover, in making its suppression ruling, the Supreme Court, in effect, made a credibility assessment as to whether the officer saw the defendant's vehicle cross over the double yellow line . . . or had merely heard the defendant's vehicle hit a rumble strip separating the lanes of traffic."

People v. Singletary, 211 A.D.3d 1626, 180 N.Y.S.3d 786 (4th Dept. 2022): The police conducted a seizure of the defendant's car by "pull[ing] into the gas station parking lot and stopp[ing] their patrol vehicle directly behind defendant's parked vehicle in such a manner as to prevent it from driving away." This seizure was unlawful because the police lacked reasonable suspicion. The police were "responding to the sound of

multiple gunshots that had originated at or near the gas station, which was known to be a high crime area" and their attention was "drawn to defendant's vehicle because, at the time they arrived on the scene, it had collided with another vehicle as it tried to leave the area." But the police did not "see any shots emanating from the area where defendant's vehicle was parked" and they were "unable to pinpoint the source of the gunfire."

People v. Marcial, 211 A.D.3d 98, 178 N.Y.S.3d 107 (2d Dept. 2022): Although the Appellate Division rejects the defendant's argument that the suppression hearing judge "erred in relying upon a legal theory not expressly argued by the People" (and the Appellate Division explains that "the suppression court is 'entitled to consider legal justifications that were supported by the evidence, even if they were not raised explicitly by the People'"), the Appellate Division nonetheless reverses the trial court and orders suppression because the police search of the defendant's car was not supported by the automobile exception relied upon by the trial court. Although a police officer "testified that he recognized the defendant's vehicle from the 'wanted' flyer describing the burglary," "the mere fact that the defendant was driving the same vehicle identified in the I-card and in the wanted poster as having been used to flee the burglaries did not give the police probable cause to conclude that the vehicle contained evidence of the burglaries." "Moreover, given the passage of a full day's time since the most recent burglaries described in the I-card, and two full days since the first set of burglaries described in the wanted poster, there was 'ample opportunity' for the defendant to have stored any items that were stolen somewhere other than in the vehicle he used to flee the burglaries." Accordingly, the police did not have probable cause to search the car pursuant to the automobile exception.

People v. Jones, 210 A.D.3d 150, 177 N.Y.S.3d 174 (3d Dept. 2022): Although the Court of Appeals in *People v. Robinson*, 97 N.Y.2d 341, 741 N.Y.S.2d 147 (2001) followed *Whren v. United States*, 517 U.S. 806 (1996), in holding that the state constitution, like the federal constitution, allows a police stop of an automobile based on probable cause of a traffic infraction even if the officer was using the traffic rationale as a pretext for investigation of a separate crime, the Third Department finds *Robinson* to be distinguishable if a traffic stop was predicated on racial profiling. The Third Department holds that "the *Robinson* standard does not preclude a challenge to a traffic stop predicated on racial profiling, at least under our state constitution." As the Third Department explains, the First Department held in *People v. Fredericks*, 37 A.D.3d 183, 829 N.Y.S.2d 78 (1st Dept. 2007) that such "discriminatory law enforcement only gives rise to a civil remedy." But the Third Department rejects that reasoning,

holding that suppression must be available as a remedy. The Third Department explains that the First Department's approach "would effectively render a defendant's constitutional rights meaningless in the criminal context – an outcome we do not accept. For a defendant's constitutional rights to be meaningful, the exclusionary rule must apply."

People v. King, 206 A.D.3d 1576, 167 N.Y.S.3d 869 (4th Dept. 2022): The police "effectively seized defendant's vehicle when they pulled into a parking lot and stopped their vehicle directly in front of defendant's parked vehicle in such a manner as to prevent defendant from driving away." The officers' stated basis for the stop – that the "apartment complex [was] known for drug activity," that the officers "believed defendant did not reside" there, and that the officers "were aware that defendant had a history of drug-related conviction" – was insufficient to satisfy the *Terry* standard of "a reasonable suspicion that defendant had committed, was committing, or was about to commit a crime."

People v. Gomez, 205 A.D.3d 1049, 168 N.Y.S.3d 128 (2d Dept. 2022): A weapon seized from a taxi cab passenger pursuant to a stop of the vehicle is suppressed because the police lacked reasonable suspicion that the passenger had committed a crime. The stop was based on a report from a civilian's report to the police that their neighbor observed the defendant get into the taxi 40 minutes after a fight and stabbing. But "[t]here was no evidence that the informant or the neighbor saw the fight, and the neighbor, who testified at the hearing, did not state that she knew that the defendant was involved in the fight."

People. v. Betsey-Jones, 203 A.D.3d 1688, 162 N.Y.S.3d 842 (4th Dept. 2022): Although the police officer's "initial stop of the vehicle that [defendant] was driving was lawful" because "the license plate was registered to a vehicle of a different color and make," "the justification for the officer's initial detention ceased once defendant showed the officer the temporary registration that had been issued for the vehicle and explained that the license plates on the vehicle had recently been transferred from another vehicle." "[I]nasmuch as 'the initial justification for seizing and detaining defendant . . . was exhausted' at the time of defendant's removal from the vehicle, the evidence seized during the ensuing search of defendant's person, as well as the statements that he made to the police thereafter, should have been suppressed."

People v. Jennings, 202 A.D.3d 1439, 158 N.Y.S.3d 903 (4th Dept. 2022): "[T]he police officers effectively seized defendant's vehicle when they

parked their patrol vehicle in such a manner that, for all practical purposes, prevented defendant from driving his vehicle away."

(6) Plain View

People v. Rodriguez, 211 A.D.3d 854, 179 N.Y.S.3d 771 (2d Dept. 2022): The plain view doctrine did not provide a lawful basis for police seizure of a ziploc bag, containing what later were found to be Klonopin pills, found during a police search of the defendant's car. The search of the car was based on "the odor of marihuana emanating from the defendant's vehicle and [an officer's]] observation of crumbs of marihuana on the defendant's shirt" but "it was obvious that the transparent ziploc bag . . . did not contain marihuana, and . . . it was not immediately apparent that the ziploc bag contained any other type of contraband, [and thus] there was no justification for seizing the bag."

(7) Search Warrants

People v. Capers, 213 A.D.3d 947, 183 N.Y.S.3d 563 (2d Dept. 2023): Suppression is granted because "the language of the [search] warrant . . . was ambiguous, and failed to clearly delineate whether it authorized a search of a single residence or two separate residences." "The warrant . . . refer[red] to the premises as a 'two-family home,' with a 'right main entrance' that led to 'a living room, a kitchen, and bedrooms,' and a 'left main entrance,' which led to 'a set of stairs that lead up to a living room, a kitchen and bedrooms,' which may have suggested that the building contained two separate apartments. Yet, the warrant referred to the premises as the 'Subject Location' and 'the residence,' and instead of using words like 'apartment' or 'unit,' it referred to the rooms on the first floor as being 'at the residence,' and referred to the rooms on the second floor as being 'at the rear of the residence.'"

(8) Knock and Announce

People v. Jones, 214 A.D.3d 483, 184 N.Y.S.3d 350 (1st Dept. 2023): Suppression is granted because the police failed to satisfy "knock and announce" requirements in executing an arrest warrant. Although the police knocked and announced their identity before opening the door (which was unlocked) and entering the apartment, they failed to satisfy CPL § 120.80(4)'s "statutory requirement of giving 'notice' of their 'purpose.'" The police "announced, 'NYPD arrest warrant'" "after entering the apartment" but "[t]here was no evidence that in any way suggests that the police [did so] before entering the apartment."

(9) Incredible Police Testimony

People v. Austin, 203 A.D.3d 732, 162 N.Y.S.3d 487 (2d Dept. 2022): Suppression should have been granted because contradictions between the officers' versions of the events undermined their credibility "to such an extent that 'it is unclear exactly what happened'" and therefore "the People have not met their initial burden of demonstrating that the police acted lawfully." "[T]he officers' versions of events sharply conflicted with each other as to where the defendant was sitting in the minivan, and what he was doing, when the officers arrived at the minivan's front windows," and the officers' "accounts both could not have been true, since both officers acknowledged that they approached the minivan simultaneously and reached the front seats at the same time."

(10) Independent Source

People v. Smith, 202 A.D.3d 1492, 162 N.Y.S.3d 631 (4th Dept. 2022): The court rejects the prosecution's "independent source" argument because the "discovery of the contraband in the [defendant's] vehicle was the direct result of, and not entirely free and distinct from, the police investigator's unlawful search of defendant and seizure of the keys." Although the prosecution asserted that "the discovery of the contraband was entirely free and distinct from the proscribed police activity because, even before the discovery of the keys, the parole officers observed defendant leaving the health facility alone and walking toward a vehicle in the parking lot and thus had an independent basis to investigate whether defendant had been driving" in violation of a parole condition, the court rejects this argument because the parole officer's testimony was "of questionable credibility" and moreover the officer commenced the investigation into the possible parole violation by "pressing the [key] fob that had been illegally seized by the police" to identify the defendant's car and therefore it could not be said that the "parole officers' investigation was independent of the unlawful seizure of the keys."

C. *Huntley* Motions

People v. Trice, 213 A.D.3d 954, 183 N.Y.S.3d 583 (2d Dept. 2023): "Custodial interrogation" took place, and therefore *Miranda* warnings were required, when the defendant was stopped by the police, who asked him whether he had been the operator of a motor vehicle involved in a collision and had left the scene. The defendant was in "custody" for purposes of *Miranda* because "[t]he location was blocked by at least ten police vehicles and multiple officers were present," and

"the defendant's hands were placed on top of a police vehicle." The officers' questioning constituted "interrogation" because this was not "the type of brief, crime-scene inquiry that may be conducted without the administration of *Miranda* warnings to enable police to ascertain transpiring events."

People v. Kemp, 213 A.D.3d 1321, 183 N.Y.S.3d 220 (4th Dept 2023): The Appellate Division relies on New York's parent-child privilege to "suppress statements defendant made to his father in the interview room at the police station." After the 15-year-old defendant "requested an attorney and ended the [stationhouse] interview," "[t]he detectives then left defendant alone with his father in the interview room, but said nothing regarding the presence of recording devices. Once ostensibly alone, defendant started to speak to his father, who responded by admonishing defendant not to speak because there were cameras in the room. Defendant nonetheless moved closer to his father, covered his face with his hands, and continued to attempt to converse quietly with his father." The court "reject[s] the People's contention that defendant waived any applicable privilege by continuing to speak after his father warned him about the cameras. Generally, a party may waive any applicable privilege when communications are knowingly made in front of a third party . . . . Here, however, most of defendant's statements to his father are inaudible as a direct result of defendant's efforts to prevent his conversation from being overheard and recorded. Defendant therefore attempted to speak 'to his father in confidence and for the purpose of obtaining support, advice or guidance' and it may easily be inferred from the father's warnings 'that the father wished to remain silent and keep [defendant's statements] confidential' . . . Thus, this is not a case where a defendant waived any privilege by knowingly speaking openly in front of third parties."

People v. Corey, 209 A.D.3d 1306, 175 N.Y.S.3d 830 (4th Dept. 2022): In a suppression hearing in which the police officer testified that "defendant 'called [the officer] over' to his bed and said 'I'm beat up,' after which the officer asked defendant 'what happened,'" and "[d]efendant then explained the circumstances surrounding how he allegedly came into possession of a weapon he was not legally authorized to possess," the trial court properly denied suppression of the defendant's initial statement "I'm beat up" as spontaneous but "erred in refusing to suppress the remainder of his statements, which were made in response to the officer's question that was intended to elicit a response, and thus those statements cannot be said to have been 'genuine[ly] spontane[ous],' i.e., they were not '"spontaneous in the literal sense of that word as having been made without apparent external cause."'"

People v. Abdullah, 206 A.D.3d 1340, 170 N.Y.S.3d 352 (3d Dept. 2022): The defendant was in "custody" and therefore *Miranda* warnings were required for police officers' interrogation of the defendant at the crime scene (a sporting goods

store): "Four police officers were present at the sporting goods store, with at least one officer positioned between defendant and the exit. More importantly, shortly after the police arrived, defendant had been told to empty his pockets and place all of his personal property on the counter. Defendant did so. While being detained by the police, defendant asked the police multiple times if he could retrieve his possessions. The police denied each of these requests. Additionally, the questions posed by the police to defendant exceeded that necessary for investigation. Many of their inquiries were not limited to the petit larceny, the allegation in question, but instead focused on firearms that defendant may have possessed, their location, caliber and defendant's intent as to his usage of same. With the benefit of viewing the interaction between the police and defendant [in videos from "the various body cameras worn by the police involved"], and considering all the circumstances involved, we cannot say that a reasonable person would have felt free to leave."

People v. Dawson, 38 N.Y.3d 1055, 171 N.Y.S.3d 19 (2022): "Once a defendant in custody unequivocally requests the assistance of counsel, the right to counsel may not be waived outside the presence of counsel . . . . But '[a] suggestion that counsel might be desired; a notification that counsel exists; or a query as to whether counsel ought to be obtained will not suffice' to unequivocally invoke the indelible right to counsel." "[W]hether a particular request is or is not unequivocal is a mixed question of law and fact that must be determined with reference to the circumstances surrounding the request including the defendant's demeanor, manner of expression and the particular words found to have been used by the defendant." In this case, the Court of Appeals concludes that there was sufficient "support in the record for the lower courts' determination that defendant – whose inquiries and demeanor suggested a conditional interest in speaking with an attorney only if it would not otherwise delay his clearly-expressed wish to speak to the police – did not unequivocally invoke his right to counsel while in custody."

D. *Wade* Motions

People v. Alcaraz-Ubiles, 214 A.D.3d 1470, 185 N.Y.S.3d 877 (4th Dept. 2023): The trial court committed reversible error by responding to the mid-trial disclosure of a previously-undisclosed photographic identification procedure by relying on the witness's trial testimony to rule that "the People were not required to give notice because the identification was confirmatory." The trial court should have conducted a mid-trial *Rodriguez* hearing to afford "defense counsel [the opportunity] to flesh out the extent of the relationship between" the witness and the defendant. The Appellate Division remands the case to the trial court for "'a hearing to determine whether the witness knew defendant so well that no amount of police suggestiveness could have tainted the identification.'"

People v. Bennett, 211 A.D.3d 488, 180 N.Y.S.3d 129 (1st Dept. 2022): A post-indictment lineup violated the right to counsel – and the lineup identification should have been suppressed – because "[i]t is undisputed that defendant had a right to counsel at this lineup, which was conducted at a time when he already had representation," and "a paralegal employed by counsel attempted to attend the lineup but was turned away by the police."

People v. Sulayman, 206 A.D.3d 574, 168 N.Y.S.3d 840 (1st Dept. 2022): The photo array was unduly suggestive because the victim's description of the robber included a "white shirt with a distinctive black design," and the "visible part of defendant's shirt" in his photo "closely matched the robber's shirt" while the fillers "wore shirts that, to the extent visible in the photos, were solid-colored shirts without any markings or designs."

People v. Ugwu, 202 A.D.3d 416, 158 N.Y.S.3d 571 (1st Dept. 2022): In a pre-*Wade Rodriguez* hearing, the trial court correctly found the victim's identification to be confirmatory because, "over a six-month period of time leading up to the crime, the victim had seen defendant on a regular basis in a park, . . . defendant had frequently spoken to her as she traversed the park, and . . . . during this time the victim had a clear view of defendant's face.

People v. Wheeler, 201 A.D.3d 960, 160 N.Y.S.3d 337 (2d Dept. 2022): The trial court erred in denying suppression of two photographic identifications by the complainant. Although the complainant's initial referral of the police to a Facebook photograph of the defendant "was not the product of a police-arranged identification procedure," the police officers' subsequent showing of an arrest photograph of the defendant to the complainant on two occasions, both of which resulted in the complainant's stating that this was the perpetrator, constituted single-photograph identification procedures, which were unduly suggestive and should have resulted in the suppression of the identification testimony.

IV. Other Motions

A. Dismissal in the Furtherance of Justice

In the Matter of James JJ., 206 A.D.3d 1091, 168 N.Y.S.3d 584 (3d Dept. 2022): The Appellate Division confirms that the Family Court had the authority to dismiss the petition in the furtherance of justice *sua sponte* prior to the Initial Appearance because "Family Court Act § 315.2(1) plainly states that a juvenile delinquency petition may be dismissed in furtherance of justice 'at any time,'" and "a motion to dismiss in the furtherance of justice is excluded from the list of specified pretrial motions that are to be made after the initial appearance." But the

Appellate Division concludes that dismissal of the assault charge was not warranted because the charge was for "a violent act, and the victim's allegations reflected 'a trend in which [respondent's] propensity towards violence ha[d] escalated.'"

B. Dismissal on Double Jeopardy Grounds

Smith v. United States, 2023 WL 4002949 (U.S. Sup. Ct. June 15, 2023): If "a conviction is reversed because the prosecution occurred in the wrong venue and before a jury drawn from the wrong location," the Double Jeopardy Clause does not bar retrial even if such a venue-based reversal is termed an "acquittal." Such venue-based reversals are controlled by the same Double Jeopardy analysis that "allow[s] retrial in nearly all circumstances" "[w]hen a conviction is reversed because of a trial error."

In the Matter of McNair v. McNamara, 206 A.D.3d 1689, 169 N.Y.S.3d 774 (4th Dept. 2022): "[T]here was no manifest necessity for the mistrial, and the court therefore abused its discretion in granting it sua sponte" based on the judge's inability to come to court due to apparent COVID symptoms until testing negative or recovering: "The record establishes that the court did not consider the alternatives to a mistrial, such as a continuance . . . or substitution of another judge."

C. Speedy Trial Motions

People v. Regan, 2023 WL 2529534 (N.Y. Ct. App. March 16, 2023): The pre-indictment delay of over four years violated the state constitution's due process clause even though the "defendant did not show special prejudice" because "establishment of prejudice is not required to find a due process violation" under the New York constitution. "'[I]mpairment of one's defense is the most difficult form of prejudice to prove because time's erosion of exculpatory evidence and testimony "can rarely be shown"' . . . . Therefore, we 'generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify.'" "The constitutional guarantee of a prompt prosecution places a burden on the state, when prosecuting crimes, to do so with alacrity. . . . The constitutional prompt prosecution guarantee benefits defendants, victims and society at large, and it is the role of the courts to protect it."

People v. Johnson, 39 N.Y.3d 92, 181 N.Y.S.3d 161 (2022): In analyzing a constitutional claim of denial of a speedy trial, the Appellate Division erred in concluding that "'the preindictment delay could not have "impaired" defendant's ability to defend himself on the charge of which he was convicted'" because the

defendant pled guilty to a lesser count of rape that "depends solely on the age difference between the defendant and the victim." The Court of Appeals explains: "When an indictment contains multiple counts, if delay impacts the defendant's ability to defend one count, it may weaken that defendant's position in plea bargaining, potentially adversely impacting the resulting plea. Thus, the appellate court must consider prejudice measured against all counts pending when the dismissal motion is made, not merely against the crime of conviction."

D. Defense's Request for an Adjournment

People v. Adrian, 209 A.D.3d 1116, 176 N.Y.S.3d 856 (3d Dept. 2022): The trial court abused its discretion in denying the defense's request for an adjournment after commencement of jury selection due to the prosecution's having informed defense counsel that it "had just learned of additional video footage" which "depict[ed] approximately 28 hours of additional footage as well as additional camera angles from what had already been disclosed to defendant." It was "unreasonable [of the trial court] to task defense counsel" with "somehow review[ing] 28 hours of footage in one evening."

People v. Reeves, 208 A.D.3d 687, 173 N.Y.S.3d 71 (2d Dept. 2022): The trial court "deprived [the defendant] of his right to a fair trial" by denying the defense's request for "a one-day continuance for the defendant's daughter to travel to New York from out of state" to provide alibi testimony. Although "'[t]he decision to grant or deny an adjournment request is committed to the trial court's sound discretion,'" "'the trial court's discretion is "more narrowly construed"'" "'[w]here the protection of fundamental rights is involved.'"

V. Fact-Finding Hearing

A. Generally

(1) Right to a Public Trial

People v. Reid, 2023 WL 3587531 (N.Y. Ct. App. May 23, 2023): The trial court violated the "defendant's Sixth Amendment right to a public trial" by "ordering the courtroom closed to the public and all interested spectators for the last four days of defendant's eight-day jury trial. Although the trial court summarized its reasons for the closure [which, "the trial court indicated," were to prevent "'[p]eople in the courtroom'" from "intimidation of witnesses, court personnel and jurors by means of social media postings, 'staring' in the courtroom, and other hostile interactions"], . . . [the trial court] held no inquiry on the record to determine the necessity and scope of the closure . . . . Nor was there any

showing that the closure was justified under the criteria set forth by the U.S. Supreme Court in *Waller v. Georgia*, 467 U.S. 39 (1984).").

People v. Muhammad, 2023 WL 2023 WL 3587528 (N.Y. Ct. App. May 23, 2023): Court officers' application of the judge's "general policy of prohibiting the public from entering or exiting the courtroom while a witness testifies" to improperly exclude "several members of the public who appeared at the courtroom doors before the witness's testimony started" "violated defendant's right to a public trial." The Appellate Division erred in concluding that this exclusion could not be attributed to the trial judge: "the exclusion resulted from at least two affirmative acts by the trial judge – the adoption of the policy and its delegation to his staff – and thus the judge caused the unjustified exclusion"; "The trial judge is in charge of the courtroom and is ultimately responsible for ensuring that any limitation on a defendant's right to a public trial conforms with constitutional dictates."

(2) Accused's Right to be Present at all Material Stages

People v. Girard, 211 A.D.3d 148, 178 N.Y.S.3d 54 (1st Dept. 2022): The trial court committed reversible error by conducting a sidebar conference with the prosecutor and defense counsel about the justification defense without the defendant being present at the conference. Contrary to the prosecution's argument on appeal, there is not a sufficient basis in the record for finding a waiver by the defendant of the right to be present: "At no time did defendant make an affirmative statement on the record that he did not wish to attend the side bar conference. And no one ever asked him directly."

(3) Judge's Improper Intervention in Lawyers' Presentation of Testimony or Other Improper Interference

People v. Aponte, 204 A.D.3d 1031, 167 N.Y.S.3d 154 (2d Dept. 2022): The trial court "substantially impaired the defendant's right 'to make an effective closing argument' . . . through sua sponte 'objection sustained' interruptions without any actual objection being posited by the People." "In sua sponte making these comments that were supported neither by the law nor the facts, the court took on the 'appearance of an advocate' on behalf of the People."

B. Evidentiary Issues

(1) Confrontation Clause Issues

Hemphill v. New York, 142 S. Ct. 681 (2022): The US. Supreme Court overrules New York caselaw that had established an "opening the door" exception to the *Crawford v. Washington* doctrine, allowing a trial judge to "admit[ ] unconfronted, testimonial hearsay" against the defendant if the judge "deemed his presentation to have created a misleading impression that the testimonial hearsay was reasonably necessary to correct." The Court states emphatically that "under the [Confrontation] Clause, . . . it [is not] the judge's role to decide that this evidence [is] reasonably necessary to correct that misleading impression. Such inquiries are antithetical to the Confrontation Clause." The *Hemphill* opinion leaves open the possibility that the "common-law rule of completeness" – which allows "a party '"against whom a part of an utterance has been put in, . . . [to] complement it by putting in the remainder"'" – "might allow the admission of testimonial hearsay against a criminal defendant," at least in some "circumstances." But even if the door-opening rationale might allow the prosecution to counter with testimonial hearsay in some narrow rule-of-completeness scenario, it is appears that the rationale can be applied no more broadly than this after *Hemphill*.

People v. Robinson, 2023 WL 3355516 (3d Dept. May 11, 2023): The trial court committed reversible error by ruling – without conducting a *Sirois* hearing – that the People had demonstrated by clear and convincing evidence that the defendant, in phone calls from jail, had rendered the complainant unavailable to testify and that the People therefore could use the complainant's written statement at trial. The court explains that "'defendant should have been afforded an opportunity to test the causal link between [the victim's refusal to testify at trial and the jail calls].'" The court rejects the People's "conten[tion] that a hearing was not necessary because the jail calls 'so overwhelming[ly]' establish that the victim's silence was procured by defendant's misconduct." The court explains that "'this conclusion . . . is not the test inasmuch as [this Court] cannot evaluate the record in its present state since no hearing was held.'"

People v. Vargas, 211 A.D.3d 1046, 180 N.Y.S.3d 299 (2d Dept. 2022): The trial court violated the Confrontation Clause and committed reversible error by allowing the prosecution to present out-of-court statements made to the police by a woman who observed her father stab her mother. "[A]t the time the statements were made, there was no ongoing emergency": "The victim had been removed from the scene and taken to a hospital,"

and "[t]he defendant had been taken into custody and transported to a police station." "[T]he primary purpose of [the officer's] questioning of the daughter 'was to investigate a possible crime.'"

People v. Ellerbee, 203 A.D.3d 1068, 165 N.Y.S.3d 592 (2d Dept. 2022): The trial court violated the Confrontation Clause by permitting the prosecution to introduce "testimony from an employee of the Department of Motor Vehicles . . . regarding notices of suspension of his driver license" to "establish an essential element of the crime of aggravated unlicensed operation of a motor vehicle in the third degree." This violated the Confrontation Clause because "the defendant was not afforded the opportunity to cross-examine a DMV employee who was directly involved in sending out the suspension notices or who had personal familiarity with the mailing practices of the DMV's central mail room or with the defendant's driving record."

(2) Hearsay

In the Matter of Omar G., 212 A.D.3d 615, 181 N.Y.S.3d 323 (2d Dept. 2023): The trial court erred in allowing the Presentment Agency to use the "excited utterance" exception to introduce statements by the respondent's mother – made while she was being interviewed by police officers in the family home after the respondent had been handcuffed and removed from the scene – that respondent had "threatened to 'boom' her and her boyfriend." The Appellate Division finds that these statements were "not spontaneous, but were made in narrative form and in response to prompting, after sufficient time had passed to render the mother capable of engaging in reasoned reflection." Although this error was harmless with respect to the counts charging criminal possession of a firearm, endangering the welfare of a child, and obstructing governmental administration in the second degree, the Appellate Division finds that they cannot be deemed harmless for the charge of criminal possession of a weapon in the second degree because they "supplied proof of the appellant's intent to use the gun unlawfully against another."

People v. Vargas, 211 A.D.3d 1046, 180 N.Y.S.3d 299 (2d Dept. 2022): In a trial of the defendant for stabbing his wife, the trial court erred in relying on the "excited utterance" exception to allow the prosecution to "admit into evidence the statement of the defendant's son asking 'Why, why, why? Why did you stab my mom?'" "[T]here is no indication in the record that the defendant's son had personally observed the stabbing, and therefore his statements did not qualify under the excited utterance exception." The trial court also erred in allowing the prosecution to

introduce a 911 call in which an "unidentified caller stated 'I think someone stab her' under the present sense impression exception to the hearsay rule." "[T]he 911 call did not qualify under the present sense impression exception, since the caller, who did not witness the stabbing, was not describing the stabbing as he personally perceived it, but was instead describing an impression he formed based on events occurring after the stabbing."

People v. Samuel, 208 A.D.3d 1261, 174 N.Y.S.3d 758 (2d Dept. 2022): The trial court "erred in admitting into evidence a recording of a 911 call from a neighbor that was made after the shooting under either the present sense impression or excited utterance exceptions to the prohibition against the admission of hearsay." "[T]he People did not present sufficient facts from which it could be inferred that the neighbor who called 911 had personally observed the incident, and thus, her statements during the 911 call did not qualify under the excited utterance exception." "Further, the statements of the neighbor did not qualify under the present sense impression exception to the prohibition against the admission of hearsay, since the neighbor was not describing events that she personally perceived as the events were unfolding."

People v. Noel, 207 A.D.3d 661, 171 N.Y.S.3d 578 (2d Dept. 2022): The trial court "erred in admitting, as an adoptive admission by silence, testimony from the defendant's mother-in-law concerning a telephone conversation in which the defendant allegedly remained silent when the mother-in-law accused her of having killed the husband": "'To use a defendant's silence or evasive response as evidence against the defendant, the People must demonstrate that the defendant heard and understood the assertion, and reasonably would have been expected to deny it.' . . . Here, the People failed to establish that the defendant actually heard the mother-in-law's accusations or that the defendant had an opportunity to respond to the accusations prior to the mother-in-law disconnecting the phone call."

People v. Gardner, 204 A.D.3d 1509, 167 N.Y.S.3d 291 (4th Dept. 2022): The trial court "erred in admitting into evidence a written statement of a prosecution witness as a past recollection recorded." "[A]s defendant contends, the prosecution witness in question did not testify that his written statement accurately represented his knowledge and recollection when made. To the contrary, the witness testified that the statement was not accurate when given because he was under the influence of narcotics at that time . . . . Moreover, because the statement was made more than six months after the alleged events recorded therein, the recollection was not 'fairly fresh' when recorded."

People v. Aponte, 204 A.D.3d 1031, 167 N.Y.S.3d 154 (2d Dept. 2022): The trial court "erred in admitting into evidence the hearsay statement of an unidentified woman that a man 'wearing all gray had the firearm' as an excited utterance exception to the hearsay rule . . . . The record contained no evidence from which a trier of fact could reasonably infer that the statement was based on the woman's personal observation."

People v. Nelson, 201 A.D.3d 413, 156 N.Y.S.3d 728 (1st Dept. 2022): Although the hearsay exception for statements made for the purpose of medical diagnosis or treatment provided a basis for introduction of the "victim's statement to an emergency medical technician during a 911 call, regarding how he came to be stabbed in the head through the bedroom door," the medical diagnosis exception did *not* provide a basis for also introducing the victim's statements "that defendant was the stabber and that the victim was pressing his body against the bedroom door to keep defendant out of the bedroom." The latter statements "exceeded the bounds of that hearsay exception, because these facts were not germane to diagnosis or treatment."

(3) Other Crimes Evidence

People v. Henderson, 211 A.D.3d 490, 180 N.Y.S.3d 127 (1st Dept. 2022): The trial court committed reversible error by modifying its pretrial *Sandoval* ruling to permit the prosecutor to exceed the scope of that ruling by questioning the defendant on cross about the underlying facts of his prior convictions. "None of defendant's responses on direct or cross-examination were so incorrect or misleading as to permit the court's modification. Unlike cases in which *Sandoval* modifications were found to be appropriate, here defendant did not attempt to assert his innocence in past cases, deny the existence of any of his convictions, or mischaracterize the crimes he had committed."

In the Matter of Jordan J., 75 Misc.3d 1223(A), 170 N.Y.S.3d 837 (Table), 2022 WL 2712034 (N.Y. Fam. Ct., N.Y. Co., June 2, 2022) (Goldstein, J.): In a case involving an alleged assault by the respondent of his girlfriend, the court grants the Presentment Agency's *Molineux* request to present evidence, in the case-in-chief, of a prior assault of the complainant by the respondent but denies the request to also present evidence of an assault that allegedly occurred after the charged offense. The court rejects the Presentment Agency's arguments that these assaults are admissible to "demonstrate[ ] respondent's intent and motive." The court explains that it "finds that this evidence is not needed to establish intent or motive"

because "[i]ntent to cause physical injury can readily be established by respondent's violent acts towards the victim, and respondent himself provided the motive for his acts – his belief that the victim was cheating on him – in a statement he made to the victim during the incident." But the court finds that the prior assault, "which occurred just a few weeks before the charged assault," is admissible on the alternative rationale that it explains "why respondent was behaving in an aggressive and violent manner towards someone with whom he had been having a romantic relationship for over nine months" and it also explains why the complainant was "compliant with respondent's request for her to kneel and place her hands behind her back while he assaulted her" since the respondent's prior "violent behavior" towards her likely caused her to be "afraid of disobeying respondent."

(4) E-mails, Texts, Social Media, and Other Electronic Evidence

People v. Rodriguez, 38 N.Y.3d 151, 169 N.Y.S.3d 910 (2022): The prosecution laid an adequate foundation to authenticate printouts of screen shots of six text messages between the defendant's phone and the complainant's. The complainant "testified that all of the screenshots . . . fairly and accurately represented text messages sent to and from defendant's phone"; the complainant's boyfriend, who took the screenshots, identified them "as the same ones he took from the victim's phone"; the prosecution also "submitted T-mobile records" for "defendant's subscriber number [which] corroborated that defendant sent the victim numerous text messages during the relevant time period." The Court of Appeals reiterates that applicable standard for authentication is the one identified in *People v. Price*, 29 N.Y.3d 472, 58 N.Y.S.3d 259 (2017): "'that the photograph [whether "digital" or "traditional"] accurately represents the subject matter depicted,'" and the court holds that "the testimony of the victim – a participant in and witness to the conversations with defendant – sufficed to authenticate the screenshots."

People v. Mayo, 202 A.D.3d 833, 833-34, 158 N.Y.S.3d 876, 876-77 (2d Dept. 2022): The trial court "erred in admitting into evidence a photograph downloaded from a Facebook account allegedly belonging to the defendant and allegedly depicting the defendant wearing certain clothing similar to that worn by the perpetrator. In order to admit a photograph into evidence, it must be authenticated by proof that it is genuine and that it has not been tampered with . . . . Here, the People failed to properly authenticate the photograph. The People's only authentication evidence consisted of the testimony of a police witness who searched for the Facebook profile 1½ years after the crime. They did not proffer any

evidence or testimony demonstrating that the photograph was 'a fair and accurate representation of the scene depicted or that it was unaltered' . . . . To the contrary, the police witness testified that he did not know whether the photograph had been altered. Furthermore, the People did not present any evidence 'to establish that the web page belonged to, and was controlled by, [the] defendant' or any evidence as to when the photograph was created or posted."

(5) Use of Documents to Impeach or Refresh

People v. Sams, 216 A.D.3d 1003, __ N.Y.S.3d __ (2d Dept. 2023): The trial court committed reversible error by "permitting the prosecutor to impeach one of her own witnesses with a prior statement in violation of CPL 60.35." The statute limits such impeachment of one's own witness to situations in which the witness has testified on "a material issue of the case" in a manner that "tends to disprove the position of such party." The Appellate Division explains that the impeachment was improper because the witness's testimony did not "tend to disprove" the prosecutor's position: "Here, the witness's testimony, in effect, that he did not see the perpetrator's face and did not see the defendant fire a gun, merely failed to corroborate or bolster the prosecutor's case, but it did not contradict or disprove any testimony or other factual evidence presented by the prosecution."

People v. Farrow, 216 A.D.3d 996, __ N.Y.S.3d __ (2d Dept. 2023): During defense counsel's cross-examination of one of the complaining witnesses, counsel sought to use "that witness's statement in a police report" to refresh the complainant's recollection. The trial judge properly refused to allow it "because the witness did not indicate that she lacked memory on the subject." But the trial court thereafter erred when it refused to allow defense counsel to introduce the statement as a prior inconsistent statement "through the testimony of the detective who recorded th[e] complainant's statements" in the police report. The report contained "the complainant's description of the alleged perpetrator's height and clothing, which was inconsistent with the complainant's testimony at trial," and thus was "admissible as a prior inconsistent statement."

(6) Reputation Evidence

People v. Lisene, 201 A.D.3d 738, 159 N.Y.S.3d 504 (2d Dept. 2022): The trial court committed reversible error by precluding testimony the defense sought to present "on the subject of the reputation for truthfulness and veracity of the eight-year-old complainant's mother . . . , who testified

for the prosecution." "'[T]he presentation of reputation evidence by a criminal defendant is a matter of right, not discretion, once a proper foundation has been laid.'" "Contrary to the [trial court's] determination . . . , neither the specific number of individuals in the purported community, nor the duration of their respective relationships with the mother was dispositive of whether [the defense witness] . . . was qualified to testify about the mother's reputation for truthfulness and veracity among their common acquaintances."

C. Defenses

(1) Right to Present a Defense

People v. Deverow, 38 N.Y.3d 157, 171 N.Y.S.3d 29 (2022): "The trial judge's erroneous evidentiary rulings deprived defendant of his constitutional right to present a defense" by precluding, as impeachment on a collateral matter, testimony of a defense witness who "could have contradicted the sole eyewitness at trial who negated the justification defense and impacted the jury's analysis of that witness's ability to perceive and recall the events," and by rejecting the defense's attempt to use the hearsay rule's "present sense impression" exception to introduce 911 calls that "could have allowed defendant the opportunity to buttress his justification defense, to mount a different defense, or to challenge the eyewitness's account of events"; "'[a] court's discretion in evidentiary rulings is circumscribed by' the defendant's constitutional right to present a defense."

(2) Justification Defense

People v. Guerra, 2023 WL 2529524 (N.Y. Ct. App. March 16, 2023): In a 4-2 decision, the majority of the Court of Appeals declines to "discard the rule . . . that 'preclud[es] the admission of prior violent acts of victims in cases where a claim of justification is made' unless the defendant was aware of the specific acts at the time of the assault." Judge Wilson, in a dissenting opinion joined by Judge Rivera, argues for the adoption of the approach followed "in most jurisdictions that a defendant may use some sort of character evidence – even if unknown to the defendant at the time – to argue that the victim was the first aggressor." Judge Wilson explains that "[a]lthough other jurisdictions do not all adopt the same rule, . . . New York appears to stand almost alone in embracing 'rule of exclusion' . . . , save for Maine."

People v. Skeeter, 2023 WL 3742971 (1st Dept. June 1, 2023): The Appellate Division vacates the manslaughter conviction because "the People did not meet their burden of disproving defendant's justification defense beyond a reasonable doubt." "'When a defense of justification is raised, the People must prove beyond a reasonable doubt that [the] defendant's conduct was not justified. In other words, the People must demonstrate beyond a reasonable doubt that the defendant did not believe deadly force was necessary or that a reasonable person in the same situation would not have perceived that deadly force was necessary.'"

People v. Delisme, 208 A.D.3d 1063, 174 N.Y.S.3d 63 (1st Dept. 2022): The trial court committed reversible error by denying the defense's "request for a jury instruction that defendant, who asserted a defense of justification, had no duty to retreat from the bathroom he shared with the complainant." "This bathroom, unlike a hallway bathroom, was accessible only from the respective rooms of defendant and the complainant. As a matter of law, the shared bathroom was a part of defendant's dwelling, notwithstanding that he shared it with the complainant, as opposed to a common area in the building. Therefore, under Penal Law § 35.15(2)(a)(i), defendant had no duty to retreat before using deadly physical force to defend himself."

(3) Temporary and Innocent Possession of a Weapon

People v. Ruiz, 39 N.Y.3d 981, 181 N.Y.S.3d 185 (2022): The defendant, who was acquitted of second-degree murder based on a justification defense but convicted of gun possession for the firearm she used in the homicide, appealed the trial court's denial of a jury instruction on the defense of Temporary and Innocent Possession of a Weapon. The Court of Appeals concludes that the defendant was not entitled to the jury instruction because Temporary and Innocent Possession of a Weapon requires both "a legal excuse for . . . possession" and """facts tending to establish that, once possession has been obtained, the weapon had not been used in a dangerous manner,""" and "[h]ere, defendant used the weapon in a dangerous manner," "fir[ing] the gun blindly through a closed, windowless door, endangering anyone who might have been on the other side, striking and killing the victim, and creating a risk that the bullet would ricochet off the metal door and potentially injure her children."

D. "Missing Witness" Inference

People v. Reeves, 208 A.D.3d 687, 173 N.Y.S.3d 71 (2d Dept. 2022): The trial court "mprovidently exercised its discretion in granting the prosecution's request

for a missing witness charge" regarding an alibi witness whom the defense was unable to call because she was out of town and the trial judge denied the defense's request for a one-day adjournment so that the witness could come to court. "[I]t is 'unfair as well as illogical to allow a jury to draw an adverse inference from the failure of the party to call a witness when the party is unable to do so.'" By denying the adjournment and granting the missing witness charge, the trial court "deprived the defendant of his right to a fair trial."

E. "Physical Injury" and "Serious Physical Injury"

People v. Mayancela, 207 A.D.3d 752, 172 N.Y.S.3d 113 (2d Dept. 2022): The "serious physical injury" element of assault in the first and second degrees, robbery in the first degree, and gang assault in the first degree was not satisfied by evidence that "the complainant was stabbed multiple times" because "there was no evidence of serious and protracted disfigurement, protracted impairment of health, or protracted loss or impairment of the function of any bodily organ."

People v. Lopez-Sarmiento, 207 A.D.3d 1210, 170 N.Y.S.3d 465 (4th Dept. 2022): The "physical injury" element of assault with a dangerous instrument was not satisfied by testimony that "defendant attempted to stab the victim and the two struggled over the knife" but "the victim suffered no more than minor cuts to her hands that did not require bandaging and caused only transient pain."

People v. Bunton, 206 A.D.3d 1724, 169 N.Y.S.3d 767 (4th Dept. 2022): In a case of assault on a police officer, the "physical injury" element was not satisfied, notwithstanding the officer's testimony that "he experienced 'quite a bit of pain' to his 'left upper thigh/groin area" after struggling with defendant when he resisted arrest and that his pain was a 6 or 7 out of 10 on the pain scale," because "[t]here was only a vague description of the injury, and no medical records for the officer were introduced in evidence . . . [and] there was no testimony that the officer took any pain medication for the injury . . . and the officer did not miss any work or testify that he was unable to perform any activities because of the pain."

People v. Wheeler, 201 A.D.3d 960, 160 N.Y.S.3d 337 (2d Dept. 2022): There was insufficient evidence that the police detective sustained "physical injury" as a result of being punched in the mouth by the defendant. Although the detective testified that "his lip bled, and that he felt severe pain at the time," the "detective did not receive stitches and went back to work that same day," and the hospital records described the injury as a "superficial laceration," and reported that the detective had "assessed his pain as a '3'" and had been "advised to take Tylenol for pain."

VI. Expungement of DNA Evidence

In the Matter of Francis O., 208 A.D.3d 51, 170 N.Y.S.3d 71 (1st Dept. 2022): The Appellate Division reverses the Family Court's denial of the respondent's motion to expunge DNA evidence, holding that the Family Court has jurisdiction to order expungement of DNA evidence and that the court should have granted the requested relief. The respondent, who made an admission to criminal possession of stolen property and received a conditional discharge, sought an order directing the NYPD and OCME to expunge all records and samples relating to DNA testing of a sample obtained by the police from the respondent during interrogation at the police station. The Appellate Division holds that expungement was warranted in this case because the the respondent's "DNA sample was . . . obtained surreptitiously" (during interrogation, the police offered the respondent water in a disposable cup and, after he drank from the cup, the officer retrieved it, vouchered it, and sent it to OCME for DNA analysis), the "DNA was taken for the sole purpose of maintaining his profile in the OCME database for possible future use" ("[t]here was no DNA evidence recovered from the incident to compare . . . [the] DNA sample to"), and "maintaining appellant's DNA profile in OCME's database in perpetuity is completely incompatible with the statutory goal [of rehabilitation] and would result in a substantial injustice" to the respondent.

Legal Updates in Child Welfare Caselaw 2022-2023

Interstate Compact for the Placement of Children (ICPC)

Matter of D.L. v. S.B.
39 N.Y.3d 81 (2022)

FACTS: A neglect petition was filed against the respondent mother and the subject child was placed in foster care. The child's father, who resides in North Carolina, made an application for the child to be put in his care. As such, an ICPC (Interstate Compact for the Placement of Children) was initiated but was denied by the State of North Carolina. In 2017, the father filed for custody, arguing that it was in the best interests of the child to award him sole custody. The Family Court dismissed the petitions without a hearing, holding that that the requirements of the ICPC applied to an out of state placement of the child, despite the fact that the father was a non-custodial parent. Second Department affirmed. Court of Appeals reverses.

The intent of the ICPC is to promote cooperation among states to provide children with the best opportunities for appropriate placement when they cannot be home. There has been disagreement amongst the Appellate Divisions as to whether the ICPC applies to out of state noncustodial parents. The Court of Appeals found that the language of the ICPC itself limits its applicability to cases of placement for foster care or adoption and "there is nothing in the statutory language to indicate that it was intended to apply to out-of-state parents seeking custody of their children."

Indian Child Welfare Act (ICWA)

Haaland v. Brackeen
599 U.S. _____ (2023), 2023 US LEXIS 2545

FACTS: This Case arises from three separate child custody proceedings. The <u>first</u> case involves a child placed in foster care when he was 10 months old. The child's biological mother is a member of the Navajo Nation and the biological father is a member of the Cherokee Nation. The foster parents, who do not have any Native American ancestry, sought to adopt the child after fostering him in excess of a year. The adoption was supported by the biological parents, but not by either Native American tribe. The Navajo Nation found an alternative placement for the child in New Mexico with nonrelative tribal members. After extensive testimony, the Texas court denied the adoption and the foster parents filed an emergency stay of the transfer of the child to New Mexico. The Navajo family withdrew from consideration and the adoption was finalized. The <u>second</u> case involve adoptive parents who were chosen by the biological mother to adopt her newborn child. The child resided with the adoptive parents from the age of three days old. The biological mother visited with the child but supported the adoption. The

biological father visited once but supported the adoption. The biological father has Native American ancestry and the tribe exercised its right to intervene and argued that the child should be removed from the adoptive parents and sent to the tribe's reservation. The tribe withdrew its challenge once the adoptive family joined this lawsuit and the adoption was later finalized. The third case involves a child in foster care whose maternal grandmother belongs to the White Earth Band of Ojibe Tribe. The tribe was notified when the child entered foster care and the tribe said that child was not eligible for tribal membership. The foster parents sought to adopt the child and the tribe sought to intervene with no explanation regarding the change in position. The child was then placed with the maternal grandmother, who lost her foster license due to a criminal conviction. The foster parents adoption was denied, citing ICWA.

The parties argued that Congress lacked the authority to enact ICWA, several ICWA requirements violate the anti-commandeering principle of the Tenth Amendment and the law employs racial classifications that hinder non-Indian families.

The Court holds that it is well established that Congress has "plenary and exclusive" power to legislate with respect to the Indian tribes, and thus, has the power to enact ICWA. The Court further finds that, while principles of Family Law are generally left to the States, the Court has "specifically recognized Congress' power to displace the jurisdiction of state courts in adoption proceedings involving Indian children." The Court further rejects that the provisions of ICWA constitute anticommandeering found in the Tenth Amendment as the regulations apply to both private parties, as well as government parties. The Court does not decide on the Equal Protection challenge and a non-delegation clause as no party with standing brought these arguments.

Derivative Findings

Matter of Divine K.M.
211 A.D.3d 733 (2d Dept. 2022)

FACTS: Domestic Violence allegation on behalf of 7 kids. Petitioner introduces CPS notes at fact finding, which appellate division finds was proper. Three children were present when the father threw an object at the non-respondent mother. ACS also presented evidence that the father frequently yelled at the mother while the children were present. Family Court makes a finding on behalf of all seven children, finding that there was frequent verbal abuse in the presence of the children, and on one occasion throwing the object at the mother.

The Second Department finds sufficient evidence of neglect for the three children who were present when the father threw an object at the mother, but not for the four children who were not present.

The Appellate Division found that the father's yelling was insufficient to impair or be in danger of impairing a child's physical, mental, or emotional condition. The Appellate Division also found that there was not enough evidence to determine that the four children who were *not* physically present when the object was thrown were neglected (because no impairment or imminent danger of physical emotional or mental impairment).

Matter of Katherine L.
209 A.D.3d 737 (2d Dept 2022)

FACTS: Two children (14-year-old target child, 6-year-old alleged as derivatively abused). Older child testifies and the court makes a finding of abuse and derivative abuse.

Appellate division affirms the finding for the 14-year-old child but reverses the derivative finding on behalf of the 6-year-old child. According to the appellate division, the children had different mothers, different "living" situations, and "markedly different relationships" with their father. The Second Department noted that the younger child lived with her father for her whole life, while the older child only started having contact with her father approximately one year prior to the incident of abuse. Also, the Second Department noted that the abuse happened on one occasion outside the home, and the younger child was not aware of the abuse, nor was she in the room when it happened.

Matter of Anthony M.-B.
208 A.D.3d 1327 (2d Dept 2022)

FACTS: Case alleging respondent committed sex abuse and derivative allegations. Non-respondent mother testifies at trial, along with the child protective specialist. Court makes findings against the respondent father for sexually abusing the child, as well as and derivative abuse on behalf of a sibling.

The Second Department affirms the decision, finding sufficient corroboration in the non-respondent mother's testimony confirming certain events. The court also found that the evidence of abuse of the older child demonstrated such an impaired level of parental judgment to create a substantial risk of harm for any child in the father's care.

Matter of Sonja R.
2023 NY Slip Op 02787 (2d Dept 2023)

FACTS: ACS filed a neglect charge alleging that a respondent's behavior and untreated mental illness created impairment or imminent danger of impairment to the child Frye. ACS also filed derivative allegations on behalf of 3 other children. The Family Court dismissed the petition on behalf of Fyre because Frye was freed in another proceeding. The Family Court found that the father derivatively neglected the other children based on the father's untreated mental illness that placed Fyre at imminent risk of harm.

On appeal, the Second Department reversed the decision. The appellate division found that the petitioner did not actually have enough evidence to show Frye was neglected, and therefore there was no basis to make a derivative finding on behalf of the other children.

Evidentiary Issues

People v. Davis
2023 NY Slip Op 01765 (1st Dept 2023)

FACTS: Criminal prosecution for attempted murder, attempted assault, and criminal possession of a weapon. Defendant was convicted. There was an excited utterance allowed into evidence by the trial court – which was made by the victim to his mother thirty minutes after the alleged event. In those thirty minutes, the victim had picked up his son and then arrived at his mother's house and then made the statement in question.

The First Department held that the victim's statement was properly admitted as an excited utterance, finding that there was testimony "visibly upset, crying, and anxious", when he made the statement. "The intervening events of picking up his young son and fleeing to his mother's house do not "suggest[] fabrication or any indication that [he] was no longer under the stress of the event"

Matter of E.H.
209 A.D.3d 582 (1st Dept. 2022)

FACTS: In a case of sex abuse, Child made statements to a medical provider at Four Winds. The Family Court found those statements did not require corroboration, as they were admissible under a hearsay exception. In the alternative, the child's statements were corroborated by the testimony of the caseworker, her treating therapist, her medical records and by expert testimony.

The First Department affirmed the decision and held that the statements contained in the medical records, to hospital staff and to a doctor did not require corroboration, because these out-of-court statements made by the child to hospital staff because they were relevant to the child's treatment, diagnosis, and discharge and thus, were separately admissible under a hearsay exception.

Matter of Taveon J.
209 A.D.3d 417 (1st Dept. 2022)

FACTS: A neglect petition was filed against the mother for failing to enforce an order of protection issued on his behalf in a prior neglect proceeding against the mother's paramour. Despite the order of protection, the mother's paramour continued to reside with the mother and the subject child and had another child together. Another domestic violence incident occurred, wherein the mother and her paramour got into an argument over feeding the baby and paramour began choking the mother. The paramour also threatened to kill the subject child. The subject child was able to grab his mother's phone and call 911. During the trial, the 911 tape with the child's statements were introduced into evidence under the excited utterance exception to hearsay.

The First Department affirmed the neglect finding, holding that the mother placed her children's physical and psychological safety in imminent risk of impairment by refusing to enforce the order of protection. The 911 tape where in the child reported that the paramour allegedly choked the mother and then threatened to kill the child fell under the excited utterance exception to hearsay and thus, did not require corroboration. Additionally, the child's out of court statements to the caseworker and police officer were also properly admitted because they were sufficiently corroborated by the 911 tape.

***Matter of Jadeliz MQ*,**
209 A.D.3d 655 (2d Dept. 2022)

FACTS: A petition was filed against the respondent father alleging sexual abuse of his daughter, as well as acts of domestic violence against the non-respondent mother. The father was arrested as a result of the domestic violence allegations and he was subsequently found guilty of criminal obstruction of breathing, endangering the welfare of a child, attempted assault in the third degree, menacing in the third degree, harassment in the second degree and two counts of criminal contempt in the second degree. ACS then moved for summary judgment based on the criminal conviction. The Court granted the motion for summary judgment and entered a finding of neglect against the father.

The Second Department affirms. The Court held that "[a] criminal conviction may be given collateral estoppel effect in a Family Court proceeding where (1) the identical issue has been resolved and (2) the defendant in the criminal action had a full and fair opportunity to litigate the issue of his or her criminal conduct."

The father was criminally convicted for endangering the welfare of a child. The Family Court gave this criminal conviction collateral estoppel effect because the issue was identical, and the father had a full and fair opportunity to litigate the issue in the criminal case.

Marijuana Caselaw

Matter of Mia S.
212 A.D.3d 17 (2d Dept. 2022)

FACTS: A petition was filed against the mother alleging that the mother abused drugs and failed to address her mental health issues, which placed the child at imminent risk of becoming emotionally, mentally and physically impaired. The mother had a history of abusing cocaine and opiates and was using marijuana and her prescribed Xanax. She also had a recent hospitalization in which she exhibited paranoia and psychosis, which appeared to be substance induced. On January 10, 2020, the Family Court entered a finding of neglect against the mother. The Second Department Affirms.
The use of marijuana became legal on April 1, 2021. The mother appealed based on the 2021 amendment to Family Court Act § 1046(a)(iii) which prevents a finding of neglect solely on marijuana usage and requires that the child's physical, mental, or emotional condition be impaired or in imminent danger of being impaired because of the marijuana usage. The decision of the Family Court predates the amendment to te statues. The mother asked the Court to apply it retroactively.
The Second Department held that the 2021 amendment applies retroactively because it was the legislators' intent to correct a mistake and prevent neglect findings based solely on marijuana usage. However, the court also held that this did not prevent findings of neglect without proving impairment or imminent danger of impairment. In cases where marijuana has been misused to an extent that it had or normally would have produced "a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation, or incompetence, or a substantial impairment of judgment, or a substantial manifestation of irrationality," a finding of neglect is warranted even without evidence of impairment or imminent danger of impairment to the child. Family Court Act § 1046(a)(iii).

Based on the above, the Court affirmed the finding of neglect as the evidence showed that the mother had misused marijuana to the extent that it impaired the mother's ability to care for the children.

Matter of Gina R.
211 A.D.3d. 1483 (4th Dept. 2022)

FACTS: Family Court found that the respondent mother neglected her youngest child in that she wrapped the infant to sleep, on more than one occasion, in loose blankets, despite repeated warnings that doing so created a substantial risk to the child. The mother was also alleged to have neglected her children based on her use of marijuana. The 4th Department remands the case back to the Family Court.

The mother appeals a decision that she neglected her children because of marijuana usage. The Fourth Department remanded the case because evidence of only marijuana usage is insufficient under Family Court Act § 1046(a)(iii).

The Marihuana Regulation and Taxation Act, enacted March 31, 2021, amended FCA §1046(a)(iii), to not allow a prima facie neglect finding based solely on the use of marijuana. The Family Court rendered its decision two days after the amendment FCA §1046(a)(iii) took effect. "[A]s a general matter, a case must be decided upon the law as it exists at the time of the decision." The Fourth Department remanded the case back to Family Court so it may re-open the fact finding hearing on the issue whether the children's condition was impaired or at imminent risk of impairment as a result of the mother's use of marijuana.

PLR Caselaw

Matter of Erica H.-J.
2023 NY Slip Op 02662 (2d Dept. 2023)

FACTS: The 23-month-old child was admitted to the hospital with a lacerated liver and various other injuries. An abuse petition was filed against the mother, the father and the father's paramour. The evidence established that the father picked up the child from the mother's home between 2:15pm and 3:00 PM on January 16, 2016 and brought her to his paramour's home. The father, his paramour and their child went to a birthday party and did not go back to the paramour's home until 10:00 PM where they spent the rest of the evening. The following day, the father, his paramour and the child stayed at home until about 7:30pm and then left for Chuck E. Cheese. The child was returned to her

mother's home at about 10:00 PM. The mother noticed a big patch of the child's hair was missing and she saw bruising on the child's vagina and blood in the diapter, so she called 911 at approximately 10:23pm. The treating physician believed that the injury to the child's liver was the result of blunt force trauma and it occurred between 36 and 48 hours before coming to the hospital. The child also suffered from a lung contusion, an external bruise to her genital area and a tear to her frenulum. Collectively, the injuries were not sustained in an accidental matter, as opined by the doctor. The Family Court entered an abuse finding against all three parties. The father and his paramour appealed the decision, asserting that the paramour was not a person legally responsible for the child's care.

The Second Department found that the paramour was a person legally responsible for the child's care. The father and his paramour had a child prior to the subject child being born, however, they continued to live separately. The paramour met the subject child when she was 6 months old and testified that she "treated [the child] like if she was my child." She also testified that she brought the child to her niece's birthday party because the child was going to be her stepdaughter and that "any child of [the father's] is mine, so any children that [the father] has is a part of me as well." On the weekend of the incident, the father left the child alone with his paramour for 30-60 minutes and they slept at the paramour's home and spent the entire next day there. The paramour also testified that she had only seen the child a total of two or three times in the 23 months of the child's life.

Justice Zayas concurs in part, and dissents in part. The dissent voices disagreement with determining that the paramour was a person legally responsible for the child's care. The dissent points out the father was present at all times when the paramour was with the child, with the exception of a period of 30-60 minutes. The dissent reviewed the definition of Person Legall Responsible, found in Section 1012(g) of the Family Court Act and applied the definition to the contacts the paramour had with the child. The dissent did not find the paramour to be "continually or at regular intervals found in the same household" as the child and also did not find the "frequency and nature of the contact" between the paramour and the child, nor the "duration of the... contact" between them sufficient to find the paramour was a person legally responsible for the child. The dissent did not find that the paramour's testimony regarding how she felt about the child, nor the one overnight at the paramour's home with the father present, was sufficient to establish that the paramour was a person legally responsible for the child's care and thus, could not have been found to abuse the child.

Matter of Elijah AA.
2023 NY Slip Op 02812 (3d Dept. 2023)

FACTS: The subject child tested positive for drugs at the time of his birth in October 2019. A petition was filed against both the mother and father and the child was placed in the care of the Petitioner. Neglect findings entered against both parents. The Father appeals, asserting that the Family Court erred in determining he was a person legally responsible for the child's care. The Third Department reverses the father's neglect finding

The Third Department admits that this case presents a "close call," but there was a sound and substantial basis in the record to find the respondent a person legally responsible for the subject child. The Respondent's testimony was found to be credible at trial. The Respondent testified that he knew he was "possibly the father" and he continued assisting the mother throughout her pregnancy, despite their relationship ending. The Respondent planned to care for the child upon the child's birth, despite any questions he had about being the biological father. The Court found this behavior "was consistent with a person behaving as the functional equivalent of a parent."

However, the evidence provided by the Petitioner at trial failed to establish that the father's conduct fell below a minimum degree of care. The Father had been incarcerated, but provided his mother's contact information as a resource for the child if it was needed. The proof at the trial was mainly hearsay and failed to show how the father's plan impaired the child or placed him in imminent danger of becoming impaired.

Hague Convention

Braude v. Zierler
2022 U.S. Dist. LEXIS 135406 (S.D.N.Y.)
Affirmed 2023 U.S. App LEXIS 9408 (2d Cir.)

FACTS: The Petitioner father filed this action against the Respondent mother, alleging that the Respondent removed their two children from Canada and brought them to the United States in violation of the Hague Convention on the Civil Aspects of International Child Abduction and the Internation Child Abduction Remedies Act. The Petitioner sought the immediate return of his children to their home country of Canada. The Respondent alleged that the father has a history of violent behavior and coercive control, including being physically aggressive even after being asked to stop, throwing and breaking objects, having fits of explosive anger, and forbidding her from speaking to her family, friends and therapist about him. The Respondent conceded that the Petitioner met their prima facie case in that the children were wrongfully removed, but

the Court determined that one of the Hague Convention's exceptions applied that would prevent the return of the children. The Second Circuit affirms.

The Respondent argues that the exceptions of consent and grave danger apply to this situation and, as such, the children should remain in the United States. The District Court held that the mother failed to prove by a preponderance of the evidence that the Petitioner consented to the Respondent taking the two children to New York. While the Petitioner and Respondent had previous conversations about the Respondents bringing the children to New York, the conversation did not happen at the time the children were moved to New York. However, the Court did determine that the Petitioner's unstable mental health, history of domestic violence and coercive conduct, along with access and possession of child pornography demonstrates a grave risk of harm to the children if returned to his care in Canada, and that any ameliorative measures proposed would be insufficient.

Golan v. Saada
142 S. Ct. 1880 (2022)

FACTS: Petitioner mother is a United States citizen who met and married the Respondent Father, an Italian citizen, in Italy, married and resided in Italy with their son. There was a lot of violence between the parties during their relationship, including the father pushing, slapping, grabbing the mother and pulling her hair on occasion. The Respondent father frequently yelled and insulted the Petitioner, often in front of others and once told the Petitioner's family that he would kill her. The incidents would occur in fronf of their son. In July 2018, the Petitioner brought the child to the United States for her brother's wedding and never returned to Italy with the child. As a result, the Respondent filed a petition under the Hague Convention and ICARA seeking the return of the child to Italy. After a trial, the District Court found that the child was wrongfully retained in the United States but found that returning the child to Italy would expose him to grave risk of harm. However, the Court used a Second Circuit precedent "obligating it to 'examine the full range of options that might make possible the safe return of a child to the home country' before it could 'deny repatriation on the ground that a grave risk of harm exists." The Court found the ameliorative measures proposed by the Respondent, including giving the Petitioner funds as financial support, to stay away from the Petitioner and begin cognitive behavior therapy, among other things, were sufficient to return the child to Italy and granted the Respondent's application. The Second Circuit affirmed.

The Supreme Court, in its review of the language of the Hague Convention, found that "nothing in the Convention's text either forbids or requires consideration of ameliorative measures in exercising this discretion." There is nothing that prohibits a district court from considering ameliorative measures, but they "reasonably may decline to consider

ameliorative measures that have not been raised by the parties, are unworkable, draw the court into determinations properly resolved in custody proceedings, or risk overly prolonging return proceedings." The matter was remanded back to the District Court to "exercise its discretion to consider ameliorative measures in a manner consistent with its general obligation to address the parties' substantive arguments and its specific obligations under the Convention."

First Amendment Caselaw

New Hope Fam. Servs. v. Poole
2022 U.S. Dist. LEXIS 160590 (N.D.N.Y.)

FACTS: New Hope Family Services, Inc. is a religious non-profit corporation that operates as a New York voluntary adoption provider authorized to place children with New York State residents through an adoption program. Due to the corporation's religious beliefs and Christian faith, New Hope does not place children with an unmarried or same-sex applicant. In 2018, OCFS informed the agency, that their practices in not placing children with unmarried persons or same-sex couples, was in violation of 18 NYCRR §421.3(d), which prohibited discrimination against applicants for adoption services on the basis of, *inter alia,* sexual orientation, gender identity or expression, and marital status. In 2018, New Hope filed a motion for a preliminary injunction seeking to prevent OCFS from revoking the agency's authorization to place children during the pendency of litigation. OCFS cross moved to dismiss the complaint. The District Court granted OCFS' motion to dismiss and denied the preliminary injunction. The Second Circuit Court of Appeals reversed the dismissal and remanded the matter back to District Court. The District Court granted New Hope's injunction and now grants their Motion for Summary Judgment.

The court held that 18 N.Y.C.R.R. § 421.3(d), which prevented New Hope from discriminating against applicants based on marital status or sexual orientation, violated New Hope's freedom of speech rights because it compelled or prohibited speech and did not pass strict scrutiny. The law compels or prohibits speech because it requires New Hope to engage in speech needed to comply with the law. Also, New Hope cannot express its view that adoption by unmarried or same-sex couples is not in the best interest of the child while complying with the law.

Furthermore, the law does not pass strict scrutiny because it is not narrowly tailored. The law does not provide an accommodation for religious beliefs. It also goes against the compelling interest of maximizing the number of available families for adoption by shutting down an adoption agency. Moreover, New Hope's practice of referring

unmarried or same-sex couples to other adoption agencies that would serve them is more narrowly tailored than shutting down the adoption agency.

New Hope Fam. Servs. v. James
2022 U.S. Dist. LEXIS 175572 (N.D.N.Y.)

FACTS: New Hope Family Services, Inc. is a religious non-profit corporation that operates as a New York voluntary adoption provider authorized to place children with New York State residents through an adoption program. Due to the corporation's religious beliefs and Christian faith, New Hope does not place children with an unmarried or same-sex applicant. A complaint was filed with the New York State Division of Human Rights alleging that, after a general inquiry about adoption services, New Hope violated New York State law and 18 NYCRR 421.3(d). A copy of the complaint and the demand that New Hope respond in 15 days was sent to New Hope. New Hope then filed this action in 2021 alleging that the "active threat" by the Division of Human Rights to investigate and penalize New Hope, violates their rights under the First and Fourteenth Amendments.

New Hope was granted an injunction against the New York State Division of Human Rights, enjoining them from directly or indirectly enforcing New York Executive Law §296 or Civil Rights Law §40-c as to not impose any penalties on New Hope for referring same-sex or unmarried cohabitating couples to other agencies, rather than providing them with adoption services themselves. The court finds that New Hope is not considered a place of public accommodation, as stated in Executive Law 40-c, and is thus not subject to the New York State Human Rights Law, which forbids discrimination based on sexual orientation or marital status. Although the law has a non-exhaustive list of places of public accommodation, an adoption agency is not listed. The Court further cites to the Supreme Court decision in *Fulton v. City of Phila., Pa.*, 141 S. Ct. 1868, 1879-81 (2021). Because New Hope is not considered a public accommodation, the Court found that New Hope was likely to succeed on the merits and granted the preliminary injunction.

LGBTQ+ Caselaw

In re Laura E. v. John D.
2023 NY Slip Op 02568 (3d Dept. 2023)

FACTS: Mother seeks to modify a custody order pursuant to Article 6, asking for sole legal and physical custody of the child. After a *Lincoln* hearing with the child, the Family Court granted the mother sole legal and physical custody of the child, with the father

having parenting time as the parties mutually agree, with the mother retaining discretion as to whether the visit should be supervised. The father was also ordered to complete anger management and mental health counseling. The father appealed and the Third Department remitted the matter back to Family Court to determine whether parenting time with the father is appropriate or whether it is detrimental to the child's welfare due to the sensitive circumstances involved and the passage of time.

The Court focuses on the parenting time awarded the father by the Family Court. The father alleges that the court punished him for his religious views. The Appellate Division disagrees. The evidence showed that the father was quick to lose his temper and his aggressive tendencies caused the child to fear spending time alone with him. Further, the father refused to use the child's chosen name and preferred pronouns, as it was contrary to his Catholic beliefs. The child often reported distress at the father's refusal to respect the child's chosen name and preferred pronouns. The father also took a rigid approach to parenting and often asserted that the child "needs to obey."

KeyCite Red Flag - Severe Negative Treatment
Unconstitutional or PreemptedRecognized as Unconstitutional by In re Adoption of Isabella, N.Y.Fam.Ct., Nov. 20, 2014

McKinney's Consolidated Laws of New York Annotated
Domestic Relations Law (Refs & Annos)
Chapter 14. Of the Consolidated Laws (Refs & Annos)
Article VII. Adoption (Refs & Annos)
Title I. Adoptions Generally (Refs & Annos)

McKinney's DRL § 111

§ 111. Whose consent required

Effective: December 30, 2022

Currentness

1. Subject to the limitations hereinafter set forth consent to adoption shall be required as follows:

(a) Of the adoptive child, if over fourteen years of age, unless the judge or surrogate in his discretion dispenses with such consent;

(b) Of the parents or surviving parent, whether adult or infant, of a child conceived or born in wedlock;

(c) Of the mother, whether adult or infant, of a child born out of wedlock;

(d) Of any person or authorized agency having lawful custody or guardianship of the adoptive child;

(e) In the case of the adoption of a child transferred to the custody and guardianship of an authorized agency, foster parent, or relative pursuant to section three hundred eighty-four-b of the social services law or a child transferred to the custody and guardianship of an authorized agency pursuant to section three hundred eighty-three-c of the social services law:

(i) Of any person adjudicated by a court of this state or a court of any other state or territory of the United States to be the father of the child prior to the filing of a petition to terminate parental rights to the child pursuant to section three hundred eighty-four-b of the social services law, an application to execute a judicial surrender of rights to the child pursuant to subdivision three of section three hundred eighty-three-c of the social services

law, or an application for approval of an extra-judicial surrender pursuant to subdivision four of section three hundred eighty-three-c of the social services law;

(ii) Of any person who filed a petition in a court in this state seeking to be adjudicated the father of the child prior to the filing of a petition to terminate parental rights to the child pursuant to section three hundred eighty-four-b of the social services law, an application to execute a judicial surrender of rights to the child pursuant to subdivision three of section three hundred eighty-three-c of the social services law, or an application for approval of an extra-judicial surrender pursuant to subdivision four of section three hundred eighty-three-c of the social services law, provided that the parentage petition has been resolved in the petitioner's favor or remains pending at the conclusion of the proceedings pursuant to section three hundred eighty-four-b, three hundred eighty-three-c, or three hundred eighty-four of the social services law;

(iii) Of any person who has executed an acknowledgment of parentage pursuant to section one hundred eleven-k of the social services law, section five hundred sixteen-a of the family court act, or section forty-one hundred thirty-five-b of the public health law prior to the filing of a petition to terminate parental rights to the child pursuant to section three hundred eighty-four-b of the social services law, an application to execute a judicial surrender of rights to the child pursuant to subdivision three of section three hundred eighty-three-c of the social services law, or an application for approval of an extra-judicial surrender pursuant to subdivision four of section three hundred eighty-three-c of the social services law, provided that such acknowledgement has not been vacated;

(iv) Of any person who filed an unrevoked notice of intent to claim parentage of the child pursuant to section three hundred seventy-two-c of the social services law prior to the filing of a petition to terminate parental rights to the child pursuant to section three hundred eighty-four-b of the social services law, an application to execute a judicial surrender of rights to the child pursuant to subdivision three of section three hundred eighty-three-c of the social services law, or an application for approval of an extra-judicial surrender pursuant to subdivision four of section three hundred eighty-three-c of the social services law;

(f) In any other adoption proceeding:

(i) Of the father, whether adult or infant, of a child born out-of-wedlock and placed with the adoptive parents more than six months after birth, but only if such father shall have maintained substantial and continuous or repeated contact with the child as manifested by: (A) the payment by the father toward the support of the child of a fair and reasonable sum, according to the father's means, and either (B) the father's visiting the child at least monthly when physically and financially able to do so and not prevented from doing so by the person or authorized agency having lawful custody of the child, or (C) the father's regular communication with the child or with the person or agency having the care or custody of the child, when physically and financially unable to visit the child or prevented from doing so by the person or authorized agency having lawful custody of the child. The subjective intent of the father, whether expressed or otherwise, unsupported by evidence of acts specified in this paragraph manifesting such intent, shall not preclude a determination that the father failed to maintain substantial and continuous or repeated contact with the child. In making such a determination, the court shall not require a showing of diligent efforts by any person or agency to encourage the father to perform the acts specified in this paragraph. A father, whether adult or infant, of a child born out-of-wedlock, who openly lived with the child for a period of six months within the one year period immediately preceding the placement of the child for adoption and who during such period openly held himself out to be the father of such

child shall be deemed to have maintained substantial and continuous contact with the child for the purpose of this subdivision;

(ii) Of the father, whether adult or infant, of a child born out-of-wedlock who is under the age of six months at the time he is placed for adoption, but only if: (A) such father openly lived with the child or the child's mother for a continuous period of six months immediately preceding the placement of the child for adoption; and (B) such father openly held himself out to be the father of such child during such period; and (C) such father paid a fair and reasonable sum, in accordance with his means, for the medical, hospital and nursing expenses incurred in connection with the mother's pregnancy or with the birth of the child.

2. The consent shall not be required of a parent or of any other person having custody of the child:

(a) who evinces an intent to forego his or her parental or custodial rights and obligations as manifested by his or her failure for a period of six months to visit the child and communicate with the child or person having legal custody of the child, although able to do so; or

(b) who has surrendered the child to an authorized agency under the provisions of section three hundred eighty-three-c or three hundred eighty-four of the social services law; or

(c) for whose child a guardian has been appointed under the provisions of section three hundred eighty-four-b of the social services law; or

(d) who, by reason of mental illness or intellectual disability, as defined in subdivision six of section three hundred eighty-four-b of the social services law, is presently and for the foreseeable future unable to provide proper care for the child. The determination as to whether a parent is mentally ill or intellectually disabled shall be made in accordance with the criteria and procedures set forth in subdivision six of section three hundred eighty-four-b of the social services law; or

(e) who has executed an instrument, which shall be irrevocable, denying the paternity of the child, such instrument having been executed after conception and acknowledged or proved in the manner required to permit the recording of a deed.

3. (a) Notice of the proposed adoption shall be given to a person whose consent to adoption is required pursuant to subdivision one and who has not already provided such consent.

(b) Notice and an opportunity to be heard upon the proposed adoption may be afforded to a parent whose consent to adoption may not be required pursuant to subdivision two, if the judge or surrogate so orders.

(c) Notice under this subdivision shall be given in such manner as the judge or surrogate may direct.

(d) Notwithstanding any other provision of law, neither the notice of a proposed adoption nor any process in such proceeding shall be required to contain the name of the person or persons seeking to adopt the child.

4. Where the adoptive child is over the age of eighteen years the consents specified in paragraphs (b), (c) and (d) of subdivision one of this section shall not be required, and the judge or surrogate in his discretion may direct that the consent specified in paragraph (f) of subdivision one of this section shall not be required if in his opinion the best interests of the adoptive child will be promoted by the adoption and such consent cannot for any reason be obtained.

5. An adoptive child who has once been lawfully adopted may be readopted directly from such child's adoptive parents in the same manner as from its birth parents. In such case the consent of such birth parents shall not be required but the judge or surrogate in his discretion may require that notice be given to the birth parents in such manner as he may prescribe.

6. For the purposes of paragraph (a) of subdivision two:

(a) In the absence of evidence to the contrary, the ability to visit and communicate with a child or person having custody of the child shall be presumed.

(b) Evidence of insubstantial or infrequent visits or communication by the parent or other person having custody of the child shall not, of itself, be sufficient as a matter of law to preclude a finding that the consent of such parent or person to the child's adoption shall not be required.

(c) The subjective intent of the parent or other person having custody of the child, whether expressed or otherwise, unsupported by evidence of acts specified in paragraph (a) of subdivision two manifesting such intent, shall not preclude a determination that the consent of such parent or other person to the child's adoption shall not be required.

(d) Payment by a parent toward the support of the child of a fair and reasonable sum, according to the parent's means, shall be deemed a substantial communication by such parent with the child or person having legal custody of the child.

Credits

(Added L.1938, c. 606, § 1. Amended L.1941, c. 13, § 2; L.1942, c. 118, § 1; L.1945, c. 531, § 1; L.1959, c. 168, § 1; L.1959, c. 448, § 1; L.1961, c. 147, § 1; L.1962, c. 689, § 17; L.1970, c. 570, § 3; L.1973, c. 195, § 16; L.1974, c. 842, § 1; L.1974, c. 920, § 6; L.1975, c. 246, § 1; L.1975, c. 704, § 3; L.1976, c. 666, § 9; L.1980, c. 575, §§ 1 to 3; L.1983, c. 152, § 1; L.1983, c. 911, § 4; L.1985, c. 918, §§ 1, 2; L.1991, c. 48, § 2; L.1997, c. 375, § 1, eff. Aug. 5, 1997; L.2008, c. 305, § 3, eff. July 21, 2008; L.2016, c. 37, § 1, eff. May 25, 2016; L.2022, c. 828, § 1, eff. Dec. 30, 2022.)

Editors' Notes

VALIDITY

<For validity of this section, see In re Adoption of Isabella, 52 Misc.3d 653, 34 N.Y.S.3d 317 (Fam. Ct. Albany 2014).>

SUPPLEMENTARY PRACTICE COMMENTARIES

by Alan D. Scheinkman

2016

C111:2: Consent to Adoption-Unwed Father of Child More Than Six Months Old

C111:4: When Consent Not Required-Abandonment

C111:7: When Consent Not Required-Mental Illness or Intellectual Disability

C111:2: Consent to Adoption-Unwed Father of Child More Than Six Months Old

There are two steps to the determination as to whether a biological father's consent may be dispensed with in a proceeding seeking approval of the adoption of a out-of-wedlock child over six months old. The threshold inquiry is whether the biological father has established a right to consent to the adoption by maintaining a substantial and continuous or repeated relationship with the child by means of financial support according to the father's means and either monthly visitation, when physically and financially able to do so, or regular communication with the child or the child's caregiver. Only after the biological father establishes his right of consent to the adoption by meeting the threshold question does the court proceed to determine whether the father forfeited that right by abandonment. Thus, even where paternity is conceded, the court may not proceed directly to the issue of abandonment without first determining whether the father is a "consent" father under Domestic Relations Law § 111(1)(d). *Matter of Blake I.*, 136 A.D.3d 1190, 26 N.Y.S.3d 793 (3d Dep't 2016). Of course, if paternity is disputed, the paternity issue becomes the first issue that must be decided, else the other questions are not relevant. *See Matter of Heaven A.A.*, 130 A.D.3d 10, 8

N.Y.S.3d 384 (2d Dep't 2015).

C114:4: When Consent Not Require--Abandonment

A court may not short-cut the process of determining whether a putative father is a consent father by proceeding directly to a hearing on the issue of abandonment without regard to the issue of paternity. Unless paternity is established is conceded, the issue of paternity must be established first, as by DNA testing. This is the holding of *Matter of Heaven A.A.*, 130 A.D.3d 10, 8 N.Y.S.3d 384 (2d Dep't 2015). The court reasoned that if DNA tests showed the putative father was not the child's biological father, there would be no need to commence a termination of parental rights proceeding against him. However, if the results of the DNA testing demonstrated that he was the biological father, it would be necessary to determine whether he was a "consent father" under Domestic Relations Law § 111(1)(d) and, if so, whether his consent would otherwise be required but his right thereto has been forfeited by his abandonment of the child. But neither of those determinations could be properly reached without the DNA evidence. Importantly, without the benefit of DNA testing, the putative father would be subject to the stigma of an abandonment finding as to a child for whom he may not have any parental rights or responsibilities. Moreover, such finding might negatively affect his status in potential future court proceedings.

Similarly, even where paternity is conceded, the court may not proceed directly to the issue of abandonment without first determining whether the father is a "consent" father under Domestic Relations Law § 111(1)(d). *Matter of Blake I.*, 136 A.D.3d 1190, 26 N.Y.S.3d 793 (3d Dep't 2016).

C111:7: When Consent Not Required--Mental Illness or Intellectual Disability

In 2016, the Legislature amended various statutes, including DRL § 111(2)(d) to substitute the term "intellectual disability" for the term "mental retardation". This amendment took effect May 25, 2016 (L.2016, ch. 37). This change undoubtedly was made in order to avoid the harshness and stigma associated with the former terminology. Since there was no intent to change the substance, references in older materials to the original term should be deemed updated accordingly.

2015

C111:1: Consent to Adoption--Whose Consent Required

C111:4: When Consent Not Required--Abandonment

C111:1: Consent to Adoption--Whose Consent Required

Consent is needed from an adoptive child who is at least 14 years old, unless the judge dispenses with the need for consent. When a child is close to 14, but not yet 14, it may be advisable to withhold a determination until after the child attains 14 so that the child's views may be considered. In *In re Gena S.,* 101 A.D.3d 1593, 958 N.Y.S.2d 546 (4th Dept. 2014), involving a dispositional order terminating the mother's parental rights with 3 children, one child was just one month short of 13 when the order was made and the child was opposed to being adopted. By the time the appeal was heard, the child was over 15, was still refusing to consent to adoption, and, according to her

attorney, had no real bond with anyone except for the mother and her sisters. The appellate court ruled that a new dispositional hearing should be held in order to determine what alternative dispositional plan would be in the best interests of the child.

C111:4: When Consent Not Required--Abandonment

Once the petitioner shows, by clear and convincing evidence, that a biological parent failed to visit the child for six months and to communicate with the child or legal custodian, although able to do so, the burden shifts to the parent to demonstrate sufficient contact or an inability to engage in such contact. *Matter of Lori QQ. v. Jason OO*, 118 A.D.3d 1084, 987 N.Y.S.2d 652 (3d Dept. 2014). In that case, the mother claimed that her inability to engage in contact with the child or legal custodian stemmed from a protective order which barred her from contact with the child and with the child's father, who had custody. However, the appellate court found this contention unavailing because the mother had consented to the protective, because the mother could have applied for visitation once she obtained psychological and alcohol and substance abuse evaluations and followed the recommended treatment, and because the mother was not precluded from contact with the paternal grandmother and did not seek any information from her. The court ruled that the mother failed to demonstrate an acceptable reason for the absence of contact or communication for over six months and that the impediments contributing to such absence of contact resulted from the mother's own acts and lack of effort.

2014

C:111:4: When Consent Not Required-Abandonment

C111:7: When Consent Not Required-Mental Illness or Retardation

C:111:4: When Consent Not Required-Abandonment

A negative inference may be drawn against a biological parent who fails to call his or her treating physician or other medical providers to testify to rebut allegations raised in the petition and by the petitioner's testimony, at least after the biological parent expressed an intention to call the medical providers. *Matter of Savannah Love Joy F.*, 110 A.D.3d 529, 973 N.Y.S.2d 165 (1st Dept. 2013).

C111:7: When Consent Not Required-Mental Illness or Retardation

A suspended judgment is not an available dispositional alternative after a fact-finding determination that a biological parent has a mental illness sufficient to warrant termination of parental rights. *Matter of Savannah Love Joy F.*, 110 A.D.3d 529, 973 N.Y.S.2d 165 (1st Dept. 2013).

2013

C:111:1: Consent to Adoption--Whose Consent Required

C:111:2: Consent to Adoption--Unwed Father of Child More than Six Months Old

C:111:1: Consent to Adoption--Whose Consent Required

The 2012 supplementary practice commentary referenced the decision in *Matter of Y.*, 34 Misc.3d 667 936 N.Y.S.2d 846 (Fam. Ct. Bronx County 2011), holding that a private placement adoption by the child's maternal aunt could proceed notwithstanding the refusal of the authorized agency having custody of the child to consent to the adoption. This determination has been reversed. *In re Yary,* 100 A.D.3d 200, 952 N.Y.S.2d 514 (1st Dep't 2012), *leave denied*, 20 N.Y.3d 1006, 983 N.E.2d 767, 959 N.Y.S.2d 689 (2013). In a comprehensive opinion by Associate Justice David Saxe, the First Department concluded that the governing statutes, which must be strictly construed, require that, where an authorized agency has custody of the subject child, the agency consent to the adoption. The First Department overruled the argument that agency consent was not necessary for a private placement adoption, ruling that consent is required whether the proposed adoption was a private placement adoption or an agency adoption. The First Department agreed with the Fourth Department's holding in *Matter of Savon*, 26 A.D.3d 821, 809 N.Y.S.2d 740 (4th Dep't 2006), cited in the main volume at page 85, that where an agency has been awarded care and custody of a child, the agency's refusal to consent to an adoption petition leaves the court without the authority to entertain the petition.

The First Department pointed out that the putative adoptive parent is not without a remedy. The court observed that the agency must not withhold its consent unreasonably. If consent is denied, putative adoptive parent may seek a fair hearing before the agency and, if relief is denied, challenge the adverse ruling by a CPLR article 78 proceeding.

C:111:2: Consent to Adoption--Unwed Father of Child More than Six Months Old

Several recent decisions have reaffirmed the proposition that the incarceration of an unwed father does not excuse his failure to meet the criteria set forth in DRL § 111(subd. 1[d]) of having to pay child support and maintain regular communications with the child. *In re Jaden Christopher W.-McC.*, 100 A.D.3d 486, 954 N.Y.S.2d 513 (1st Dep't 2012), *leave denied*, 20 N.Y.3d 858, 960 N.Y.S.2d 349, 984 N.E.2d 324 (2013); *Matter of John Q. v. Erica R.,* 104 A.D.3d 1097, 962 N.Y.S.2d 487 (3rd Dep't 2013); *Matter of Harold Ali D.-E. [Rubin Louis E.]*, 94 A.D.3d 449, 449, 942 N.Y.S.2d 50 (1st Dep't 2012). While incarceration may, perhaps, excuse or explain the unwed father's failure-really inability-to visit with the child, the unwed father is still obligated to pay support and maintain regular communications.

While incarceration may limit the amount that the unwed father may earn, it does not, by itself, show that he can earn nothing. Further, the unwed father is obligated to contribute something even if no court order of support is in effect. *Matter of John Q. v. Erica R., supra*. Indeed, the unwed father's willingness to pay child support voluntarily is perhaps more indicative of a sincere interest in asserting his parental rights than his making payments under compulsion of a court order.

2012

C111:1 Consent to Adoption-Whose Consent Required

The materials in the main volume (pages 85-86) point out that where an authorized agency has custody of the child, the agency's consent to the adoption is mandatory and, if the agency refuses consent, the court lacks jurisdiction to entertain the adoption. However, in *Matter of Y.*, 34 Misc.3d 667, 936 N.Y.S.2d 846 (Fam. Ct. Bronx County 2011), the court held that a private placement adoption brought by the child's maternal aunt could proceed notwithstanding the refusal of the agency, who had custody of the child, to consent to the adoption. In that case, the child had been removed from the mother's home and placed with a non-kinship foster parent, who sought to adopt the child. During the pendency of termination proceedings, the birth mother died. When the maternal aunt, who had not participated in the prior proceedings, learned that the mother had died, she sought guardianship of the child but that proceeding was ultimately denied and the aunt, based on information from a court referee, proceeded to file for adoption. The agency argued that the aunt could not proceed with the adoption without its consent and that the agency's plan was to proceed with the adoption by the foster mother. The court noted, however, that the investigatory report in connection with the foster mother's adoption was inadequate and, despite several letters from the court, the information provided was incomplete, inadequate, contradictory and specious. The court expressed its concern that if it dismissed the aunt's petition and then found that the foster mother was unsuitable, the child would be left without an adoptive resource or opportunity for permanency.

PRACTICE COMMENTARIES

by Alan D. Scheinkman

C111:1: Consent to Adoption--Whose Consent Required

C111:2: Consent to Adoption--Unwed Father of Child More Than Six Months Old

C111:3: Consent to Adoption--Unwed Father of Child Under Six Months Old

C111:4: When Consent Not Required--Abandonment

C111:5: When Consent Not Required--Surrender

C111:6: When Consent Not Required--Involuntary Guardianship

C111:7: When Consent Not Required--Mental Illness or Retardation

C111:8: When Consent Not Required--Denial of Paternity

C111:9: When Consent Not Required--Other Instances

C111:10: Revocation of Consent--Agency Adoptions

C111:11: Notice of Proposed Adoption

C111:12: Consent--When Obtained

C111:1: Consent to Adoption--Whose Consent Required

Traditionally, and today, consent to adoption is required from:

(a) the adoptive child, if over the age of 14, unless the judge or surrogate, as a matter of discretion, dispenses with the need for such consent;

(b) both parents, or the surviving parent, whether adult or infant, of a child conceived or born in wedlock;

(c) the mother, whether adult or infant, of a child born out of wedlock; and

(d) any person or authorized agency having lawful custody of the adoptive child. DRL § 111 (subd. 1[a-c], [f]).

In a private placement adoption, a parent having custody of a child whose adoption is sought by his or her spouse need only consent that his or her child be adopted by a named stepfather or stepmother. DRL § 115-b (subd. 5).

Any person or authorized agency who has lawful custody of the adoptive child must consent to the adoption. DRL § 111(1)(a) to (1)(c), (1)(f). Where the county department of social services has lawful custody of the child, the failure of the department to execute and file written consents with the court renders the court without jurisdiction to entertain the adoption proceeding. *Matter of Savon,* 26 A.D.3d 821, 809 N.Y.S.2d 740 (4th Dept. 2006); *Matter of Ralph*, 274 A.D.2d 965, 710 N.Y.S.2d 500 (4th Dept. 2000).

In *Savon*, the great aunt of the child petitioned the court for an adoption. However, the child was in the care and custody of the county department of social services, which refused to provide its consent. As the result, the court was without jurisdiction to entertain the adoption proceeding. While the great aunt could challenge the agency's refusal to consent by seeking an administrative hearing and, thereafter obtain judicial review by an Article 78 proceeding, the great aunt could not dispense with the agency's need for consent. *Ralph* arose on unusual facts, in which inconsistency on the part of the county department of social services led to competing adoption petitions being filed by different sets of adoptive parents, with both sets of parents being fit and both having strong emotional connections to the children at issue. The children, who were half-siblings, were initially placed with one set of foster parents. However, after several years, one child was removed to another foster parent, the social services officials explaining that they had received professional advice that the children should be separated and separately adopted. Later, the social services officials reversed themselves and told the second foster parent that both children should be adopted together, and that she could adopt both the child who was with her as well as the child who remained with the first couple. The social services department then initiated steps to remove the child from the home of the first couple. After both sets

of prospective adoptive parents commenced competing proceedings, the parties and the social services department consented to allowing the family court to conduct a hearing and decide which of the proposed adoptions was in the children's best interests. After the family court held that the second adoptive parent should be allowed to adopt both children, the first set of adoptive parents appealed. The appellate court held that the procedure that was followed allowed the department of social services to abdicate its role of using its professional judgment in placing for adoption children within its lawful custody. Since there was no indication that the department had executed and filed its consent to the adoption of the children by any of the parents, the adoption application was incomplete and the court lacked jurisdiction to entertain it. The role of the court is to determine whether a complete adoption application for a child in the care and custody of an authorized agency should be approved in the best interests of the child. The appellate court directed that the pending adoption proceedings be dismissed, subject to the right of all parties to submit new adoption petitions, and any rights that the first set of foster parents might have to challenge the removal of the child who was still with them from their home, and to challenge any refusal of the social services officials to consent to their petition to adopt.

At one time, DRL § 111 which is the principal statute governing consent requirements in adoption proceedings, did not make the consent of the birth father a prerequisite to adoption. However, in 1979, the United States Supreme Court, in *Caban v. Mohammed*, 441 U.S. 380, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1979), declared the statute unconstitutional as it authorized the adoption of children over the objections of a birth father who had maintained a substantial relationship with the children. In *Caban*, the birth father had lived with the birth mother for several years and, though they were not married, they held themselves out as married. The birth father supported the children and, after he separated from the mother and she took up residence with another man, visited the children regularly. The Court held that where a birth father of an out-of-wedlock child has maintained a substantial relationship with the child and has admitted his paternity, the state may not exclude the father from participation in the adoption decision and may not allow birth mothers to arbitrarily cut off the parental rights of the birth father. On the other hand, in *Quilloin v. Walcott*, 434 U.S. 246, 98 S.Ct. 549 (1978), the Supreme Court held that a birth father, who never had or sought legal custody of a child and who had not regularly supported the child, was not deprived of due process by a state court decision to allow the husband of the birth mother to adopt the child because the decision was in the child's best interests. The Supreme Court in *Caban* and *Quilloin* thus determined that the entitlement of a birth father of an out-of-wedlock child to veto a proposed adoption of the child by withholding a required consent is dependent upon the substantiality of his contacts and relationship with the child, including his frequency of visitation and the degree of support provided to the child.

In response to *Caban,* the Legislature amended section 111 to require the consent of birth fathers, whether adults or minors, of out-of-wedlock children where certain statutory criteria have been met. The Legislature set up one test for an unwed father's consent right where the child to be adopted is more than six months old (DRL § 111[1][d]) and a different test where the child is less than six months old when placed for adoption. DRL § 111[1][e]. The standards for determining the consent rights of an unwed father where the child is over six months old focus on the father's provision of financial support and his visitation and communication with the child. An exception is made for cases in which the father's efforts were thwarted by the mother or others. In the case of the consent rights of an unwed father where the child is less than six months old when placed, in addition to requiring financial support and acknowledgement of the child, the unwed father was required to have openly lived with the mother for at least six months. These different requirements, discussed in Practice Commentaries C111:2 and C111:3 below, have led to different judicial reactions. The statutory requirements imposed for consent rights of unwed fathers of children less than six months old when placed for adoption have been held unconstitutional. The requirements imposed for consent rights of unwed fathers of children more than six months old when placed for adoption have been sustained and judicially enforced.

Whether an unwed father has taken, or was prevented from taking, the steps sufficient to give him the right to veto the adoption of his child will most usually involve questions of fact which cannot properly be resolved by summary judgment. In *Matter of M.*, 39 A.D.3d 754, 833 N.Y.S.2d 248 (2nd Dept. 2007), the Appellate Division reversed an order of the Family Court which had held, on the basis of summary judgment, that the unwed father's consent was not required. In that case, father had had custody of his two children but, after a few months, guardianship was awarded to the biological mother's sister and her husband, who later petitioned for adoption. The father subsequently brought a proceeding in Massachusetts seeking to change the guardianship to a paternal aunt and uncle. He did not succeed but did obtain an order permitting to him to obtain the identity of, and contact, the children's therapist in New York. Contemporaneously, the maternal aunt sought, and obtained on default, an order of protection in New York. The unwed father defaulted because he claimed that New York lack jurisdiction. The father did contact the therapist and tried unsuccessfully to obtain an order permitting visitation from the Massachusetts court. When the guardians sought to adopt, the Family Court, on summary judgment, ruled that the consent of the unwed father was not needed as he did not pay support and he had failed to oppose the order of protection which had prevented him from contacting the children. The Appellate Division reversed, holding that there were several potential explanations for the father's nonpayment of support and his lack of direct contact with the children. As to support, the father contended that he was indigent and that, while he attempted to send gifts to the children, the gifts were refused by the prospective adoptive parents. As to communications with the children, the order of protection precluded him from such communications and his default could be explained by his indigency, the absence of counsel, and his difficulties in navigating the legal system from out-of-state and between two jurisdictions. On the other hand, in *Matter of Jamize G.*, 40 A.D.3d 543, 838 N.Y.S.2d 499 (1st Dept. 2007), *leave to appeal denied,* 9 N.Y.3d 808, 844 N.Y.S.2d 174, 875 N.E.2d 893 (2007), the First Department held that the unwed father's formal acknowledgment of paternity, his establishment of paternity by blood testing, and his provision of financial support to the birth mother during pregnancy and for a period after the birth of the child did not even merit granting him a hearing on the issue of consent rights. The appellate court relied upon the father's discontinuance of support once the child was placed in foster care and his failure to make inquiry as to his financial responsibility. Furthermore, he did not seek custody or recommend viable alternative caretakers and, while he ultimately submitted to blood testing, he initially failed to comply with court orders directing blood tests.

Note that where the consent of a parent is not required, as where the father of an out-of-wedlock child placed for adoption more than six months after birth fails to meet the requirements of DRL § 111 (subd. 1[d]), it is not necessary to establish the existence of grounds for avoiding such consent. *Matter of Kasiem H.*, 230 A.D.2d 796, 646 N.Y.S.2d 541 (2nd Dept. 1996).

Where a parent is unable to care for a child, both at present and for the foreseeable future, because of mental illness or retardation, proceedings may be brought under Social Services Law § 384-b to terminate the rights of the disabled parent and dispense with the need for that parent's consent to adoption. (*See* Practice Commentary C111:7). In *Matter of Caroline*, 218 A.D.2d 388, 638 N.Y.S.2d 997 (4th Dept. 1996), the court held that private placement petitioners have standing to seek to dispense with the consent of a biological parent on the ground of parental mental illness or retardation. *See* discussion in Practice Commentary C111:7, *infra*.

C111:2: Consent to Adoption--Unwed Father of Child More Than Six Months Old

Where the out-of-wedlock child was placed with adoptive parents more than six months after the child's birth, the birth father's consent is required where he has maintained substantial and continuous

or repeated contact with the child as manifested by:

(i) the payment by the father toward the support of the child of a fair and reasonable sum, according to the father's means, and either

(ii) the father's visiting the child at least monthly when physically and financially able to do so and not prevented from doing so by the person or authorized agency having lawful custody of the child, or

(iii) the father's regular communication with the child or with the person or agency having the care or custody of the child when physically and financially unable to visit the child or prevented from doing so by the person or authorized agency having lawful custody of the child.

The subjective intent of the father, whether expressed or otherwise, unsupported by evidence of acts specified manifesting such intent, does not preclude a determination that the father failed to maintain substantial and continuous or repeated contact with the child. In making such a determination, the court is not to require a showing of diligent efforts by any person or agency to encourage the father to perform the acts specified. A father, whether adult or infant, of a child born out-of-wedlock, who openly lived with the child for a period of six months within the one year period immediately preceding the placement of the child for adoption and who during such period openly held himself out to be the father of such child is deemed to have maintained substantial and continuous contact with the child for the purposes of the statutory provisions. DRL § 111 (subd. 1[d]).

Since DRL § 111 (subd. 1[d]) focuses on the relationship between unwed father and child, provides criteria that are keyed to manifestation of parental responsibility, and makes allowance for the possibility that the father may be hindered in his efforts to comply with the statute by the actions of persons having custody, it would seem secure from constitutional attack. In one case, the Court of Appeals expressly declined to address the issue of the constitutionality of DRL § 111 (subd. 1[d]). *Matter of Andrew Peter H.T.*, 64 N.Y.2d 1090, 489 N.Y.S.2d 882, 479 N.E.2d 227 (1985). However, subsequently, the Court of Appeals has indicated in *dicta* that the provisions of DRL § 111 (subd. 1[d]) are constitutional. In invalidating the companion provisions of DRL § 111 (subd. 1[e]), the Court observed that the distinctions between the two statutes, based upon the child's age, reflect the inherently different position of an unwed mother alone faced with the enormous responsibility of making crucial decisions about the future of her newborn child. *Matter of Raquel Marie X.*, 76 N.Y.2d 387, 404, 559 N.Y.S.2d 855, 862, 559 N.E.2d 418 (1990), *cert. denied*, 111 S.Ct. 517, 498 U.S. 984, 112 L.Ed.2d 528. As the child grows older, the urgency underlying certain of those decisions arguably diminishes, and at that point there may be less justification for requiring the biological father's participation rather than allowing him to fulfill his responsibilities through financial support and occasional visitation or communication, as contemplated by Domestic Relations Law § 111(1)(d). While the state cannot deny unwed fathers of newborns an opportunity to establish legal responsibility for the child, it can deny a right of consent to unwed fathers who do not come forward to immediately assume their parental responsibilities. DRL § 111 (subd. 1[d]) is a constitutional exercise of the state's right to prescribe conditions for determining whether the unwed father's manifestation of interest in his child is sufficiently prompt and substantial to require constitutional protection.

On the other hand, in *Matter of M./B. Children*, 7 Misc. 3d 272, 792 N.Y.S.2d 785 (Fam. Ct. Kings County 2004), the court held that the requirement of DRL 111(1)(d) that the father out of an out-of-wedlock child must have paid fair and reasonable child support in order for him to block adoption of the child is unconstitutional, at least as applied to a father who had established a

significant relationship with the child. In that case, orders of filiation had been issued establishing paternity for four of the five children at issue and, indeed, the father had obtained custody of those four children for a period of about one year. Thereafter, those children were placed in the custody of the children's maternal grandmother, who later became the foster mother of the four children, as well as the custodian and foster mother of fifth child. The father was incarcerated and spent about five years in prison. However, he maintained telephone contact with the children and, after his release, he visited the children. The biological father could not satisfy the threshold statutory requirement of having paid child support. Nevertheless, the family court ruled that, because the father had manifested a significant, substantial relationship with the oldest four children, he was entitled to have parental rights with respect to those children, though not with respect to the fifth, and youngest, child. In contrast, in *Matter of St. Vincent's Services, Inc.,* 17 Misc.3d 443, 841 N.Y.S.2d 834 (Fam.Ct. Kings County 2007), the court distinguished *Matter of M./B. Children* found the statute constitutional and applied it to deny consent rights to a father never had actual or legal custody of his daughter, never took take steps to prepare to obtain custody of her, did not buy any provisions or make any arrangements to provide her a home and, despite having a job at the time of the child's birth, did not provide financial support to the mother during her pregnancy or following the birth of the child.

In *Matter of Sergio LL*, 269 A.D.2d 699, 703 N.Y.S.2d 310 (3rd Dept. 2000), the court held that the unwed father of a 10-year-old failed to meet the criteria set forth in DRL § 111(1)(d) for establishing a right to veto a proposed adoption of the child. In that case, the petitioners had been the foster parents of the child since the child was five years old. Both biological parents of the child were incarcerated. The child's mother had surrendered him for adoption five years earlier. The unwed father had apparently been incarcerated since before the child's birth. He was serving a 15-year-to-life prison term and would not be eligible for parole until at least September 29, 2003. While the court acknowledged that the father's incarceration made the task of establishing a relationship with his newborn son somewhat difficult, the court held that there were numerous steps that the father could have taken, but did not, to maintain a substantial and continuous relationship with him while in prison or, at the very least, to maintain regular communication with him or his caregiver. For example, even though he had telephone privileges, the unwed father did not attempt to contact the child's mother (before her own incarceration) to inquire about the child's progress and well-being. He never even requested her telephone number while they were still in contact with each other. Neither did he ask the mother to bring the child for visits. He also never asked his family to attempt to make contact with the child or the child's mother on his behalf. Also, he did not request that his family be permitted to visit with the child during his incarceration, and he made no effort to ascertain who was caring for the child, simply assuming that the mother's extended family was doing so. He did not attempt to make any contact with these family members. In fact, the unwed father took no action at all until he was told that the child was in the care and custody of the county department of social services and had foster parents who were willing to adopt him. This belated interest in the child was neither sufficiently prompt nor sufficiently substantial to require constitutional protection, and was nothing more than an effort to block the adoption.

In *Matter of Vanessa Ann G.-L.*, 50 A.D.3d 1036, 856 N.Y.S.2d 657 (2nd Dept. 2008), the Appellate Division, reversing the Family Court, held that the unwed father had established consent rights under the criteria set forth in DRL § 111(1)(d), observing that, though the child had been placed immediately after birth, she was more than six months old when actually placed for adoption, rendering DLR § 111(1)(d) applicable, not subdivision 1(e). Of moment, the child had been removed immediately upon birth and placed the foster parents, with whom she continued to reside and who sought to adopt her. However, the placement was not for adoption purposes but rather the objective at the time was the restoration of the child to the birth mother. As to the birth father, he had no contact with the birth mother at the time of the birth and was unaware of the birth. He filed a paternity petition about one year after the birth and was found to be the father. He began paying child support through a wage deduction order and commenced supervised visitation. He filed a custody petition as

well. The appellate court concluded that the birth father testified, without refutation, that he regularly visited the child, paid child support and did all that was requested of him. This satisfied the statutory requirements applicable to a placement of a child for adoption when the child is more than six months old and also negated any finding of abandonment. Accordingly, it was ruled that the father had the right to consent to (or more precisely to veto) the proposed adoption.

In *Matter of Maxamillian*, 6 A.D.3d 349, 777 N.Y.S.2d 35 (1st Dept. 2004), the Appellate Division, First Department, held that the biological father of an out-of-wedlock child, who was seven years old when his mother's new husband sought to adopt him, did not qualify for consent rights. The biological father did pay some child support during the first 18 months of the child's life but his payments were limited and did not indicate that he was a consistent and reliable source of support. Further, he paid no support at all for the ensuing five and one-half years, which were the years immediately prior to the filing of the adoption petition. Nor did the biological father attempt to visit or maintain contact with the child during the five-and-one-half-year period. While he claimed that he had called the child and sent letters to the child, he did not provide any objective proof to substantiate his claim.

In *Matter of James Q*, 240 A.D.2d 841, 658 N.Y.S.2d 535 (3rd Dept. 1997), the court, applying DRL § 111 (subd. 1[d]), held that the unwed father had not established his right to veto the adoption of his child and that he had no constitutional right to such a veto. In that case, after his birth, the child lived with the mother who, more than six years later, married another man. After the mother, her husband, and the child lived together for nearly five years, the mother's husband sought to adopt the child. The record showed that the child had not received any cards or gifts from his biological father since the time that the father sent him a wagon and some books when the child was approximately two years old. Since that time, the father had seen the child on only one occasion, a brief meeting several years prior to the commencement of the proceeding. In addition to the lack of contact with the child, the father never provided any financial support even though he had been employed. While the father had filed three paternity proceedings, each case was dismissed to the father's failure to have his blood drawn for genetic marker testing.

For another case in it was held that the unwed father had not maintained substantial and continuous or repeated contact with the child within the meaning of DRL § 111 (subd. 1[d]), *see Matter of Kasiem H.*, 230 A.D.2d 796, 646 N.Y.S.2d 541 (2nd Dept. 1996).

Where the parent of an out-of-wedlock child is a minor, a guardian ad litem must be appointed for the parent but, in view of the statutory provision requiring the consent of the parent, whether adult or minor, the consent of the guardian ad litem is not necessary for the adoption. *Matter of X*, 84 Misc.2d 770, 376 N.Y.S.2d 825 (Surr.Ct. Cattaraugus County 1975).

C111:3: Consent to Adoption--Unwed Father of Child Under Six Months Old

In one of its most significant decisions in the adoption area, the Court of Appeals declared the provisions of DRL § 111 (subd. 1[e]) to be unconstitutional. *Matter of Raquel Marie X.*, 76 N.Y.2d 387, 559 N.Y.S.2d 855, 559 N.E.2d 418 (1990), *cert. denied*, 111 S.Ct. 517, 498 U.S. 984, 112 L.Ed.2d 528, *on remand* 173 A.D.2d 709, 570 N.Y.S.2d 604 (2nd Dept. 1991). (In the interests of full disclosure, note that this writer represented the adoptive parents involved in the proceedings in the Court of Appeals).

The invalidated statute provided that the consent of the father of a child born out of wedlock and placed for adoption when less than six months old is required only where the father meets three criteria: i) that he openly lived with the child's mother for a continuous period of six months immediately preceding the placement of the child; ii) that he openly held himself out as the child's father during that six month period; and iii) that he paid a fair and reasonable sum for pregnancy and birth expense. The Court of Appeals declared that the first criterion--the cohabitation requirement--was unconstitutional. The Court ruled further that, while the latter two criteria do pass constitutional muster, the invalidated criterion was so central to the legislation, that the statute had to be jettisoned in its entirety.

Recognizing that the Legislature would not have desired to have the two remaining tests in DRL § 111 (subd. 1[e]) stand alone as the only measure for an unwed father's commitment to the child, the Court declared that the entire statute would be invalidated. 76 N.Y.2d at 407, 559 N.Y.S.2d at 864.

The Court acknowledged that, pending further legislative development, it would be necessary to devise a principled standard for use in resolving pending cases. The Court opted for a standard based on the father's manifestation of parental responsibility, meaning "the qualifying interest of an unwed father" which "requires a willingness himself to assume full custody of the child--not merely to block adoption by others." 76 N.Y.2d at 408, 559 N.Y.S.2d at 865. The Court stated that, "any unfitness, or waiver or abandonment on the part of the father would be considered by the courts, as they would whenever custody is in issue", id, citing *Bennett v. Jeffreys*, 40 N.Y.2d 543, 387 N.Y.S.2d 821, 356 N.E.2d 277 (1976). The Court explicitly commented that the manifestation of parental responsibility must be prompt. The Court also acknowledged the relevance of the two remaining criteria from DRL § 111 (subd. 1[e])--acknowledgement and payment of support. The Court further held that the relevant period for scrutiny is the six month period prior to placement, which flows from DRL § 111 (subd. 1[e]). The Court drew upon its analysis of the Supreme Court precedents in sketching out the interim judicial standard.

The Court wrote: "[t]he key period may include such considerations as his public acknowledgement of paternity, payment of pregnancy and birth expenses, steps taken to establish legal responsibility for the child, and other factors evincing a commitment to the child". 76 N.Y.2d at 408, 559 N.Y.S.2d at 865.

Despite the fact that *Raquel Marie* is now over twenty years old, the Legislature has not fashioned a replacement. As a result, the interim standard developed by the Court of Appeals remains in effect.

The provisions of DRL § 111 (subd. 1[e]) represented an attempt by the Legislature to bring New York into compliance with the decision of the Supreme Court in *Caban v. Mohammed*, 99 S.Ct. 1760, 441 U.S. 380, 60 L.Ed.2d 297 (1979), *on remand* 47 N.Y.2d 880, 419 N.Y.S.2d 74, 392 N.E.2d 1257. *Caban* had declared the predecessor version of DRL § 111 unconstitutional insofar as it authorized the adoption of children over the objections of a biological father who had maintained a substantial relationship with the children.

In reworking the statute, the Legislature concluded that *Caban* did not require that every nonmarital father be afforded a veto right. The major policy question was what test to devise by which to determine whether a veto right should be recognized. The Law Revision Commission suggested legislation which would have afforded every nonmarital father a veto right, except where the father had not manifested significant parental interest. *See* Recommendation of the Law Revision

Commission to the 1980 Legislature Relating to the Rights of Fathers in the Adoption of Children Born Out of Wedlock, 1980 McKinney's Session Laws of New York, 1672, 1673-1674. The Legislature declined to follow that suggestion out of concern that the standard would be too imprecise and subjective and that, as a result, there would be a proliferation of protracted hearings which would be determined by courts unguided by any fixed criteria. Indeed, the legislative record indicates that considerable confusion had already been engendered because of the statutory void that *Caban* had left behind. The Legislature enacted DRL § 111 (subd. 1[d] and [e]) in the belief that these statutes would provide "reasonable, unambiguous and objective" standards to guide the courts and agencies. *See* Sponsor's Memorandum, 1980 New York State Leg. Ann. 242-243.

With respect to newborn infants, in recognition of the fact that many children are placed for adoption within days of birth, and therefore, the father would have little, if any, opportunity to demonstrate commitment by visiting or communicating with the child, the Legislature focused on whether the unwed father had participated in the creation of a family unit by cohabiting with the mother, acknowledging the child, and providing support, during the six month period prior to placement.

Whether the statute was constitutional came into question following the Supreme Court's decision in *Lehr v. Robertson*, 103 S.Ct. 2985, 463 U.S. 248, 77 L.Ed.2d 614 (1983). *Lehr* required that states provide procedural due process protection (notice and an opportunity to be heard) to biological fathers who "grasp" the opportunity for a relationship with the child that the biological connection affords, 463 U.S. at 262. The Court of Appeals in *Raquel Marie* read *Lehr* and other Supreme Court precedents as requiring that, in an adoption proceeding brought by persons not having any prior relationship with the child, the biological father is entitled to the maximum protection of his relationship to the child, so long as he promptly availed himself of all possible mechanisms for forming a legal and emotional bond with the child. The Court extended the standards discussed in *Lehr* as relevant for measuring the procedural due process right to notice by utilizing those standards to provide substantive due process right to veto.

The Court of Appeals concluded that the cohabitation requirement of DRL § 111 (subd. 1[e]) could not pass constitutional muster since it would permit "adoption despite the father's prompt objection even when he wishes to form or actually has attempted to form a relationship with the infant that would satisfy the State as substantial, continuous and meaningful by any other standard." 76 N.Y.2d at 405, 559 N.Y.S.2d at 863.

The Court actually decided two adoption cases under the *Raquel Marie* caption. In the captioned case, *Matter of Raquel Marie*, it referred the matter back to the Appellate Division, Second Department, for further review of whether, as a matter of the facts presented in that case, the biological father met the new judicial standard. In the other case, *Matter of Baby Girl S.,* decided with *Raquel Marie*, the Court held that the affirmed factual findings supported a conclusion that the biological father had shown sufficient parental responsibility to merit a right to veto the adoption. The Court pointed to "extensive affirmed findings supported by the record to sustain the unanimous conclusion reached by the courts that Gustavo, the biological father himself seeking full custodial responsibility virtually from the time he learned of [the biological mother's] pregnancy, did everything possible to manifest and establish his parental responsibility." 76 N.Y.2d at 409, 559 N.Y.S.2d at 865. Specifically, the Court of Appeals pointed to findings that the biological father had made persistent and uniformly rebuffed expressions of concern, offers of support and requests for custody, as well as legal efforts to establish paternity and secure custody prior to placement. Since the Court of Appeals did not discuss the facts in either case in great detail, for factual discussion of *Baby Girl S.*, *see* 141 Misc.2d 905, 535 N.Y.S.2d 676 (Surr.Ct. N.Y. County 1988), *affirmed* 150 A.D.2d 993, 543 N.Y.S.2d 602 (1st Dept. 1989); for the prior Appellate Division opinion in *Raquel Marie*, *see* 150 A.D.2d 23, 545 N.Y.S.2d

379 (2nd Dept. 1989).

It should also be noted that, in *Raquel Marie*, the Court held that a post-placement marriage by the biological parents was not sufficient to move the biological father from the category of out-of-wedlock father (whose consent may be required) to the category of in-wedlock father (whose consent is always required). In order to qualify as an in-wedlock father, the marriage, held the Court, must take place by the time of the child's birth.

In *Raquel Marie*, the child was born out of wedlock and was placed for adoption two months later by the biological mother. After a few more months went by, but before a New York adoption proceeding was filed, the biological parents married. When a New York adoption proceeding was instituted, both biological parents opposed the proceeding and sought the return of the child. The biological father argued that, by virtue of DRL § 24 (which renders children legitimate upon a post-birth marriage of the parents), the child had been legitimated by the marriage of her biological parents and, therefore, as the father of a legitimated child, he could claim a veto right under DRL § 111 (subd. 1[b]). This contention was rejected by the Court of Appeals.

The Court reasoned that the father's argument would render the statute meaningless and "introduce a new uncertainty into every adoption". The Court concluded that, unless the veto power accruing to married parents attaches only when the child is "conceived in or born in wedlock", unwed parents "could marry at any point before an adoption became final and thereby acquire an absolute veto". The Court further held that it was reasonable, and constitutional, for a State to require, "in order to protect children and prospective adoptive parents from heartbreak and uncertainty", that a marriage, in order to form the predicate for the use of an automatic veto, "take place by the time the child is born". 76 N.Y.2d at 936 n.2, 559 N.Y.S.2d at 858 n.2.

In *Raquel Marie*, following remand from the Court of Appeals, the Appellate Division, Second Department, concluded that the biological father did not satisfy the interim judicial standard developed by the Court of Appeals. 173 A.D.2d 709, 570 N.Y.S.2d 604 (2nd Dept. 1991). The Appellate Division noted that, during pregnancy, the biological mother had repeatedly expressed her intent to give up the child for adoption and the biological father, though opposed to that action, never took any legal steps to establish his paternity prior to the birth of the child. (*See* Family Court Act § 517). Even after the birth of the child, the biological father did not take steps to assert paternity or to obtain custody, even though the mother complained to him of her inability to care for the child and even though she placed the child in foster care for a 20 day period. While the biological father did file a Family Court custody petition three days before the child was placed for adoption, the Appellate Division viewed that filing as an effort to block the anticipated adoption and not an expression of a genuine desire on his part to assume custody himself. The Appellate Division also found that the evidence of the father's public acknowledgement of paternity and payment of pregnancy and birth expenses was not sufficient.

The Appellate Division also held that, while the father's fitness had not been "expressly placed in issue", there was proof of numerous instances of violent and abusive conduct on his part which raised "great doubts as to his fitness to assume custody". Though the father's violent and abusive conduct was directed at the mother, not the child, the Appellate Division considered the conduct, and its effect on the father's parent fitness, as relevant to the determination of whether the father's interest in the child is entitled to constitutional protection. *See* 570 N.Y.S.2d at 608. No further application for leave to appeal was made.

With the passage of time and the absence of a legislative response to *Raquel Marie*, the cases continue to proliferate under the interim judicial standard articulated by the Court of Appeals.

In *Matter of Seasia D.,* 10 N.Y.3d 879, 890 N.E.2d 875, 860 N.Y.S.2d 760 (2008), the most recent case on this point to be decided by the Court of Appeals, the Court unanimously held that, under the *Raquel Marie* standard, the unwed father there did not have consent rights. According to the Court of Appeals, during the six month period between the time that the biological father learned of the birth mother's pregnancy and the adoption proceeding, the unwed father met none of the *Raquel Marie* criteria, offering only excuses for his lapses. Specifically, he claimed that the mother's family was hostile to him, that he had relocated to Maryland with his family, that he was unaware of the putative father registry, that he was led to believe by court officials that he could not commence a paternity case until after the child was born, that the mother's medical expenses were paid by Medicaid and that he was attending high school and was not employed. The Court found these insufficient. Further, while the Appellate Division had, in finding for the unwed father, placed reliance on actions taken by the father's family, the Court of Appeals stated, that even assuming those actions could be attributed to the father for purposes of establishing his status as a consent father, the gestures by the family of this father (an offer to take the birth mother shopping for maternity clothes and certain telephone calls) were insubstantial.

In *Matter of Carrie GG*, 273 A.D.2d 561, 709 N.Y.S.2d 247 (3rd Dept. 2000), the court held that the unwed father was not entitled to veto the proposed adoption of his child. The father was aware that the child had been placed with an agency on the day she was born, and was also aware that the mother had surrendered the child for adoption. The father denied paternity in the proceeding commenced by the mother and paid no medical, nursing, or hospital expenses for the child or the pregnancy. Thus, the facts showed that the father did not manifest the ability and willingness to assume custody of the child. Indeed, his only manifestation of interest was his opposition to the agency's application in the proceeding to free the child for adoption, which was patently insufficient. While the father argued that the agency had an obligation to exercise diligent efforts to encourage a relationship between him and the child, the court held that there was no such obligation under these circumstances.

In *Matter of Adoption of Matthew D.,* 31 A.D.3d 1103, 818 N.Y.S.2d 399 (4th Dept. 2006), *leave to appeal dismissed*, 7 N.Y.3d 837, 824 N.Y.S.2d 207, 857 N.E.2d 528 (2006), a narrowly divided Fourth Department affirmed the trial court's determination the unwed father had timely manifested his willingness and ability to raise the child and, hence, had established that his consent to the adoption was required. Three justices concurred in a memorandum which stated that the father had acknowledged his paternity from the outset. While the father did not pay any pregnancy or birth expenses, this was not regarded as significant as the mother testified that these expenses were all paid by Medicaid and that she neither needed nor asked for the father's assistance. As for steps taken to establish his legal responsibility, the appellate court pointed to both a paternity proceeding the father commenced prior to the child's birth and to a custody proceeding that the father commenced immediately after the child's placement for adoption. While custody proceeding was filed after the child was already six months old, the court still viewed it as evidence of his parental commitment. The appellate court also upheld the trial court's finding that the father had believed that the mother would not surrender the child for adoption and that she had frustrated his efforts to become involved with the child. A two-justice dissent viewed these facts differently. According to the dissent, all that the father did in the period up to six months preplacement was to buy $156.04 in baby items and bring a paternity proceeding in which he did not seek custody. The dissent would not consider the later custody proceeding on the ground that it was not brought until one month after the child had been placed for adoption. The dissent also focused on some things the father did not do: file with the putative father registry, seek to be named as father on the birth certificate; place the child on his

medical insurance, or attend the birth. The dissenters noted that the father lived in an apartment that was too small and dangerously located and otherwise unfit for an infant. The adoptive parents sought to take the case to the Court of Appeals, relying on the two-justice dissent. However, the Court of Appeals dismissed their appeal, viewing the dissent to have been on questions of fact, rather than questions of law.

By way of contrast, in *Matter of Gionna L.,* 33 A.D.3d 1168, 824 N.Y.S.2d 182 (3rd Dept. 2006), *leave to appeal denied,* 8 N.Y.3d 802, 830 N.Y.S.2d 698, 862 N.E.2d 790 (2007), the Third Department upheld the trial court's determination that the father's consent was not needed, viewing his conduct as simply being an effort to block adoption by others and not as assertions of his own parental rights and responsibilities. The father had briefly cohabited with the mother during her pregnancy but did so in order to evade arrest. However, his efforts at avoiding the authorities were apparently not successful as he was incarcerated and began serving a 10-year prison term. According to the father, the mother initially told him that she intended to abort the pregnancy. An attorney for the adoption agency visited him in prison and asked if he would consent to an adoption but he refused. However, he did not discuss the child's future with the mother or pursue the matter, perceiving that, without his consent, the mother would have to raise the child herself. While he did file a paternity petition after the child's birth, he later sought a DNA test as he questioned the mother's assertion that he was the father. He did not seek to ascertain the child's whereabouts or inquire as to where he could send support. He did no planning for the child, other than express his desire that the mother care for the child until his release from prison.

A biological father was found to have fallen short of the interim judicial standard in *Matter of John E. v. Doe*, 164 A.D.2d 375, 564 N.Y.S.2d 439 (2nd Dept. 1990), *leave to appeal denied*, 78 N.Y.2d 853, 573 N.Y.S.2d 466, 577 N.E.2d 1058 (1991). There, the child was conceived as a result of an affair the father was conducting with a married woman. The two parents initially intended to live together and raise the child, but the woman subsequently left the father and resumed living with her husband. The child was placed for adoption four days after birth.

A two justice plurality in the Appellate Division concluded that, during the key six month period prior to placement, the father had not provided meaningful financial support, and had not publicly acknowledged the child. The two judge plurality also noted that the father had not commenced a paternity proceeding during the mother's pregnancy, as he could legally have done (Family Court Act § 517).

The majority observed that the biological father was willing to forego his parental responsibilities and rights as long as he believed that the child would be raised by the biological mother and her husband. His opposition to the adoption, the two judges maintained, was simply an effort to block the adoption, not an effort to assume custody himself. Indeed, the two judges noted that the biological father was single, employed full time, and resided out of State with his adult daughter. Since the father testified that, if he had custody, the child would be in day care and the father himself would have only limited contact with the child, the two judge plurality questioned his motivations in seeking custody. Indeed, there was testimony, including substantial expert opinion, which supported the view that the adoption was in the child's best interest and that the father could supply the child "with little more than a biological parent". 564 N.Y.S.2d at 444.

A concurring opinion stressed the testimony that it would be "devastating" to the child to separate him from the prospective adoptive parents and maintained that the liberty interest of the father should not be given preference over the child's own right to "grow up free of avoidable, severe emotional

scarring". 564 N.Y.S.2d at 447.

A dissenting judge wrote that the biological mother's reconciliation with her husband was prompted by her concern over her teenage child who had remained with her husband. She initially maintained contact with the biological father of the adoptive child and it was reasonable for the father to trust in her return to him after resolving the issues concerning the teenager. The dissenter maintained that the mother and her husband had frustrated the father's efforts to assume parental responsibilities. The dissenter argued that the father did all he reasonably could do under the circumstances and, because the father was not unfit, he should be granted custody. 564 N.Y.S.2d at 450-452.

In *Matter of Stephen C.*, 170 A.D.2d 1035, 566 N.Y.S.2d 178 (4th Dept. 1991), the baby's mother placed the child in foster care and signed an adoption surrender. The father contended that as soon as he learned of the baby's existence, he asserted his paternity and sought custody. However, there was testimony that the father did not believe he could raise the child himself and wanted to place the child with his grandmother or his sister. The father also tried to persuade the mother to keep the child herself. Under these circumstances, it was held that the father had not met the "threshold criterion" that he was willing to assume fully custody himself, and wanted simply to block an adoption by others.

Another decision which rejected a claim by an unwed father to veto rights is *Matter of Kailee CC*, 179 A.D.2d 891, 579 N.Y.S.2d 191 (3rd Dept. 1992), *appeal denied* 79 N.Y.2d 759, 584 N.Y.S.2d 447, 594 N.E.2d 941. There, the father, upon learning of the pregnancy, suggested that the mother have an abortion. When the mother rejected that suggestion, the father acceded to her plans for an adoption, did not interfere with the plans for the adoption being made by the mother and her family, and did not contact the mother's attorney, despite repeated requests from the mother that he do so. The father also quit his employment, left his place of lodging and became essentially a street person. And, there was no indication that the father had discontinued the use of drugs.

On the other hand, a veto right was extended to the biological father in *Matter of Kiran Chandini*, 166 A.D.2d 599, 560 N.Y.S.2d 886 (2nd Dept. 1990). There, the court found that the biological father had sufficiently demonstrated his manifestation of parental responsibility. He publicly acknowledged his paternity; he had offered to pay for pregnancy and birth expenses, but had his offer rejected by the mother who had the entire hospital bill paid by Medicaid. The father had not sought custody himself because he did not believe that the mother would actually place the child for adoption; the child was given to the adoptive parents without his knowledge. However, the court held that, while the father was entitled to veto the adoption, it was necessary to conduct a hearing as to whether any extraordinary circumstances existed which would permit an inquiry into what custody arrangement would be in the child's best interest. 560 N.Y.S.2d at 888.

In *Raquel Marie*, the Court of Appeals held that measuring point for whether an unwed father engaged in conduct indicative of a manifestation of parental responsibility is the six months preceding the child's placement for adoption. Thus, where the unwed mother left the unwed father because he was unemployed, abusing alcohol and drugs, and had been prone to violence, the father, who after the child's placement obtained employment, attained counseling, applied for parenting classes, and entered an inpatient rehabilitation program, came too late to give rise to a right to veto the adoption. *Matter of Raymond AA v. Doe*, 217 A.D.2d 757, 629 N.Y.S.2d 321 (3rd Dept. 1995). In that case, looking at the father's activities during the six-month period prior to placement, the court found that the father had not manifested sufficient commitment to the child. While the fact that the unwed father received public assistance was not determinative of his ability to be a parent and that the unwed

mother's receipt of medicaid obviated the father's need to pay for her medical expenses, the fact remained that the unwed father was consistently unemployed during the time that respondent was pregnant, attributing such to a back injury which apparently did not prevent him from routinely carrying large quantities of beer home from the store. The unwed father refused to attend the mother's first Lamaze class because he was both intoxicated and high on LSD, though he drove the mother to her class in such condition and had done so without a license to drive an automobile. The unwed father spent more money on drugs and alcohol than he received in public assistance, using the mother's money for this purpose. The unwed father did not buy anything for the mother or baby with the exception of a $10 stroller, relying instead on donations from family and friends. This sort of conduct was insufficient to entitle him to veto the adoption of the child.

From these cases, it would appear that the appellate courts are placing considerable weight on the sincerity, or lack of sincerity, of claims by biological fathers that they desire to assume full custody of their children in lieu of adoption. Fathers have tended to prevail in cases where they have consistently sought to raise their children personally, not through others, and timely demonstrated personal and financial commitment. On the other hand, fathers have not been permitted to veto adoptions in cases where they have not shown willingness and ability to raise the children on their own or where they have not timely demonstrated commitment to the children.

Another important factor is whether the mother's plans for adoption were made known to the father. Where those plans were made known, and the father was given information sufficient to allow him to register any opposition to the adoption, but did not do so, the tendency has been not to confer veto rights given the lack of prompt assertion of parental rights.

The Court of Appeals has held that an unwed father cannot vacate a finalized adoption on the ground that he was not informed of the pregnancy by the mother and, because of his lack of knowledge of the child, was prevented from asserting parental interest. In *Matter of Robert O. v. Russell K.*, 80 N.Y.2d 254, 590 N.Y.S.2d 37, 604 N.E.2d 99 (1992), the Court held that the timetable for the prompt assertion of parental responsibility is measured in terms of the child's life, not from the onset of the father's awareness, and upheld the denial of the unwed father's application to vacate the adoption.

In *Robert O.*, the unwed parents became engaged and began living together. Within a few months, they disagreed over whether to marry. The mother became pregnant but decided not to tell the father because she believed that he might feel that she was trying to coerce him into marriage. The mother broke off the engagement and the father moved out, unaware of the pregnancy. The mother, prior to the child's birth, made arrangements to have the child adopted by friends of hers. When the child was born, the child was released to the prospective adoptive parents. The birth certificate omitted the father's name. When the mother signed a judicial consent to the adoption, she stated that there was no one entitled to notice or veto rights and the adoption court did not ask her to identify the father.

Some 7 months after the adoption was completed, the parents reconciled; they later married. Three months later, the mother informed the father that a child had been born. The father then reimbursed the mother for her medical expenses, filed with the putative father registry, and sought to vacate the adoption. However, it was established that, during the separation of the parties, the father made no attempt to contact the mother, though she lived in the same house, and though the mother did nothing to conceal her whereabouts or her pregnancy.

The father maintained that the *Raquel Marie* decision should be extended to protect the custodial

opportunity of an "unknowing" unwed father who does nothing to manifest his parental willingness before placement because he is unaware of the child's existence. The Court rejected this contention, holding that the timing of the father's actions is the "most significant" element in determining whether an unwed father has created a liberty interest under the Due Process Clause. 80 N.Y.2d at 264, 590 N.Y.S.2d at 41. The Court stressed that the demand for prompt action by the father is a logical and necessary outgrowth of the State's legitimate interest in the child's need for early permanence and stability. The Court noted that the unwed father commenced his proceeding nearly 18 months after the child went to live with the adoptive parents and more than 10 months after the adoptive parents were told that the child was legally theirs.

Robert O. explains that the opportunity interest recognized in *Raquel Marie* arises and becomes protected only after the father manifests willingness to be a custodial parent. In contrast, *Robert O.* involved an attempt to assert a right to an opportunity to manifest willingness. This attempt was rejected, with the Court holding that no one, let alone any one acting for the state, prevented him from finding out about the pregnancy. 80 N.Y.2d at 265, 590 N.Y.S.2d at 42. The Court also expressed concern that recognition of a father's right to an opportunity to manifest willingness, would inhibit the state's interest in prompt and efficient efforts to finalize adoption proceedings and would limit a mother's right to privacy. 80 N.Y.2d at 266, 590 N.Y.S.2d at 42.

In *Robert O.*, the Court also rejected the father's claim that he had been denied equal protection. The Court held that the equal protection clause did not preclude the state from withholding the privilege of vetoing an adoption from an unwed father who had not come forward to participate in the rearing of his child. 80 N.Y.2d at 267, 590 N.Y.S.2d at 43.

While the *Robert O.* opinion does not frame the issue in terms of the parties' obligations to each other, the case certainly rejects the contention that an unwed mother is under an affirmative obligation to notify the unwed father of the fact of her pregnancy. This point is made by the result of the case, rather than by language in the opinion.

Robert O. leaves many questions still unanswered. In describing the facts, the Court noted that the unwed mother had not moved away and had not done anything to conceal her whereabouts or her pregnancy. As a result, the unwed father would not have been impeded by the mother had he tried to locate her or find out if she had become pregnant. The Court did not comment on the effect, if any, had the mother relocated, concealed her whereabouts, or misrepresented her condition to the unwed father.

The Court also did not explicitly address the propriety of the adoption court not having asked the mother to identify the father at the time consent was given. The Appellate Division had specifically held that an unwed mother is not required to disclose the identity of the unwed father during the adoption proceeding. From the absence of any express disapproval of the adoption court's failure to inquire, as well as the concern expressed by the Court of Appeals that acceptance of the father's position would limit a mother's right to privacy, it may be inferred that the Court of Appeals did not believe it was error for the adoption court to decline to make inquiry as to the father's identity. However, the Court did not preclude adoption courts from making such inquiries, as the Appellate Division had. The Court of Appeals also did not reach the issue whether the court should notify a father whose identity is disclosed by the mother upon questioning in court. The Court did observe that the unwed father in *Robert O.* was not entitled to notice under DRL § 111-a.

Matter of Stephen, 239 A.D.2d 963, 659 N.Y.S.2d 588 (4th Dept. 1997), makes two points worthy of note. In that private placement adoption, the mother was married at the time the child was conceived, making her husband the child's legal father. Both the mother and her husband signed consents to the child's adoption. However, the mother refused to name the child's biological father.

The Family Court ordered the prospective adoptive parents to subpoena the birth mother, who resided in Ohio, to compel her attendance at a hearing. It appears that the Family Court wanted to question the mother concerning the child's paternity. The Appellate Division held this error, for two distinct reasons.

Initially, the Appellate Division observed that, under Judiciary Law § 2-b (subd. 1), a New York court of record may issue a subpoena to compel a person "found in the state" to testify in a case pending in that court. However, a New York court may not direct the service of a subpoena outside the State. Therefore, it was error for the Family Court to order the adoptive parents to serve that subpoena outside the State.

More important, since the child was conceived in wedlock, the mother and her husband were the legal parents of the child and only their consents, which were given, were necessary. The biological mother was within her rights to refuse to name the biological father. And, since the biological father had not asserted parental interest and a willingness to assume full custody during the six months prior to the placement of the child, the biological father, even if identified, would not have been entitled to notice of the proceeding, much less entitled to veto the adoption.

The opinion in *Robert O.* recognizes the competing interests of the adoptive parents by noting that, by the time the unwed father sought to undo the adoption, the child had lived with the adoptive parents for more than a year and a half and more than 10 months had passed from the completion of the adoption. This recognition contrasts with the references in *Raquel Marie* to prospective adoptive parents as strangers, who were entitled to little, if any, legal recognition. The difference lies in the fact that in *Robert O.* the adoption had been completed and, therefore, the adoptive parents had acquired, through the adoption order, full legal recognition as parents of the child. Presumably, if the unwed father learns of the pregnancy and acts to manifest responsibility within the six months prior to placement, the unwed father's rights would gain priority and, without the existence of an adoption order, the rights of the prospective adoptive parents would not have legal existence.

The decision in *Matter of Baby Girl U*, 224 A.D.2d 869, 638 N.Y.S.2d 253 (3rd Dept. 1996) pulls together, and applies, the separate Court of Appeals' decisions in the *Robert O.* and *Raquel Marie* cases. In *Baby Girl U*, the child was placed for adoption, without notice to the unwed, biological father, a substantial time after her birth. Sometime later, the adoptive parents filed an adoption proceeding and, six months later, the biological father was notified of the proposed adoption by the adoption agency. He sought and obtained an order of filiation and then petitioned for custody. After a hearing, his petition was denied and the adoption petition was granted.

The unwed father argued that the mother had fraudulently concealed the child's birth from him. Applying the *Robert O.* requirement that the unwed father manifest a willingness to assume custody and the *Raquel Marie* rule that the relevant period is the six months prior to placement, the *Baby Girl U* court held that the unwed father had failed to establish his interest in assuming the responsibilities of parenthood in the relevant period. While the unwed father maintained the mother concealed her pregnancy and the child from him, that claim was undercut by a relative's testimony that he had told

the unwed father of the pregnancy. While this relative also testified that the mother had denied the pregnancy to the respondent, whatever doubt or confusion existed on the part of the unwed father was, or should have been, dispelled when the same relative later told the unwed father that a child had been born, a fact confirmed to the unwed father about a week later by the mother herself. Even armed with this knowledge, the unwed father waited at least six months to seek a declaration of paternity and failed to establish that he was willing to be financially responsible for the child. And, perhaps most tellingly, adoption agency caseworkers testified that the unwed father had indicated that he did not want to raise the child and only wanted to see her so she would "know who he is". Since the unwed father's position was more an effort to block the adoption by others than a claim for custody, his consent to the adoption was not required.

Also relevant here is *Matter of Jarrett*, 224 A.D.2d 1029, 637 N.Y.S.2d 912 (4th Dept. 1996), where the court held that the failure of the birth father to know of the pregnancy was due to his own misconduct. The birth father had assaulted the birth mother at the outset of her pregnancy and was thereafter advised by an attorney to stay away from her. Moreover, although the birth mother did not tell her friends and family of her pregnancy, she acknowledged that she went out in public and did not attempt to conceal it. In particular, the birth father visited with her for four or five hours approximately one week before the birth. The court concluded that the birth father either knew or should have known of the pregnancy and there was no such active concealment as would excuse the failure of the birth father to assert his parental interest in the six months before placement of the child for adoption, and thus he had no constitutionally protected interest in retaining custody of the child.

The courts have dealt with the rights of unwed fathers whose freedom of movement was restrained--in one case, voluntarily and in the other, involuntarily.

In *Matter of Baby Girl*, 206 A.D.2d 932, 615 N.Y.S.2d 800 (4th Dept. 1994), the unwed father had been in the military for over a decade. The child was placed with the adoptive parents within six months of birth and had resided with them ever since. The unwed father was not notified that an adoption proceeding was pending until after the period to establish his paternal interest--six months preceding placement--had elapsed. The courts held that the father knew, or should have known, that the mother was pregnant and he failed to do all he could to establish a parental relationship within the pertinent time frame. The father's claim that he was unaware of the child, and that the six months should run from the onset of his awareness, was rebuffed in light of *Robert O.*, discussed *supra*. The father tried another tack, asserting the applicability of the statutes which give military personnel a tolling of the statute of limitations. *See* Military Law, § 308; 50 U.S.C.A. §§ 501, *et seq.* This argument fails, however, because the six month period is not a statute of limitation at all; what it constitutes is part of the way the courts measure and define whether the biological connection has ripened into a constitutionally protected liberty interest for an unwed father and his child. The unwed father need not commence an action in that period; what he must do is grasp the opportunity to assert his parental interest and responsibility.

The other case, *Matter of Baby Girl S.*, 208 A.D.2d 930, 617 N.Y.S.2d 539 (2nd Dept. 1994), involved an unwed father who was incarcerated at the time of the adoption proceeding. However, he was due to be released on parole in one year. Perhaps because of the relatively short time remaining to be served in prison, the court might have been inclined to empower him with an adoption veto if he was willing to promptly assume custody upon his release and could establish that there were appropriate persons who could care for the child until then. In this case, the unwed father failed on both counts. On the second point, the existence of appropriate temporary custodians, the court held that the father had offered only his own assertions that his mother and friends were willing and able to assume temporary custody. This strongly suggests that it would be appropriate for trial counsel in

these cases to produce the suggested temporary guardians in court. If the proposed temporary guardian is truly willing to assume custody, then he or she would presumably be willing to appear in court to proclaim custodial availability. Likewise, a personal appearance in court by the proposed guardian would enable the court to better judge the guardian's suitability. Without such an appearance, and without a good reason for excusing it, the court, in weighing the evidence, may appropriately discount the claim that a temporary guardian is able and available, just as was done in the cited case.

Also of moment in this area is the decision in *Matter of Kyle*, 156 Misc.2d 260, 592 N.Y.S.2d 557 (Surr.Ct. Steuben County 1992). There, the court held that an unwed father, who had promptly acknowledged the child, provided financial support, and asserted his parental interest, was not entitled to veto the adoption of the child because of the father's lengthy incarceration. The case is further confirmation of the view made in prior commentaries that fathers tend not to gain veto rights where they have not shown the ability and willingness to raise the children on their own.

Kyle presented a situation where the biological parents resided together and planned to have a child. During the mother's pregnancy, the father acknowledged paternity, provided financial support, and otherwise expressed his interest in the child. However, some five months before the child's birth, both parents were arrested and incarcerated due to the commission of a violent felony. While the mother was released, the father was not. He was unable to obtain a court order allowing him to attend the birth, but he did talk to the mother that day and, subsequently, the child was taken to visit him in jail twice each week. While the father was in jail, the mother terminated her relationship with the father, and commenced a relationship with another man, and executed a judicial surrender of the child. The father's criminal case resulted in a sentence of 4 1/2 years to 9 years.

The father asserted that he qualified for veto rights under the *Raquel Marie* standard. He maintained that the child could live with the paternal grandmother until the father's release from prison and could have regular visitation with the father in prison. Indeed, the father had another child, with whom he had an acceptable relationship, and who regularly visited him in prison.

The Surrogate's Court held that the lengthy period of the father's incarceration disqualified the father from obtaining a veto right over the adoption. The court held that under *Raquel Marie* an unwed father must be willing and able to assume custodial responsibility for the child, not simply make a plan to avoid the father's inability to assume custody for an indefinite time. The court stressed that the ability to assume custody involved a matter of degree; it suggested that the result would be different if the father was due to be released from prison in 40 days, rather than 4 years.

The result in *Kyle* could be seen as harsh, particularly since the father engaged in conduct evincing his commitment to the child and since it appears that the father would have maintained a relationship with the child but for the termination of his relationship with the mother. And, indeed, a principal point of *Raquel Marie* is that the father's rights in the child should be measured by his relationship with the child, not by his relationship to the mother. Yet, it would also seem that the *Kyle* decision was an appropriate application of the *Raquel Marie* requirement that the father show a qualifying interest in the child which requires his own willingness to assume full custody.

Even though the father in *Kyle* was denied a veto right, the court could have rejected the adoption on the ground that the adoption was not in the child's best interest. While that issue is not discussed in the court's opinion, the court presumably was concerned with the bonding that occurred between the

child and the adoptive parents in the months between the mother's surrender and the court's decision.

The court in *Kyle* makes a point about the obligations of attorneys in these cases: "Attorneys must be scrupulous in their efforts to facilitate a private adoption by investigating fully the legal risk at which the child is being placed and fully informing the prospective adoptive parents of those risks". 592 N.Y.S.2d at 561.

The case also points up the difficult situation adoptive parents confront when filing an adoption petition. In *Kyle*, the petition averred that the father was "unknown--may be in jail". 592 N.Y.S.2d at 561. The court's opinion does not indicate whether the adoptive parents were simply repeating the information given to them by the mother. Nor does it indicate the extent to which the mother was asked for, and gave, complete and accurate information about the father.

In *Matter of Kevin G.*, 163 Misc.2d 849, 622 N.Y.S.2d 420 (Family Court Kings County 1995), *affirmed*, 227 A.D.2d 622, 643 N.Y.S.2d 590 (2nd Dept. 1996), the lower court held that, unless the putative father is entitled to notice of the adoption, there is no obligation to admit or disclose his identity. In *Kevin G.*, it was the adoptive father, not the putative father, who sought to undo the adoption. The adoptive father's attack on the adoption was apparently aimed at gaining advantage in a matrimonial action pending between him and the adoptive mother. In any event, the Appellate Division held that the failure to disclose information regarding a child's putative father to the adoptive parent does not constitute fraud in the very means by which the adoption was procured, which is the standard by which applications to vacate adoptions for fraud must be measured. The Appellate Division, like the Family Court before it, held that the biological mother has no obligation to admit paternity or to volunteer any information with respect to the putative father.

There is a caveat to *Kevin G*: the identification of the unwed father is required if he would have notice rights. The ultimate question then becomes whether identification of the unwed father is relevant to the issue of his rights to notice. In *Kevin G.,* the mother, at the time of the adoption proceeding, submitted sworn documents asserting that the unwed father had abandoned the child and had never claimed paternity and, therefore, that he was entitled to neither notice nor veto rights. The court, if it wishes to check the validity of these assertions, can probe the circumstances of the pregnancy, but can do so in a manner that does not require divulging the name of the putative father.

But there are those, including some courts, who believe that the unwed father may be entitled to notice of the proceeding so that he could assert his right to notice, as well as a possible veto. However, the statute (DRL § 111-a) does not provide for a right to notice, unless certain criteria are met. It was this statute that was upheld in *Lehr* and it was *Lehr* that was followed in*Kevin G.*

As noted above, *Kevin G.* arose in an unusual setting. The case did not involve an unwed father who, having been denied timely notice, sought to re-open the adoption. Rather, the adoption went through and it was the adoptive father, prompted by the pendency of a matrimonial action with the adoptive mother, who sought to undo the adoption. The unsavory motivation of the adoptive father--to find a loophole in order to avoid financial responsibility for a child he had willingly adopted years before--undoubtedly influenced the court's determination of his application.

C111:4: When Consent Not Required--Abandonment

DRL § 111 provides for a number of instances where consent of a parent or any other person having lawful custody of the child to be adopted is not required.

The consent of a parent or other lawful custodian of a child is not required where he or she evinces an intent to forego his or her parental or custodial rights and obligations as manifested by his or her failure for a period of six months to visit the child and communicate with the child or person having legal custody of the child, although able to do so. DRL § 111 (subd. 2[a]). For purposes of this provision, in the absence of evidence to the contrary, the ability to visit and communicate with the child or person having custody of the child is presumed. DRL § 111 (subd. 2[a]). Evidence of insubstantial or infrequent visits or communication by the parent or other person having custody of the child shall not, by itself, be sufficient as a matter of law to preclude a finding that the consent of such parent or person to the child's adoption shall not be required. DRL § 111 (subd. 6[b]). The subjective intent of the parent or other person having custody of the child, whether expressed or not, unsupported by evidence of communication or visitation manifesting such intent, shall not preclude a determination that the consent of the parent or other person to the child's adoption need not be required. DRL § 111 (subd. 6[c]). Payment by a parent toward the support of the child of a fair and reasonable sum, according to the parent's means, shall be deemed to be a substantial communication by such parent with the person having legal custody of the child. DRL § 111 (subd. 6[d]).

The purpose of these statutory provisions was to overturn the burden imposed by former law. Under former law, abandonment had to be shown and a finding of abandonment was precluded if the parent or custodian showed a "flicker of interest". *Matter of W. v. G.*, 34 N.Y.2d 76, 356 N.Y.S.2d 34, 312 N.E.2d 171 (1974). A case which demonstrates the change made in the statute is *Matter of James "Q"*, 240 A.D.2d 841, 658 N.Y.S.2d 535 (3rd Dept. 1997) involving a step-parent adoption. In that case, the child was born out of wedlock in 1983 and lived with the mother. In 1989, the mother married and the child lived with the mother and step-father for five years. When the step-father sought to adopt the child, the child's biological father was notified and sought to oppose the adoption. A hearing was held and the evidence showed that the child had not received any cards or gifts from the biological father other than a wagon and some books received in 1985. Since that time, the biological father had seen the child just once, a brief meeting in 1994. Moreover, while the biological father had always been employed and had other resources, he never provided financial support. Significantly, the father had filed three separate paternity petitions but each case was dismissed when he failed to have his blood drawn for genetic marker testing. On these facts, the court held that the father's consent to adoption was not necessary.

In *Matter of Corey L. v. Martin L.*, 45 N.Y.2d 383, 408 N.Y.S.2d 439, 380 N.E.2d 266 (1978), the Court of Appeals acknowledged that section 111 had been revised in an attempt to overcome the "flicker of interest" standard and to ease the burden on a party attempting to prove abandonment. Nevertheless, ruled the Court, the statutory provisions must be measured in the light of the respect for constitutional limitations on the procedures for termination or deprivation of parental rights. Accordingly, the Court held that the ultimate question remains where there is sufficient evidence to support a conclusion, as a matter of law, that the parent or custodian abandoned the child. The statute, ruled the Court in *Corey L.*, does not mandate a conclusion that insubstantial visitation, by itself, constitutes abandonment. Abandonment means such conduct on the part of a parent as evinces a purposeful release of parental obligations and the foregoing of parental rights, such as a withholding of interest, presence, affection, care and support. While consideration as to what is the best interests of the child is essential to ultimate approval of an adoption application, such interests cannot act as a substitute for a finding of abandonment. The mere showing, therefore, of two years of infrequent contact between the birth father who was in military service and the child was insufficient to show such abandonment. Under the circumstances, the Court added, it was too brief a period to justify a conclusion of abandonment with such drastic consequences.

In a later decision, the Court of Appeals, citing *Corey L. v. Martin L., supra*, stated that parental rights may not be terminated for adoption purposes, when there has been no parental consent, abandonment, neglect or proven unfitness, even though some might find adoption to be in the child's best interests. *Matter of Sanjivini K.,* 47 N.Y.2d 374, 418 N.Y.S.2d 339, 391 N.E.2d 1316 (1979). In that case, a mother who temporarily placed her infant daughter with the Rockland County Department of Social Services for foster care sought to regain custody of the child. The department had repeatedly denied her requests and for several years had sought to offer the child for adoption by attempting to prove, in successive proceedings and on a variety of grounds, that the mother was unfit. Despite financial and legal obstacles, the mother had maintained ties with her daughter and in the various proceedings it had been held, by the Family Court or on appeal, that she had not abandoned or neglected the child and was not otherwise unfit. The Court of Appeals held that there was no legal basis for offering the child for adoption against her mother's wishes. The prolonged separation of mother and daughter was, of course, regrettable. But that was due to litigation initiated or necessitated by the department's actions and was not the result of any parental neglect. Indeed despite the financial and subsequent legal inability of the mother to provide full custody and care, she had, through uncommon effort, preserved parental ties throughout the child's life.

In *Dickson v. Lascaris*, 53 N.Y.2d 204, 440 N.Y.S.2d 884, 423 N.E.2d 361 (1981), a father petitioned to regain custody of children he had entrusted to another. The Court of Appeals, in granting relief to the petitioner, stated that the trial court had erred in concluding, by use of a passive abandonment theory, that the father had abandoned his children. The Court, *citing Bennett v. Jeffreys*, 40 N.Y.2d 543, 387 N.Y.S.2d 821, 356 N.E.2d 277 (1976), held that absent "surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances", the "State may not deprive a parent of the custody of a child".

The burden of proving abandonment as it pertains to adoption remains a heavy one, for constitutional limitations on procedures for the termination or deprivation of parental rights must be respected. In evaluating the evidence, the reviewing court must first determine that an abandonment has been established before applying the statutory amendment to DRL § 111 providing that proof of insubstantial contacts shall not, standing alone, be sufficient as a matter of law to preclude a finding of abandonment.

The fact that a parent is incarcerated does not excuse the parent's failure for a period of six months to contact or communicate with the child or the other parent although able to do so and not prevented from doing so. *Matter of Clair*, 231 A.D.2d 842, 647 N.Y.S.2d 610 (4th Dept. 1996), *leave to appeal denied*, 89 N.Y.2d 806, 654 N.Y.S.2d 716.

Abandonment was found in *Matter of Adoption of Julia P.*, 306 A.D.2d 937, 760 N.Y.S.2d 793 (4th Dept. 2003), wherein the court dispensed with the necessity for consent from the birth father and permitted the adoption of the child by the child's stepfather. The mother was the adopted daughter of the father, and the child in question was conceived in an act of incestuous rape, which resulted in the conviction and incarceration of the father. More than six months after the father was incarcerated, the mother and the stepfather commenced the adoption proceeding. They showed that the father had not provided financial support for the child and had failed to communicate with the mother and the child. The father argued that these failures were explained because an order of protection prohibited him from having contact with the mother and child. The court rejected the father's claim, pointing out that the order of protection did not prohibit the father from contacting the County Department of Social Services, the agency which was supervising the child's care. Moreover, the court held that the father's

inability to visit the child was the result of the father's own criminal acts.

On the other hand, the evidence was found insufficient to support an abandonment in *Matter of Madeline S.*, 3 A.D.3d 13, 769 N.Y.S.2d 22 (1st Dept. 2003), which also involved an attempted stepparent adoption. The child was born to a couple who had been married for about eight months. Both were professional actors. When the child was slightly more than a-year-old, the mother and child moved into the apartment of the mother's new companion. The relationship between the mother and father deteriorated during the course of a divorce action. There was bitter litigation over the father's visitation rights, including multiple court appearances and police intervention. The mother's hostility toward the father was fueled by his failure to make regular child support payments. Eventually, the marital litigation was settled. The mother received custody of the child and the father was granted two days per week of visitation, to be followed by overnight visitations after six weeks of successful visitation. Nevertheless, the mother took the child to Texas (because she had a business commitment there) shortly after the settlement, thus precluding the father's visitation. Moreover, the mother unilaterally canceled visitations, sometimes because the father was late. The mother ultimately blocked visitation, leading the father to commence enforcement proceedings and to seek to reduce his support. The father then accepted employment in Las Vegas at a substantially higher pay than his unemployment benefits. He moved without reporting his move to the mother and without giving her a forwarding address. He also decided not to send any letters or gifts to the child because he presumed that she would not get them due to the animosity between the parents. About nine months later, the father returned to New York and contacted the mother to request a resolution of their visitation issues. He did not receive a response and filed a visitation petition in family court. He abandoned that proceeding because he could not afford an attorney. The adoption proceeding followed.

The appellate court agreed with the trial court that the father's conduct had been that of an inconsistent and inconsiderate parent. Nevertheless, the appellate court concluded that the focus must be on whether the nature and extent of his contacts with the child manifested an actual intent to abandon the child and his parental position. Herein, the existence of any such intent was not established. Rather, the father's failure to visit the child, prior to his relocation to Las Vegas, was attributable to the mother's interference, through outright denials of visitation and a level of hostility that strongly discouraged any such attempts. The father's relocation to Las Vegas, like the regular temporary relocations by the mother, were understandably necessary in view of their respective careers as professional actors. Likewise, the father's failure to voluntarily pay support was not viewed as determinative.

In *Matter of Shauna B.*, 305 A.D.2d 737, 759 N.Y.S.2d 563 (3rd Dept. 2003), in a proceeding by the child's biological father and his wife to adopt his two children, the petitioners had met the heavy burden of proving by clear and convincing evidence that the biological mother had evinced an intent to rid herself of her parental obligations. In 1997, the family court had granted the father custody of the children. The mother made some attempts at visitation for several months, with problems arising between the parties, the mother's boyfriend, and the children. The family court modified the custody order to provide for supervision of visitation by the County Mental Health Department. However, only one such visit, in the summer of 1998, took place. The mother did try to call the father at home a few times after that, but was answered only by an answering machine. The father changed his telephone number in late 1999 without informing the mother of the new, unlisted number, but the mother made no effort to try to obtain it. While she bought presents for the children, she kept them in a room in her home. In January 2001, the father and his wife commenced the adoption proceeding, which was granted by the family court. In affirming the determination below, the appellate division held that, pursuant to DRL § 111(6)(c), the mother's subjective intent to maintain her rights did not defeat the finding of abandonment. Having failed to visit and communicate with the children for six months, the mother was required to provide a proper explanation in order to avoid an abandonment

finding. The appellate division ruled that her explanation was not satisfactory. She did not see her children for over two years, never sent them the gifts she bought them, made a few calls but never followed up, never paid child support, did not follow up with their counselor who had agreed to arrange for telephone contact between her and the children, and never filed a petition in family court to enforce or modify the prior visitation orders. Given the mother's total failure to avail herself of the access to the children provided by the family court, the appellate division was not persuaded that the conduct of the father and his wife had effected the mother's lack of contact.

The consent of the child's father was found unnecessary in *Matter of Taylor O.P.,* 303 A.D.2d 1024, 757 N.Y.S.2d 194 (4th Dept. 2003), where during a period of approximately 11 months preceding the filing of the petition, the father's only contact with the child consisted of a letter, a card, and a gift of $35. The court ruled that such insubstantial and infrequent contact was insufficient to preclude a finding of abandonment. The court rejected the father's claim that the child's mother thwarted his efforts to contact the child, and perceived no basis for disturbing the trial court's credibility determination. The court also held that the father's payment of child-support arrears, made after he learned of the impending adoption proceeding, was not required to be viewed as a substantial communication by the father with the child or the legal custodian.

Social Service Law § 384-b defines the relevant period for proof of abandonment of a child in foster care as the period of six months immediately prior to the date on which the adoption petition is filed. In *Matter of Commitment of C. Children*, 4 Misc. 3d 363, 780 N.Y.S.2d 476 (Fam. Ct. Kings County 2004), the court held that the statute does not require that the child have been in foster care for the entire six-month period. Accordingly, the court held that, where the biological mother had no contact with the children during the six months prior to the adoption petition, the mother had abandoned them, even though the children had not yet been in foster care for six months.

C111:5: When Consent Not Required--Surrender

The consent of a parent or of any other person having custody of the child is not required where the parent or custodian has surrendered the child to an authorized agency pursuant to either Section 383-c or Section 384 of the Social Services Law. DRL § 111 (subd. 2[b]).

Social Services Law § 383-c authorizes both judicial and extra-judicial surrenders for purposes of adoption. However, a surrender for adoption executed by a parent, parents or guardian who is in foster care must be executed before a Family Court Judge. In addition, extra-judicial surrenders under must be approved by the court and, if not, the surrender becomes null and void. *See* Social Services Law § 384-c. Like a judicial consent to adoption (*see* DRL § 115-b), a judicial surrender becomes final and irrevocable immediately. Like an extra-judicial consent (*see* DRL § 115-b), an extra-judicial surrender is subject to revocation within 45 days of its execution. But, importantly, while an attempted revocation of an extra-judicial adoption consent may lead to hearing on whether revocation is in the child's best interest, revocation of an extra-judicial surrender is automatic and requires that the child be returned to the care and custody of the authorized agency.

Social Services Law § 384 permits the guardianship and custody of a destitute or dependent child under age 18 to be committed to an authorized agency by a written surrender instrument. Under subdivision 2 of Social Services Law § 384 the instrument must recite that the authorized agency is authorized and empowered to consent to the adoption of the child in the place and stead of the person signing the instrument and may also provide for waiver of notice of adoption. This provision applies only to surrenders to authorized agencies. A surrender of a child by a parent to an attorney, who is not

an authorized agency, does not avoid the necessity for obtaining that parent's consent. *Matter of X*, 84 Misc.2d 770, 376 N.Y.S.2d 825 (Surr.Ct. Cattaraugus County 1975).

The consent of a parent or custodian of a child is not required where the parent or custodian has executed an irrevocable instrument which either denies paternity of the child or consents to the other parent's surrender of the child or consent to adoption. Such instruments, however, must be made after conception of the child and duly acknowledged or proven in the manner required to entitle a deed to be recorded. DRL § 111 (subd. 2[e]).

C111:6: When Consent Not Required--Involuntary Guardianship

The consent of a parent or of any other person having custody of the child is not required where the child has had a guardian appointed for him or her pursuant to the provisions of section 384-b of the Social Services Law. DRL § 111 (subd. 2[c]). Under section 384-b of the Social Services Law, guardianship of the person and custody of a destitute or dependent child may be committed to an authorized agency or to a foster parent where:

(a) both parents of the child are dead and no guardian of the person of the child has been lawfully appointed;

(b) the parent or parents of the child, whose consent to adoption would otherwise be required, abandoned the child for a period of six months immediately preceding the date of the filing of the petition;

(c) the parent or parents, whose consent to adoption would otherwise be required, are presently and are for the foreseeable future unable, by reason of mental illness or mental retardation, to provide proper and adequate care for a child who has been in the care of an authorized agency for a period of one year immediately preceding the date on which the petition is filed;

(d) the child is permanently neglected; or

(e) the parent or parents, whose consent to adoption would otherwise be required, have severely or repeatedly abused the child and the child has been in the care of an authorized agency for a period of one year immediately preceding the date on which the petition is filed. Where a court has determined that reasonable efforts to reunite the child with his or her parent are not required, a petition to terminate parental rights on the ground of severe abuse, as further defined in the statute,may be filed immediately upon such determination; provided, however, that the fact finding hearing on such petition shall commence no sooner than one year from the date the child first entered care and the court shall consider at such hearing the actions by the parent during the entire period prior to the hearing. Social Services Law § 384-b (subd. 4).

Where the consent of a parent is not required, as where the father of an out of wedlock child placed for adoption more than six months after birth fails to meet the requirements of DRL § 111 (subd. 1[d]), it is not necessary to establish the existence of grounds avoiding such consent. *Matter of Kasiem H.*, 230 A.D.2d 796, 646 N.Y.S.2d 541 (2nd Dept. 1996). *Kasiem M.* held that it was proper to permit an agency to withdraw its petition for involuntary guardianship under Social Services Law §

384-b as against the unwed biological father, since the father had not qualified for adoption consent under DRL § 111 (subd. 1[d]), as the father had not maintained substantial and continuous or repeated contact with the child.

C111:7: When Consent Not Required--Mental Illness or Retardation

The consent of a parent or of any other person having custody of the child is not required where the parent or custodian is, by reason of mental illness or mental retardation, presently and for the foreseeable future unable to provide care for the child. The terms mental illness and mental retardation are as defined in section 384-b, subdivision 6 of the Social Services Law and the determination as to whether a parent or custodian is mentally ill or mentally retarded is to be made in accordance with the procedures and criteria set forth in that statute. DRL § 111 (subd. 2[d]).

While section 384-b of the Social Services Law authorizes a guardianship proceeding to be brought on the ground of mental illness or retardation, and that guardianship itself suffices to dispense with consent, the guardianship proceeding cannot be brought unless the child has been in the care of the authorized agency for at least one year. Hence, consent may be dispensed with on the ground of mental illness or retardation under DRL § 111, subdivision 2[d], without the necessity of having to place the child with an authorized agency for a period of at least one year.

Mental illness, for this purpose, means an affliction with a mental disease or mental condition, which is manifested by a disorder or disturbance in behavior, feeling, thinking or judgment to such an extent that if the child were placed in or returned to the custody of the parent, the child would be in danger of becoming a neglected child as defined in the Family Court Act. Social Services Law § 384-b (subd. 6[a]). Mental retardation is defined as subaverage intellectual functioning which originates during the developmental period and is associated with impairment in adaptive behavior to such an extent that if the child were placed in or returned to the custody of the parent, the child would be in danger of becoming a neglected child as defined in the Family Court Act. Social Services Law § 384-b (subd. 6[b]).

The legal sufficiency of the proof in such a proceeding may not be determined until the court has taken the testimony of a physician and psychologist, or psychiatrist. Social Services Law § 384-b (subd. 6[c]). The court must order the parent to be examined by, and must take the testimony of, a physician and certified psychologist in the case of a parent alleged to be mentally ill. The court must order the parent to be examined by, and must take the testimony of, a physician and psychiatrist in the case of a parent alleged to be mentally retarded. These experts are to be appointed by the court pursuant to section 35 of the Judiciary Law. The parent and an authorized agency involved in the proceeding have the right to submit other psychiatric, psychological or medical evidence. If a parent refuses to submit to examination ordered by the court, or if the parent renders himself unavailable, either before or after commencement of proceedings, by departing from the state or concealing himself within the state, the appointed physician, psychologist or psychiatrist, upon the basis of other available information, such as agency, hospital or clinic records, may testify without an examination of the parent provided that the other available information affords a reasonable basis for the opinion. Social Services Law § 384-b (subd. 6[e]).

The mental illness or mental retardation which presently and for the foreseeable future renders the parent unable to provide proper and adequate care for the child must be established by clear and convincing evidence. If it is not so established, the parent's consent to the proposed adoption may not be dispensed with. *Isaacson v. Manashel,* 92 A.D.2d 894, 459 N.Y.S.2d 884 (2nd Dept. 1983).

In *Matter of Caroline,* 218 A.D.2d 388, 638 N.Y.S.2d 997 (4th Dept. 1996), the court held that private placement petitioners have standing to seek to dispense with the consent of a biological parent on the ground of parental mental illness or retardation. The *Caroline* court further held that there is no requirement that an authorized agency be involved or have engaged in efforts to reunite the child with the biological parents.

Under DRL § 111 (subd. 2[d]), the consent of a biological parent may be dispensed if the parent, by reason of mental illness or retardation, is unable to provide proper care for the child. What complicates the statute is the requirement built in to DRL § 111 (subd. 2[d]) that the determination of mental illness or retardation be made "in accordance with the criteria and procedures" set forth in Social Services Law § 384-b(6). Section 384-b (subd. 3[b]) permits authorized agencies, certain foster parents, or relatives with care and custody of the child, to initiate termination proceedings on the grounds set forth in the statute. However, that subdivision is not incorporated by reference into DRL § 111. What is incorporated are the details in § 384-b(6) as to what constitutes mental illness or retardation and how such illness or retardation is established. For example, the statute requires that there be testimony from a psychiatrist or psychologist. The statute requires that the court appoint a psychiatrist or psychologist and adds that "[t]he parent and the authorized agency shall have the right to submit other psychiatric, psychological or medical evidence." The reference to authorized agencies, and the absence of any reference to foster parents, adoptive parents or anyone else, suggests an assumption on the part of the Legislature that only authorized agencies may seek termination of parental rights on the ground of mental illness. On the other hand, DRL § 115 (subd. 5), applicable solely to private placement adoptions, provides that where mental illness or mental retardation of a biological parent is alleged, proof must be submitted that the disability exists at the time of the proposed adoption.

In actuality, mental illness or retardation is almost always asserted by an authorized agency in the context of a termination proceeding. However, *Matter of Caroline* is the unusual case where private placement adoption petitioners sought to dispense with consent of the biological parents on the ground of mental illness or retardation. The case involved the parental aunt and uncle of a child who took the child into custody, with the consent of the parents, shortly after the child's birth. The child's parents were married and were each mentally retarded. When the aunt and uncle commenced adoption proceedings, the biological parents objected, asserting that only an authorized agency could assert the mental illness or retardation of the biological parents and, at that, the agency would have to show diligent efforts to reunite the biological parents and child.

The Appellate Division concluded that, the reference in DRL § 111 (subd. 2[d]) to Social Services Law § 384-b (subd. 6), apparently limiting this ground to authorized agencies, was more than counter-balanced by DRL § 115 (subd. 5) which requires that, in private placement adoptions in which the mental illness or retardation of the biological asserted, there must be proof that the illness or retardation continued to the time of the adoption. This reading of the statute seems sound. There would be no reason for the Legislature to have added a requirement that the continuing nature of the mental condition be shown in private placement cases if the mental condition of the biological parents could not be asserted in such cases as a ground for avoiding the need for parental consent to adoption.

The court also declined to read into the law a requirement that an authorized agency must be involved and must make diligent efforts to reunite the child with the biological parents. No such requirement is imposed in termination cases under Social Services Law § 384-b where agencies are involved. With there being no requirement that agencies make reuniting efforts in cases brought by agencies, it would

scarcely be appropriate to construct such a requirement by judicial decision in cases in which no agency is involved at all.

Note that an earlier decision had held that the Social Services Law proceeding is available only to authorized agencies and authorized foster parents. *Matter of Adoption of Michael S. and Samantha S. by Michael B.*, 159 Misc.2d 894, 607 N.Y.S.2d 214 (Family Court Westchester County 1993).

C111:8: When Consent Not Required--Denial of Paternity

Consent to adoption is not required from a parent who had irrevocably denied paternity of the child. DRL § 111 (subd. 2[e]). To be effective, the instrument denying paternity must be executed after conception of the child and must be acknowledged in the manner required to permit the recording of a deed. This aspect of the statute is available to prevent a man who has denied paternity from disrupting an adoption by later asserting a consent right. Since the assertion of a consent right is inconsistent with a sworn, acknowledged denial of paternity, the statute allows a man who has denied paternity to take the next logical step and disavow any adoption consent rights.

When a man denies paternity, and an adoption is being considered, it would be prudent to have the man sign the statutory instrument, in order to avoid a later assertion of consent rights.

The statute does not limit its application to unwed fathers. It would appear open to the husband of a married woman to deny paternity and disavow consent rights by this statutory instrument.

The statute provides that the instrument, once executed, is irrevocable. The statute makes no procedure for revoking the instrument. The instrument, nevertheless, may be challenged on the basis of fraud in the inducement, or other grounds which would render the instrument *void ab initio*. A claim of invalidity, however, must be brought promptly.

C111:9: When Consent Not Required--Other Instances

Where the adoptive child is over the age of 18 years, the consent of the parents of the child to the adoption is not required. Further, the court may dispense with the need for consent from any person or authorized agency having lawful custody of the child, other than the parent or parents, if in the opinion of the court the best interests of the adoptive child will be promoted by the adoption and that such consent cannot be obtained for any reason. DRL § 111 (subd. 4).

An adoptive child who has been once lawfully adopted may be readopted directly from its adoptive parents in the same manner as from its birth parents. In such a case, the consent of the birth parents is not required. DRL § 111 (subd. 5). However, the court may, in its discretion, require that notice of the readoption be given to the birth parents in such manner as the court may prescribe. DRL § 111 (subd. 5).

C111:10: Revocation of Consent--Agency Adoptions

A written surrender by a parent terminates the parental rights of the parent. The surrender which terminates parental rights is distinguished from a voluntary commitment, as to which *see* Social Services Law § 384-a. Section 384 of the Social Services Law governs written surrenders with respect to children who are not in foster care. Written surrenders with respect to children in foster care are governed by Section 383-c of the Social Services Law.

Surrender instruments made pursuant to Section 384 must be executed or acknowledged: (a) before any judge or surrogate in New York who has jurisdiction over adoption proceedings or (b) in the presence of at least one witness, who must acknowledge the instrument before a notary public or other official authorized to administer oaths. Social Services Law § 384 (subd. 3).

Section 384, subdivision 4, permits, but does not require, authorized agencies to seek judicial approval of the surrender, upon notice to the affected persons. No person who has received such notice and been afforded an opportunity to be heard may challenge the validity of an approved surrender in any other proceeding.

If a duly executed and acknowledged adoption surrender so recites, no action or proceeding may be maintained by the surrendering parent or guardian for the custody of the surrendered child or to revoke or annul such surrender where the child has been placed in the home of adoptive parents and more than 30 days have elapsed since the execution of the surrender or where the purpose of such action or proceeding is to return the child to or vest the child's custody in any person other than the parent or guardian who originally executed such surrender. Social Services Law, § 384 (subd. 5). However, this limitation does not bar actions or proceedings brought on the ground of fraud, duress or coercion in the execution or inducement of a surrender. The 30-day period does not begin to run unless the fact of the placement, the date thereof, the date of the agreement pertaining thereto and the names and addresses of the adoptive parents shall have been recorded in a bound volume maintained by the agency for the purpose of recording such information in chronological order.

In an action or proceeding to determine the custody of a child not in foster care surrendered for adoption and placed in an adoptive home or to revoke or annul a surrender instrument in the case of such child placed in an adoptive home, the parent or parents who surrendered such child shall have no right to the custody of such child superior to that of the adoptive parents, notwithstanding that the parent or parents who surrendered the child are fit, competent and able to duly maintain, support and educate the child. The custody of such child shall be awarded solely on the basis of the best interests of the child, and there shall be no presumption that such interests will be promoted by any particular custodial disposition. Social Services Law § 384 (subd. 6). The provisions were originally enacted to overcome the decision of the Court of Appeals in the famous "*Baby Lenore*" case, *People ex rel. Scarpetta v. Spence-Chapin Adoption Service, Inc.*, 28 N.Y.2d 185, 321 N.Y.S.2d 65, 269 N.E.2d 787 (1971), *appeal dismissed, certiorari denied*, 404 U.S. 805, 92 S.Ct. 54, 30 L.Ed.2d 38 (1971).

Section 383-c of the Social Services Law, pertaining to surrenders of children in foster care, provides for both judicial and extra-judicial surrenders. However, an extra-judicial surrender must be approved by the court, with the agency being required to commence an approval proceeding within 15 days after execution of such surrender. Social Services Law § 383-c (subd. 4). If the court disapproves the surrender, then the surrender is a nullity. Further, the surrendering parent has 45 days from the execution of an extra-judicial surrender to revoke it. If a revocation of an extra-judicial surrender is mailed and postmarked or otherwise delivered to the court named in the surrender within 45 days of the execution of the surrender, such surrender shall be deemed a nullity, and the child shall be returned to the care and custody of the authorized agency. Social Services Law, § 383-c (subd. 6). If a

revocation of an extra-judicial surrender is mailed and postmarked or otherwise delivered to the court named in the surrender more than 45 days after its execution and the child has not been placed in an adoptive home, such surrender shall also be deemed a nullity, and the child shall be returned to the care and custody of the authorized agency. Nothing contained in the statute bars actions or proceedings brought on the ground of fraud, duress or coercion in the execution or inducement of a surrender. No action or proceeding may be maintained by the surrendering parent or guardian for the custody of the surrendered child or to revoke or annul such surrender except as provided in the statute. Social Services Law, § 383-c (subd. 6).

A surrender for adoption executed by a parent, parents or guardian who is in foster care shall be executed only before a judge of the family court. Social Services Law, § 383-c (subd. 7).

Any person or persons having custody of a child for the purpose of adoption through an authorized agency are entitled, as of right, as an interested party, to intervene in any proceeding commenced to set aside a surrender purporting to commit a guardianship of the person or custody of a child executed under the provisions of Section 383-c. Such intervention may be made anonymously or in the true name of such person. Any person or persons having custody for more than twelve months through an authorized agency for the purpose of foster care are likewise entitled as a matter of right, as an interested party, to intervene in any proceeding commenced to set aside a surrender purporting to commit the guardianship of the person and custody of a child executed under the provisions of Section 383-c. Such intervention may be made anonymously or in the true name of such person or persons having custody of the child for the purpose of foster care. Social Services Law § 383-c (subd. 9).

C111:11: Notice of Proposed Adoption

Notice of a proposed adoption is to be given in such manner as the Family Court Judge or Surrogate may direct. Notice of the proceeding must be given to a person whose consent is required but who has not consented. Further, notice and an opportunity to be heard may be given to a parent whose consent to the adoption is not required, if the Judge or Surrogate so orders. In the case of readoption from adoptive parents, the consent of the birth parents is not required, but the Family Court Judge or Surrogate, as a matter of discretion, may require that notice of the proposed adoption be given to the birth parents in such a manner as the court may prescribe. DRL § 111 (subd. 5). However, notwithstanding any other provision of law, neither notice of a proposed adoption nor any process in an adoption proceeding may be required to contain the name of the person or persons seeking to adopt the child. DRL § 111 (subd. 3).

The general notice requirements of DRL § 111 must be read in conjunction with the requirements for notifying the fathers of out-of-wedlock children imposed by DRL § 111-a. While DRL 111, in subdivisions d and e, defines the circumstances under which the consent of the birth father is a condition precedent to adoption, DRL § 111-a mandates that notice be provided to under more broadly defined set of criteria.

DRL § 111 does not expressly require that notice of a proposed adoption be given to birth parents or others who have already consented to the adoption. While, at one time, DRL § 115-b, dealing with extrajudicial consents in private placement adoptions was construed so as to require that a consenting parent be given notice of the adoption proceeding, *see Matter of Sarah K.*, 66 N.Y.2d 223, 496 N.Y.S.2d 384, 487 N.E.2d 241 (1985), the Legislature has since recast DRL § 115-b and notice of the commencement of the proceeding is no longer required in that context.

It is not mandatory that a law guardian be appointed to represent a child in a proceeding to dispense with the necessity of consent from a parent. *Matter of Amanda*, 197 A.D.2d 923, 602 N.Y.S.2d 461 (4th Dept. 1993), *leave to appeal denied,* 82 N.Y.2d 662, 610 N.Y.S.2d 150, 632 N.E.2d 460. Under Family Court Act § 249, the appointment of a law guardian is mandatory in a proceeding to revoke parental consent. The need for a law guardian in that setting is implicated by the possible, if not probable, application of the best interests of the child standard, as to which the child's voice should be considered. However, in deciding whether parental consent may be dispensed with, best interests is not ordinarily reached. Thus, whether to appoint a law guardian is within the sound discretion of the trial court.

C111:12: Consent to Adoption--When Obtained

There is nothing in the statute which addresses the time within which consent to adoption can be obtained. Manifestly, if consent of a parent is required, consent must be obtained prior to making an order of adoption. At the opposite end of the time continuum, there is nothing in the statute which precludes taking consent from a parent prior to the birth of the child. However, an adoption proceeding, logically, cannot be commenced until the child is born since, until birth, there is no child to be adopted. This creates an issue because, pursuant to DRL § 115-b, a parent has a time window within which he or she may seek to revoke the consent. The difficulty is that, where consent is taken judicially prior to birth, the time allowed for a revocation attempt may expire even before the child is born. There are undoubtedly situations where a parent, upon learning of the pregnancy, would be tempted, perhaps in haste or in emotional distress, to sign away parental rights only to desire to retain those rights once the child becomes a living, breathing reality. Taking note of these considerations, and the Legislature's efforts to afford protection to the rights of birth parents, the Appellate Division, Third Department has held that pre-birth adoption consents are voidable at the option of the parent who gave the consent. *People ex. rel. Anonymous v. Anonymous*, 139 A.D.2d 189, 530 N.Y.S.2d 613 (3rd Dept. 1988).

The court concluded that it would be too harsh to view pre-birth consents as void, since that might pave the way to collaterally attack longstanding, fully consummated adoptions. Viewing pre-birth consents as voidable gives the parent the opportunity to nullify the consent after birth, in which case the consent becomes invalid and of no legal significance. On the other hand, a parent can ratify the pre-birth consent either by signing further documents confirming the adoption process or, perhaps, by conduct. However, in order for a ratification to be effective, the parent must confirm the adoption with knowledge of his or her legal rights and with knowledge of the legal effect of the prior consent. Thus, in the *Anonymous* case, while the birth mother who had given pre-birth consent had also, after birth, signed documents authorizing the hospital to release the child to the agent for the adoptive parents, the court refused to view the execution of the release as a ratification. The court held that there was no evidence that the mother was aware of her rights, and of the legal status of the pre-birth consent, at the time she signed the release.

The Third Department's decision reflects a careful balancing of the rights of birth parents and those of the prospective adoptive parents. Once the child is born, the prospective adoptive parents acquire secure emotional attachments which deserve--and have earned--legal protection. However, those attachments do not exist pre-birth and the legal rights of the prospective adoptive parents are, therefore, hardly as acute.

The decision does not grapple with the question of whether adoptive parents may refuse to accept a

child where the adoption arrangements were made prior to birth. The decision to adopt is a consensual one and it seems doubtful that the court may compel an otherwise unwilling person to adopt another.

Notes of Decisions (512)

McKinney's D. R. L. § 111, NY DOM REL § 111
Current through L.2023, chapters 1 to 189. Some statute sections may be more current, see credits for details.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Domestic Relations Law (Refs & Annos)
Chapter 14. Of the Consolidated Laws (Refs & Annos)
Article VII. Adoption (Refs & Annos)
Title I. Adoptions Generally (Refs & Annos)

McKinney's DRL § 111-a

§ 111-a. Notice in certain proceedings to fathers of children born out-of-wedlock

Effective: December 30, 2022

Currentness

1. Notwithstanding any inconsistent provisions of this or any other law, and in addition to the notice requirements of any law pertaining to persons other than those specified in subdivision two of this section, notice as provided herein shall be given to the persons specified in subdivision two of this section of any adoption proceeding initiated pursuant to this article or of any proceeding initiated pursuant to section one hundred fifteen-b of this article relating to the revocation of an adoption consent, when such proceeding involves a child born out-of-wedlock provided, however, that such notice shall not be required to be given: (a) in the case of the adoption of a child transferred to the custody and guardianship of an authorized agency, foster parent, or relative pursuant to section three hundred eighty-four-b of the social services law or a child transferred to the custody and guardianship of an authorized agency pursuant to section three hundred eighty-three-c of the social services law; or (b) to any person who has previously received notice of any proceeding pursuant to section one hundred fifteen-b of this article. In addition to such other requirements as may be applicable to the petition in any proceeding in which notice must be given pursuant to this section, the petition shall set forth the names and last known addresses of all persons required to be given notice of the proceeding, pursuant to this section, and there shall be shown by the petition or by affidavit or other proof satisfactory to the court that there are no persons other than those set forth in the petition who are entitled to notice. For the purpose of determining persons entitled to notice of adoption proceedings initiated pursuant to this article, persons specified in subdivision two of this section shall not include any person who has been convicted of one or more of the following sexual offenses in this state or convicted of one or more offenses in another jurisdiction which, if committed in this state, would constitute one or more of the following offenses, when the child who is the subject of the proceeding was conceived as a result: (A) rape in first or second degree; (B) course of sexual conduct against a child in the first degree; (C) predatory sexual assault; or (D) predatory sexual assault against a child.

2. Persons entitled to notice, pursuant to subdivision one of this section, shall include:

(a) any person adjudicated by a court in this state to be the father of the child;

(b) any person adjudicated by a court of another state or territory of the United States to be the father of the child, when a certified copy of the court order has been filed with the putative father registry, pursuant to section three hundred seventy-two-c of the social services law;

(c) any person who has timely filed an unrevoked notice of intent to claim paternity of the child, pursuant to section three hundred seventy-two-c of the social services law;

(d) any person who is recorded on the child's birth certificate as the child's father;

(e) any person who is openly living with the child and the child's mother at the time the proceeding is initiated and who is holding himself out to be the child's father;

(f) any person who has been identified as the child's father by the mother in written, sworn statement;

(g) any person who was married to the child's mother within six months subsequent to the birth of the child and prior to the execution of a surrender instrument or the initiation of a proceeding pursuant to section three hundred eighty-four-b of the social services law; and

(h) any person who has filed with the putative father registry an instrument acknowledging paternity of the child, pursuant to section 4-1.2 of the estates, powers and trusts law.

3. The provisions of this section shall not apply to persons entitled to notice pursuant to section one hundred eleven.

The sole purpose of notice under this section shall be to enable the person served pursuant to subdivision two to present evidence to the court relevant to the best interests of the child.

4. Notice under this section shall be given at least twenty days prior to the proceeding by delivery of a copy of the petition and notice to the person. Upon a showing to the court, by affidavit or otherwise, on or before the date of the proceeding or within such further time as the court may allow, that personal service cannot be effected at the person's last known address with reasonable effort, notice may be given, without prior court order therefor, at least twenty days prior to the proceeding by registered or certified mail directed to the person's last known address or, where the person has filed a notice of intent to claim paternity pursuant to section three hundred seventy-two-c of the social services law, to the address last entered therein. Notice by publication shall not be required to be given to a person entitled to notice pursuant to the provisions of this section.

5. A person may waive his right to notice under this section by written instrument subscribed by him and acknowledged or proved in the manner required for the execution of a surrender instrument pursuant to section three hundred eighty-four of the social services law.

6. The notice given to persons pursuant to this section shall inform them of the time, date, place and purpose of the proceeding and shall also apprise such persons that their failure to appear shall constitute a denial of their interest in the child which denial may result, without further notice, in the adoption or other disposition of the custody of the child.

7. No order of adoption and no order of the court pursuant to section one hundred fifteen-b shall be vacated, annulled or reversed upon the application of any person who was properly served with notice in accordance with this section but failed to appear, or who waived notice pursuant to subdivision five. Nor shall any order of adoption be vacated, annulled or reversed upon the application of any person who was properly served with notice in accordance with this section in any previous proceeding pursuant to section one hundred fifteen-b in which the court determined that the best interests of the child would be served by adoption of the child by the adoptive parents.

Credits

(Added L.1976, c. 665, § 3. Amended L.1977, c. 862, §§ 7 to 9; L.1980, c. 575, §§ 4 to 6; L.1993, c. 353, § 1; L.2013, c. 371, § 2, eff. Sept. 27, 2013; L.2022, c. 828, § 2, eff. Dec. 30, 2022.)

Editors' Notes

PRACTICE COMMENTARIES

by Alan D. Scheinkman

DRL § 111, subdivisions d and e, define the circumstances under which the consent of the birth father of an out-of-wedlock child is a prerequisite to the adoption of that child. However, in addition to the consent requirements of DRL § 111, DRL § 111-a describes more broadly defined and liberal circumstances under which birth fathers of out-of-wedlock children are entitled to notice of any adoption proceeding and to notice of any proceeding, initiated pursuant to DRL § 115-b, relating to the revocation of an adoption consent. DRL § 111-a (subd. 1). The entitlement provided for by the statute is to notice; the birth fathers entitled to notice under DRL § 111-a are not entitled to veto a proposed adoption by withholding consent unless they qualify under the more restrictive requirements of DRL § 111. The father of an out-of-wedlock child who is entitled to notice of the proposed adoption under > N.Y. Dom. Rel. Law § 111-a is afforded that notice in order to afford him the opportunity to be heard on the subject of the disposition of the children. He is an interested person but is not a party to the proceedings. Thus, a notice father does not have the rights to seek pre-trial discovery as the discovery devices provided by the CPLR are available only to parties. *Matter of Adoption of C.*, 6 Misc.3d 357, 789 N.Y.S.2d 610 (Fam.Ct. Queens County 2004). The sole purpose of notice to birth fathers whose contacts with the children are not such as to qualify the fathers under

DRL § 111 is to permit them to present evidence relevant to the best interests of the child. DRL § 111-a (subd. 3). The provisions relating to notice to birth fathers of out-of-wedlock children under DRL § 111-a do not apply to the notices to be given birth fathers of out-of-wedlock children under DRL § 111. DRL § 111-a (subd. 3).

While DRL § 111-a, subdivision 2, sets forth the circumstances under which birth fathers of out-of-wedlock children, not entitled to an adoption veto, are entitled to notice of the adoption proceeding, DRL § 111-a, subdivision 1, excludes certain birth fathers from even the notice entitlement. Fathers who previously were given notice of a proceeding for guardianship under Social Services Law § 384-c or prior notice of a consent revocation proceeding under Domestic Relations Law § 115-b are not entitled to further notice of an adoption proceeding by DRL § 111-a. *Matter of R.*, 52 A.D.3d 609, 860 N.Y.S.2d 572 (2nd Dept. 2008). However, in *Matter of Aaliah*, 10 Misc.3d 640, 809 N.Y.S. 2d 809 (Family Court Bronx County 2005), the court held that notice was not dispensed with as to a father who had received notice of a Section 384-c termination of parental rights proceeding, where that proceeding was withdrawn and did not result in any adjudication, even though the putative father, through by his conduct, had thwarted the adjudication of the termination of rights proceeding. In that case, a termination proceeding was commenced against the putative father, who was incarcerated. The putative father commenced his own paternity proceeding which was heard with the termination proceeding. However, the father's assigned counsel withdrew due to a grievance the putative father filed against him, the successor counsel withdrew because the putative father had allegedly threatened to kill him, and the court had difficulty obtaining replacement counsel. The putative father could not be produced in court on numerous occasions due to his belligerence and the putative father refused to submit to a paternity test. The mother, whose rights had been terminated, refused to allow her address to be disclosed to the putative father out of fear for her safety. Ultimately, the paternity and termination proceedings were withdrawn without prejudice. Thereafter, an adoption proceeding was filed. By that time, the putative father had filed with the putative father registry, an action that would entitle him to notice of the adoption proceeding. While the petitioners and the law guardian urged that the putative father was not entitled to notice on the ground that he had notice of the prior proceedings, the court held that notice of prior proceedings would dispense with notice of the adoption only if the prior proceedings had resulted in an adjudication of paternity and an adjudication of the child's placement. Here, the prior proceedings had not resolved anything so the putative father was entitled to notice. Since he was only a "notice" father, and not a "consent" father, his participation in the adoption proceeding would be limited to submitting evidence as to the child's best interests. To safeguard the petitioner, the court directed that the petitioner's identity and address would be redacted from the papers to be provided to the putative father. It was sufficient, held the court, for the putative father to be provided with the petitioner's age, occupation, marital history, and manner in which the child came into petitioner's care. With this information, the putative father could decide whether to participate in the hearing and submit evidence as to the child's best interests.

Notice need not be given to an unwed father who was convicted of rape in the first degree involving forcible compulsion, provided that the child who is the subject of the proceeding was conceived as the result of the rape. This provision seems to be based on the admonition in the plurality opinion by Justice Antonin Scalia in *Michael H. v. Gerald D.*, 109 S.Ct. 2333, 491 U.S. 110, 105 L.Ed.2d 91 (1989), *rehearing denied,* 110 S.Ct. 22, 492 U.S. 937, 106 L.Ed.2d 634, *rehearing denied,* 111 S.Ct. 1645, 499 U.S. 984, 113 L.Ed.2d 739, *motion to amend or clarify denied*, 112 S.Ct. 1931, 118 U.S. 538, 118 L.Ed.2d 538, against viewing a liberty interest "in isolation from its effect upon other people.... "109 S.Ct. at 2343 n.4, and Justice Scalia's express rejection of the notion that a rapist, by impregnating his victim, may forge a liberty interest unaffected by the brutality of his conduct.

The statutory provision for precluding notice to forcible rapists raises a number of questions. The statute makes the fact of the conviction for a specified rape crime the controlling event, rather than the

fact of the rape itself. Thus, if there is no prosecution at all, or if the conviction is for a lessor offense than rape in the first degree, the notice exception is inapplicable. Nor does the statute offer anything in the event that the placement of the child occurs before criminal proceedings are commenced or resolved.

First degree rape is defined by Penal Law § 130.35 to include sexual intercourse: (a) by forcible compulsion; (b) with a person who is unable to consent because of being physically helpless; (c) with a person who is less than 11 years old; and (d) by a person who is at least 18 years old with a person who is less than thirteen years old. The notice exception contained in DRL § 111-a applies only in the instance of forcible compulsion and does not apply to the other two categories of first degree rape.

The statutory notice exception applies only where the child involved was conceived as the result of the rape. If the unwed father engaged in both forcible, first degree rape, as well as non-forcible sexual relations with the mother, or in sexual relations with the mother which did not involve first degree rape, a factual issue may be presented as to which sexual acts resulted in conception. In such instance, the unwed father may be entitled to notice of a hearing on his entitlement to notice of the proceeding.

The adoption or consent revocation petition must set forth the names and last known addresses of all persons required to be given notice under DRL § 111-a. In addition, it must be shown by the petition, by affidavit or by other proof satisfactory to the court that there are no persons other than those set forth in the petition who are entitled to notice. DRL § 111-a (subd. 1).

The birth fathers of out-of-wedlock children who are entitled to notice under the provisions of DRL § 111-a are as follows:

1. any person adjudicated by a court in New York State to be the father of the child;

2. any person adjudicated by a court of another state or territory of the United States to be the father of the child, provided that a certified copy of the court order has been filed with the putative father registry, pursuant to the provisions of section 372-c of the Social Services Law;

3. any person who has filed a timely and unrevoked notice of intent to claim paternity of the child, pursuant to section 372-c of the Social Services Law;

4. any person who is recorded on the child's birth certificate to be the child's father;

5. any person who is openly living with the child and the child's mother at the time that the proceeding is instituted and who is holding himself out to be the child's father;

6. any person who has been identified as the child's father by the mother in a written, sworn statement;

7. any person who was married to the child's mother within six months subsequent to the birth of the

child but prior to the execution of a surrender instrument or the initiation of a guardianship proceeding under section 384-c of the Social Services Law; and

8. any person who has filed with the putative father registry an instrument acknowledging paternity of the child, pursuant to section 4-1.2 of the Estates, Powers and Trusts Law. DRL § 111-a (subd. 2).

As set forth in the statute, one test for measuring the notice rights of an unwed father is whether the mother has identified the man as the child's father in a written, sworn statement. DRL § 111-a (subd. 2[f]). If the mother has identified a given person as the father of the child in a written, sworn statement, then that person is entitled to notice of the proposed adoption. That the mother names a man as the father in a written but unsworn statement is not sufficient to entitle that man to notice. So holds the court in *Matter of Jerell Lee C.,* 225 A.D.2d 544, 638 N.Y.S.2d 754 (2nd Dept. 1996). In that case, the man in question did not meet any of the other seven notice criteria and even the unsworn statement was subject to doubt since the mother later recanted her unsworn statement in a sworn statement and gave a plausible reason for the prior unsworn identification.

The approach taken by *Matter of Jerell Lee C.*, while strict, is in keeping with the statutory purpose. The statute requires a written statement, precisely because oral statements may be difficult to prove and, even more important, may be casually made. Unsworn statements may also be casually made, without regard to the truth. Indeed, unsworn written statements may be made in a variety of documents which may not be known to petitioners, such as in letters to third parties or in notes or even diaries. Because oral or unsworn statements may be lightly made, may not be made truthfully, and may not be made with intent that the statement be relied upon for a serious purpose, the statute requires that the statement be written and sworn. If the mother identifies a person as the father of her child in a written, sworn statement, the fact that the statement is written and was made under oath shows that the statement was not lightly made and was made with a high degree of regard for the truth. Moreover, a strict reading of this subdivision, which turns on a statement by the mother, is hardly an insurmountable barrier to notice since the putative father can guarantee himself the right to notice simply by filing notice with the putative father registry.

The notice required by DRL § 111-a is to be given at least 20 days prior to the proceeding by delivery of a copy of the petition and notice to the person. Upon a showing to the court, by affidavit or otherwise, before the date of the proceeding or within such further time as the court may allow, that personal service cannot be effected at the person's last known address with reasonable effort, notice may be given, without court order, at least 20 days prior to the proceeding by registered or certified mail directed to the person's last known address or, where the person has filed a notice of intent to claim paternity pursuant to Social Services Law § 372-c to the last address entered therein. Notice by publication is not to be required to be given to a person entitled to notice under the statute. DRL § 111-a (subd. 4).

As noted above, by the very terms of the statute the purpose of the notice is to enable the putative father to be heard on the issue of the child's best interests. Accordingly, it has been held that the putative father is not entitled to full and complete information as to the identity and whereabouts of the adoptive parents. The court may delete from the copy of the petition being forwarded to the putative father information that would disclose the names, residence addresses and business addresses of the petitioners. However, even if this information is redacted, the petition itself should still disclose the ages of the petitioners, their marital history, religious preference, occupation, income, the circumstances under which they obtained the child, the length of time the child has resided with the petitioners, and the name of the authorized agency. This information should be sufficient to enable the

putative father to determine whether he believes that the proposed adoption is consistent with the child's best interest. *See Matter of "Male F."*, 97 Misc.2d 505, 411 N.Y.S.2d 982 (Surr.Ct. Bronx County 1978).

Where there is a failure to comply with the terms of DRL § 111-a, the remedy of the birth father is to seek to set aside any adoption order issued without notice to him. However, the birth mother does not have standing to complain about a lack of notice to the birth father, at least where the birth mother irrevocably consented to the adoption, did not disclose the birth father's identity, and the name of the birth father was not set out on the papers. *Matter of Adoption of E.W.C.*, 89 Misc.2d 64, 389 N.Y.S.2d 743 (Surr.Ct. Nassau County 1976).

The constitutionality of DRL § 111-a was sustained in *Lehr v. Robertson*, 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983), *affirming Matter of Jessica XX*, 54 N.Y.2d 417, 446 N.Y.S.2d 20, 430 N.E.2d 896 (1981). There, a putative father was not given timely notice of a proceeding which resulted in the adoption of the child by the birth mother's husband. Before the adoption was permitted, the Family Court had the putative father registry examined; the putative father had not entered his name and, therefore, his claim to paternity was not disclosed. While the putative father had lived with the mother before the child was born and had visited the mother in the hospital, he did not live with the mother and the child afterwards and did not provide financial support. However, one month after the adoption petition was filed and before the adoption order was made, the putative father commenced proceedings to adjudicate his paternity and fix his visitation rights. The putative father's paternity proceeding was brought in a different county than the adoption proceeding, of which the putative father was still unaware. When, in the course of the pendency of the paternity proceeding, the pendency of the adoption proceeding was disclosed, the putative father attempted unsuccessfully to stay the adoption proceeding. Thereafter, he sought to vacate the adoption order and after a full hearing, his application was denied.

During the course of the vacatur proceeding, the birth mother did not concede that the putative father was, in fact, the father of the child. However, the Supreme Court of the United States ruled that, even assuming that the putative father was the father of the child, the denial to him of timely notice and an opportunity to be heard in the adoption proceeding was not unconstitutional. The putative father had not established any significant custodial, personal or financial relationship with the child and had not sought to establish a legal relationship until the child was more than two years old. There was no denial of due process, said the Supreme Court, because by merely filing his intention to claim paternity with the putative father registry, he would have assured himself notice of any adoption proceeding under DRL § 111-a. Moreover, while DRL § 111-a would have afforded the putative father notice had he been adjudicated the child's father, the putative father was not protected since he delayed the commencement of a paternity proceeding for over two years, with the result that his proceeding was commenced, but undetermined, at the time of the adoption order. The putative father's mere commencement of a paternity proceeding was not sufficient, under DRL § 111-a, to require that he be notified of any adoption proceeding, at least where the putative father did not file his name with the putative father registry.

While the statute has been declared constitutional, the statute has been significantly undercut as a result of the decision of the Court of Appeals in *Matter of Raquel Marie X.*, 75 N.Y.2d 864, 552 N.Y.S.2d 920, 552 N.E.2d 168 (1990), *cert. denied*, 111 S.Ct. 517, 498 U.S. 984, 112 L.Ed.2d 528.

Raquel Marie held unconstitutional the provisions of DRL § 111 (subd. 1[e]) which delimited the veto rights of unwed fathers with respect to the adoption of children less than six months at time of

placement. The Court of Appeals created an interim judicial standard for determining whether such unwed fathers should be accorded the right to veto adoptions of their children. The Court devised a standard based on the father's manifestation of parental responsibility, meaning "the qualifying interest of an unwed father" which "requires a willingness himself to assume full custody of the child--not merely to block adoption by others." As the Legislature has not, despite the passage of two decades, adopted an amendment to DRL § 111 (subd. 1[e]), the interim standard created in *Raquel Marie* remains in effect.

In *Robert O. v. Russell K.*, 80 N.Y.2d 254, 590 N.Y.S.2d 37, 604 N.E.2d 99 (1992), an unwed father maintained that it was unconstitutional to deprive him of notice and veto rights where he was not timely informed of the pregnancy by the mother. The Court rejected the unwed father's claim, and declined to set the adoption aside, holding that the protected liberty interest of an unwed father arises only after he has manifested his willingness to be a custodial parent. The unwed father's inaction was, the Court held, solely attributable to his own conduct. *Robert O.* is discussed in more detail in Practice Commentary C111:3 to DRL § 111.

Notes of Decisions (42)

McKinney's D. R. L. § 111-a, NY DOM REL § 111-a
Current through L.2023, chapters 1 to 189. Some statute sections may be more current, see credits for details.

End of Document

STATE OF NEW YORK

6389

2021-2022 Regular Sessions

IN SENATE

April 26, 2021

Introduced by Sen. BRISPORT -- read twice and ordered printed, and when printed to be committed to the Committee on Children and Families

AN ACT to amend the domestic relations law and the social services law, in relation to the rights of non-marital parents in adoption, surrender, and termination of parental rights proceedings in family court and surrogate's court; and to repeal subdivision 12 of section 384-b of the social services law relating thereto

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraphs (d), (e), and (f) of subdivision 1 of section 111 of the domestic relations law, paragraphs (d) and (e) as added and paragraph (f) as relettered by chapter 575 of the laws of 1980, and paragraph (f) as amended by chapter 666 of the laws of 1976, are amended to read as follows:

(d) **Of any person or authorized agency having lawful custody or guardianship of the adoptive child;**

(e) In the case of the adoption of a child transferred to the custody and guardianship of an authorized agency, foster parent, or relative pursuant to section three hundred eighty-four-b of the social services law or a child transferred to the custody and guardianship of an authorized agency pursuant to section three hundred eighty-three-c of the social services law:

(i) Of any person adjudicated by a court of this state or a court of any other state or territory of the United States to be the father of the child prior to the filing of a petition to terminate parental rights to the child pursuant to section three hundred eighty-four-b of the social services law, an application to execute a judicial surrender of rights to the child pursuant to subdivision three of section three hundred eighty-three-c of the social services law, or an application for approval of an extra-judicial surrender pursuant to subdivision four of section three hundred eighty-three-c of the social services law;

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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(ii) Of any person who filed a petition in a court in this state seeking to be adjudicated the father of the child prior to the filing of a petition to terminate parental rights to the child pursuant to section three hundred eighty-four-b of the social services law, an application to execute a judicial surrender of rights to the child pursuant to subdivision three of section three hundred eighty-three-c of the social services law, or an application for approval of an extra-judicial surrender pursuant to subdivision four of section three hundred eighty-three-c of the social services law, provided that the parentage petition has been resolved in the petitioner's favor or remains pending at the conclusion of the proceedings pursuant to section three hundred eighty-four-b, three hundred eighty-three-c, or three hundred eighty-four of the social services law;

(iii) Of any person who has executed an acknowledgment of parentage pursuant to section one hundred eleven-k of the social services law, section five hundred sixteen-a of the family court act, or section forty-one hundred thirty-five-b of the public health law prior to the filing of a petition to terminate parental rights to the child pursuant to section three hundred eighty-four-b of the social services law, an application to execute a judicial surrender of rights to the child pursuant to subdivision three of section three hundred eighty-three-c of the social services law, or an application for approval of an extra-judicial surrender pursuant to subdivision four of section three hundred eighty-three-c of the social services law, provided that such acknowledgement has not been vacated;

(iv) Of any person who filed an unrevoked notice of intent to claim parentage of the child pursuant to section three hundred seventy-two-c of the social services law prior to the filing of a petition to terminate parental rights to the child pursuant to section three hundred eighty-four-b of the social services law, an application to execute a judicial surrender of rights to the child pursuant to subdivision three of section three hundred eighty-three-c of the social services law, or an application for approval of an extra-judicial surrender pursuant to subdivision four of section three hundred eighty-three-c of the social services law;

(f) In any other adoption proceeding:

(i) Of the father, whether adult or infant, of a child born out-of-wedlock and placed with the adoptive parents more than six months after birth, but only if such father shall have maintained substantial and continuous or repeated contact with the child as manifested by: [~~(i)~~] (A) the payment by the father toward the support of the child of a fair and reasonable sum, according to the father's means, and either [~~(ii)~~] (B) the father's visiting the child at least monthly when physically and financially able to do so and not prevented from doing so by the person or authorized agency having lawful custody of the child, or [~~(iii)~~] (C) the father's regular communication with the child or with the person or agency having the care or custody of the child, when physically and financially unable to visit the child or prevented from doing so by the person or authorized agency having lawful custody of the child. The subjective intent of the father, whether expressed or otherwise, unsupported by evidence of acts specified in this paragraph manifesting such intent, shall not preclude a determination that the father failed to maintain substantial and continuous or repeated contact with the child. In making such a determination, the court shall not require a showing of diligent efforts by any person or agency to encourage the father to perform the acts specified in this paragraph. A father, whether adult or

infant, of a child born out-of-wedlock, who openly lived with the child for a period of six months within the one year period immediately preceding the placement of the child for adoption and who during such period openly held himself out to be the father of such child shall be deemed to have maintained substantial and continuous contact with the child for the purpose of this subdivision[~~.~~]**;**

[~~(c)~~] **(ii)** Of the father, whether adult or infant, of a child born out-of-wedlock who is under the age of six months at the time he is placed for adoption, but only if: [~~(i)~~] **(A)** such father openly lived with the child or the child's mother for a continuous period of six months immediately preceding the placement of the child for adoption; and [~~(ii)~~] **(B)** such father openly held himself out to be the father of such child during such period; and [~~(iii)~~] **(C)** such father paid a fair and reasonable sum, in accordance with his means, for the medical, hospital and nursing expenses incurred in connection with the mother's pregnancy or with the birth of the child.

[~~(f) Of any person or authorized agency having lawful custody of the adoptive child.~~]

§ 2. Subdivision 1 of section 111-a of the domestic relations law, as amended by chapter 371 of the laws of 2013, is amended to read as follows:

1. Notwithstanding any inconsistent provisions of this or any other law, and in addition to the notice requirements of any law pertaining to persons other than those specified in subdivision two of this section, notice as provided herein shall be given to the persons specified in subdivision two of this section of any adoption proceeding initiated pursuant to this article or of any proceeding initiated pursuant to section one hundred fifteen-b of this article relating to the revocation of an adoption consent, when such proceeding involves a child born out-of-wedlock provided, however, that such notice shall not be required to be given [~~to any person who previously has been given notice of any proceeding involving the child, pursuant to section three hundred eighty-four-c of the social services law, and provided further that notice in an adoption proceeding, pursuant to this section shall not be required to be given~~]**: (a) in the case of the adoption of a child transferred to the custody and guardianship of an authorized agency, foster parent, or relative pursuant to section three hundred eighty-four-b of the social services law or a child transferred to the custody and guardianship of an authorized agency pursuant to section three hundred eighty-three-c of the social services law; or (b)** to any person who has previously received notice of any proceeding pursuant to section one hundred fifteen-b of this article. In addition to such other requirements as may be applicable to the petition in any proceeding in which notice must be given pursuant to this section, the petition shall set forth the names and last known addresses of all persons required to be given notice of the proceeding, pursuant to this section, and there shall be shown by the petition or by affidavit or other proof satisfactory to the court that there are no persons other than those set forth in the petition who are entitled to notice. For the purpose of determining persons entitled to notice of adoption proceedings initiated pursuant to this article, persons specified in subdivision two of this section shall not include any person who has been convicted of one or more of the following sexual offenses in this state or convicted of one or more offenses in another jurisdiction which, if committed in this state, would constitute one or more of the following offenses, when the child who is the subject of the proceeding was conceived as a result: (A) rape in first or second

degree; (B) course of sexual conduct against a child in the first degree; (C) predatory sexual assault; or (D) predatory sexual assault against a child.

§ 3. Paragraph (b) of subdivision 3 of section 383-c of the social services law, as amended by section 42 of part A of chapter 3 of the laws of 2005, is amended to read as follows:

(b) Before a judge or surrogate approves a judicial surrender, the judge or surrogate [~~shall~~] **may** order that notice of the surrender proceeding be given to [~~persons identified in subdivision two of section three hundred eighty-four-c of this title and to~~] such [~~other~~] persons as the judge or surrogate may, in his or her discretion, prescribe. At the time that a parent appears before a judge or surrogate to execute and acknowledge a surrender, the judge or surrogate shall inform such parent of the right to be represented by legal counsel of the parent's own choosing and of the right to obtain supportive counseling and of any right to have counsel assigned pursuant to section two hundred sixty-two of the family court act, section four hundred seven of the surrogate's court procedure act, or section thirty-five of the judiciary law. The judge or surrogate also shall inform the parent of the consequences of such surrender, including informing such parent that the parent is giving up all rights to have custody, visit with, speak with, write to or learn about the child, forever, unless the parties have agreed to different terms pursuant to subdivision two of this section, or, if the parent registers with the adoption information register, as specified in section forty-one hundred thirty-eight-d of the public health law, that the parent may be contacted at any time after the child reaches the age of eighteen years, but only if both the parent and the adult child so choose. The court shall determine whether the terms and conditions agreed to by the parties pursuant to subdivision two of this section are in the child's best interests before approving the surrender. The judge or surrogate shall inform the parent that where a surrender containing conditions has been executed, the parent is obligated to provide the authorized agency with a designated mailing address, as well as any subsequent changes in such address, at which the parent may receive notices regarding any substantial failure of a material condition, unless such notification is expressly waived by a statement written by the parent and appended to or included in such instrument. The judge or surrogate also shall inform the parent that the surrender shall become final and irrevocable immediately upon its execution and acknowledgment. The judge or surrogate shall give the parent a copy of such surrender upon the execution thereof.

§ 4. Paragraph (d) of subdivision 4 of section 383-c of the social services law, as amended by chapter 394 of the laws of 1993, is amended to read as follows:

(d) Before a judge or surrogate approves an extra-judicial surrender, the judge or surrogate shall order notice to be given to the person who executed the surrender[~~, to persons identified in subdivision two of section three hundred eighty-four-c of this title~~] and to such other persons as the judge or surrogate may, in his or her discretion, prescribe. [~~The petition shall set forth the names and last known addresses of all persons required to be given notice of the proceeding, pursuant to section three hundred eighty-four-c, and there shall be shown by the petition or by affidavit or other proof satisfactory to the court that there are no persons other than those set forth in the petition who are entitled to notice pursuant to such section.~~] No person who has received such notice and been afforded an opportunity to be heard

may challenge the validity of a surrender approved pursuant to this subdivision in any other proceeding. Nothing in this section shall be deemed to dispense with the consent to adopt if otherwise required of any person who has not executed the surrender.

§ 5. Paragraph (h) of subdivision 5 of section 383-c of the social services law, as added by section 45 of part A of chapter 3 of the laws of 2005 and as relettered by chapter 435 of the laws of 2008, is amended to read as follows:

(h) Upon execution of a surrender instrument, the parent executing the surrender shall provide information to the extent known regarding the other parent, any person to whom the surrendering parent had been married at the time of the conception or birth of the child and any other person who would be entitled to [~~notice of a proceeding to terminate parental rights pursuant to section three hundred eighty-four-c of this title~~] consent to the adoption of the child pursuant to subdivision one of section one hundred eleven of the domestic relations law. Such information shall include, but not be limited to, such parent's or person's name, last-known address, social security number, employer's address and any other identifying information. Any information provided pursuant to this paragraph shall be recorded in the uniform case record maintained pursuant to section four hundred nine-f of this article; provided, however, that the failure to provide such information shall not invalidate the surrender.

§ 6. Subdivision 8 of section 384 of the social services law, as added by section 51 of part A of chapter 3 of the laws of 2005, is amended to read as follows:

8. Upon execution of a surrender instrument, the parent executing the surrender shall provide information to the extent known regarding the other parent, any person to whom the surrendering parent had been married at the time of the conception or birth of the child and any other person [~~who would be entitled to notice of a proceeding to terminate parental rights pursuant to~~] listed in subdivision two of section three hundred eighty-four-c of this title. Such information shall include, but not be limited to, such parent's or person's name, last-known address, social security number, employer's address and any other identifying information. Any information provided pursuant to this subdivision shall be recorded in the uniform case record maintained pursuant to section four hundred nine-f of this article; provided, however, that the failure to provide such information shall not invalidate the surrender.

§ 7. Subdivision 1-b of section 384-a of the social services law, as added by section 53 of part A of chapter 3 of the laws of 2005, is amended to read as follows:

1-b. Upon accepting the transfer of care and custody of a child from the parent, guardian or other person to whom care of the child has been entrusted, a local social services official shall obtain information to the extent known from such person regarding the other parent, any person to whom the parent transferring care and custody had been married at the time of the conception or birth of the child, any person who would be entitled to consent to the adoption of the child pursuant to subdivision one of section one hundred eleven of the domestic relations law, and any other person [~~who would be entitled to notice of a proceeding to terminate parental rights pursuant to~~] listed in subdivision two of section three hundred eighty-four-c of this title. Such information shall include, but not be limited to, such parent's or person's name, last-known address, social security number, employer's address and any other

identifying information. Any information provided pursuant to this subdivision shall be recorded in the uniform case record maintained pursuant to section four hundred nine-f of this article; provided, however, that the failure to provide such information shall not invalidate the transfer of care and custody.

§ 8. Paragraph (e) of subdivision 3 of section 384-b of the social services law, as amended by section 55 of part A of chapter 3 of the laws of 2005, is amended to read as follows:

(e) A proceeding under this section is originated by a petition on notice served upon the child's parent or parents, the attorney for the child's parent or parents and upon such other persons as the court may in its discretion prescribe. Such notice shall inform the parents and such other persons that the proceeding may result in an order freeing the child for adoption without the consent of or notice to the parents or such other persons. Such notice also shall inform the parents and such other persons of their right to the assistance of counsel, including any right they may have to have counsel assigned by the court in any case where they are financially unable to obtain counsel. [~~The petition shall set forth the names and last known addresses of all persons required to be given notice of the proceeding, pursuant to this section and section three hundred eighty-four-c of this title, and there shall be shown by the petition or by affidavit or other proof satisfactory to the court that there are no persons other than those set forth in the petition who are entitled to notice pursuant to the provisions of this section or of section three hundred eighty-four-c of this title.~~] When the proceeding is initiated in family court service of the petition and other process shall be made in accordance with the provisions of section six hundred seventeen of the family court act, and when the proceeding is initiated in surrogate's court, service shall be made in accordance with the provisions of section three hundred seven of the surrogate's court procedure act. When the proceeding is initiated on the grounds of abandonment of a child less than one year of age at the time of the transfer of the care and custody of such child to a local social services official, the court shall take judicial notice of efforts to locate the child's parents or other known relatives or other persons legally responsible pursuant to paragraph (ii) of subdivision (b) of section one thousand fifty-five of the family court act.

§ 9. Subdivision 12 of section 384-b of the social services law is REPEALED.

§ 10. Subdivision 1 of section 384-c of the social services law, as amended by chapter 371 of the laws of 2013, is amended to read as follows:

1. Notwithstanding any inconsistent provision of this or any other law, and in addition to the notice requirements of any law pertaining to persons other than those specified in subdivision two of this section, notice as provided herein shall be given to the persons specified in subdivision two of this section of any proceeding initiated pursuant to sections three hundred fifty-eight-a[~~,~~] **and** three hundred eighty-four[~~, and three hundred eighty-four-b~~] of this [~~chapter~~] **title**, involving a child born out-of-wedlock. Persons specified in subdivision two of this section shall not include any person who has been convicted of one or more of the following sexual offenses in this state or convicted of one or more offenses in another jurisdiction which, if committed in this state, would constitute one or more of the following offenses, when the child who is the subject of the proceeding was conceived as a result: [~~(A)~~] **(a)** rape in first or second degree; [~~(B)~~] **(b)** course of sexual

conduct against a child in the first degree; [~~(C)~~] (c) predatory sexual assault; or [~~(D)~~] (d) predatory sexual assault against a child.

§ 11. Subdivision 3 of section 384-c of the social services law, as amended by chapter 575 of the laws of 1980, is amended to read as follows:

3. The provisions of this section shall not apply to persons entitled to notice pursuant to section one hundred eleven of the domestic relations law. The sole purpose of notice under this section shall be to enable the person served pursuant to subdivision two of this section to present evidence to the court relevant to the best interests of the child. [~~In any proceeding brought upon the ground specified in paragraph (d) of subdivision four of section three hundred eighty-four-b, a person served pursuant to this section may appear and present evidence only in the dispositional hearing.~~]

§ 12. Subdivision 7 of section 384-c of the social services law, as added by chapter 665 of the laws of 1976, is amended to read as follows:

7. No order of the court in any proceeding pursuant to section three hundred fifty-eight-a[~~,~~] or three hundred eighty-four [~~or three hundred eighty-four-b~~] of this [~~chapter~~] title or in any subsequent proceeding involving the child's custody, guardianship or adoption shall be vacated, annulled or reversed upon the application of any person who was properly served with notice in accordance with this section but failed to appear, or who waived notice pursuant to subdivision five of this section. Nor shall any order of the court in any proceeding involving the child's custody, guardianship or adoption be vacated, annulled or reversed upon the application of any person who was properly served with notice in accordance with this section in any previous proceeding in which the court determined that the transfer or commitment of the child's care, custody or guardianship to an authorized agency was in the child's best interests.

§ 13. This act shall take effect immediately.

New York Sponsors Memorandum, 2021 S.B. 6389

May 1, 2021

New York Assembly

244th Legislature, 2021 Regular Session

SPONSOR: BRISPORT

TITLE OF BILL:

An act to amend the domestic relations law and the social services law, in relation to the rights of non-marital parents in adoption, surrender, and termination of parental rights proceedings in family court and surrogate's court; and to repeal subdivision 12 of section 384-b of the social services law relating thereto

SUMMARY OF PROVISIONS:

Section one provides full parental rights to fathers of children in foster care who have been adjudicated or are in the process of being adjudicated a parent, have executed an unrevoked acknowledgement of parentage, or have filed an unrevoked notice of intent to claim parentage.

Section two rescinds the requirement of notice of adoption proceedings to fathers of children in foster care who do not have full parental rights.

Sections three through twelve modify relevant provisions of the Social Services Law and the Domestic Relations Law to make them consistent with the modifications made by sections one and two.

Section thirteen would make the bill effective immediately.

JUSTIFICATION:

New York State has a clear policy in favor of prioritizing the preservation and reunification of families. However, current law fails to abide by this policy, and fails to keep families together, in cases of “public” adoptions resulting from state intervention. As a result of certain peculiarities in New York law, unmarried fathers may have their parental rights prematurely terminated without a proper hearing.

Under the Domestic Relations Law, in cases of “public” adoptions, only certain fathers have the right to consent to or prevent the adoption of their child. The only fathers who have “consent” rights if the child was placed for adoption at over six months of age are (1) those who were married to the child's mother at the time of the child's

birth; (2) those who lived with the child for at least six months of the year preceding the child's placement for adoption and "openly held "them- selves out to be the father of the child"; and (3) those who otherwise "maintained substantial and continuous contact with the child" both by regularly visiting or communicating with them and by paying "a fair and reasonable sum" to support them. If a father meets these criteria, then the state is compelled to establish a basis for termination of parental rights by clear and convincing evidence.

With respect to unmarried fathers and "public" adoptions, it is necessarily impossible to prove that they have been married to the child's mother, and it is highly unlikely that the father has been living with the child for six months of the previous year if the child is in foster care and the foster care agency is considering adoption. Therefore, the only option for an unmarried father to preserve "consent" rights is to demonstrate that the father "maintained substantial and continuous contact with the child" both by regularly visiting or communicating with them and by paying "a fair and reasonable sum" to support them. In cases of "public" adoptions this rule leads to peculiar results because New York case law has interpreted the duty to pay "a fair and reasonable sum" in cases of "public" adoptions to require that the unmarried father - who may not have even known of such an obligation - to have made payments to the foster care agency that had been caring for the child. A father who fails to make these payments can permanently lose his parental rights. This is particularly egregious because there is no requirement that foster care agencies inform fathers of the requirement to pay support to the agency, nor even a requirement that agencies provide a means by which fathers may do so. Indeed, a significant percentage of fathers are never provided an option by which they could pay child support while their children are in foster care in New York.

With respect to "public" adoptions, and the termination of parental rights for failure to make payments to foster care agencies, current law has a disproportionate impact on fathers and children of color. Lawyers for fathers of children in foster care regularly challenge the constitutionality of the current practice described above. However, regardless of the outcome of this litigation, legislation can remedy this issue and further New York's policy of prioritizing the preservation and reunification of families.

In order to remedy this issue, this legislation broadens the definition of "consent" fathers in cases of "public" adoptions, so that fathers who have been legally adjudicated to be the parent of the child or have timely executed a formal acknowledgment of parentage have full parental rights. This law does not affect "private" adoptions in any way. Rather, it applies only to adoptions that occur after a child has been involuntarily separated from their family by the state, and the state seeks to take the step of severing the

parent-child relationship for an unmarried father. The state will still be able to terminate such an unmarried father's parental rights in appropriate cases on the grounds of abandonment, permanent neglect, mental illness, intellectual disability, and severe and repeated abuse, just as it would in the case of a mother or married father who failed to meet those obligations. The local child protective agencies will similarly still have the ability to seek child support from the parents of children in foster care, if they choose to do so. This legislation simply alters the potential consequence of an unmarried father's failure to comply with his (often hidden) obligation to pay support to a third party agency, so that his continued relation- ship to his child does not hinge on such payment alone.

PRIOR LEGISLATIVE HISTORY:

New bill.

FISCAL IMPLICATIONS FOR STATE AND LOCAL GOVERNMENTS:

To be determined.

EFFECTIVE DATE:

This act shall take effect immediately.

The Basics of the Parental Equity Act

What does it mean to say that the father of a child in foster care has "consent" rights?

New York law provides that only certain fathers have the right to consent to or oppose the adoption of their child. As applied to the fathers of children in foster care, that means that foster care agencies are only required to terminate the parental rights of certain fathers to place their children for adoption. If a father does not qualify as a "consent father" under the statutory definition, the agency only has to establish that fact in order to place his child for adoption; it does not have to establish a substantive cause of action for terminating his parental rights (such as permanent neglect or abandonment). This means that the father of a child in foster care who does not meet the legal definition of a "consent father" can lose his child to adoption even if he is visiting with the child, participating in services, and planning for reunification.

Prior law regarding the rights of unmarried fathers of children placed for adoption:

Prior to enactment of the Parental Equity Act ("PEA"), section 111 of the Domestic Relations Law ("DRL") made no explicit distinction between private agency adoptions initiated by a child's parents and adoptions undertaken following a child's removal by the State.

Pursuant to the prior version of DRL § 111, consent for a child's adoption was required from: (1) the child, if the child was over the age of fourteen at the time of the adoption; (2) any person or agency with lawful custody or guardianship of the child; (3) the child's mother, whether she was married or unmarried at the time of the child's birth and regardless of the age of the child; (4) the father of the child, if the parents were married at the time of the child's birth; and (5) certain fathers who were not married to the mother of the child at the time of the child's birth.

With regard to unmarried fathers, the law made a distinction between fathers of children who are being placed for adoption prior to six months of age and fathers of children who were being placed for adoption after six months of age. For a child placed for adoption under six months of age, the prior version of DRL § 111(1)(e) required an unmarried father's consent to the adoption

only if the father lived with the child or the child's mother, claimed to be the father of the child, and paid a reasonable sum towards the pregnancy and birth expenses.[1]

For children placed for adoption over six months of age, the prior version of DRL § 111(1)(d) required an unmarried father's consent to adoption only if the father was found to have "maintained substantial and continuous or repeated contact" with the child as manifested by paying child support and visiting or (when unable to visit) regularly communicating with the child or the child's custodian. The statute further provided that individuals who held themselves out to be the father and openly lived with the child for six months within the year immediately preceding the child's placement for adoption were deemed to have maintained substantial and continuous contact for purposes of establishing their right to veto an adoption.

Pursuant to DRL § 111-a, some (but not all) unmarried fathers who did not meet the definition of "consent" fathers were deemed to be "notice" fathers. Such fathers did not have the right to consent or object to their child's adoption, but did have the right to appear in court and "present evidence relevant to the best interests of the child." Notice fathers included many people who would otherwise be understood to be "fathers"—such as individuals who had been adjudicated to be the father of the child and those who were named on the birth certificate of the child—along with a number of others, including any person who was openly living with the child and the child's mother at the time the proceeding was initiated and holding himself out to be the child's father, any person who was identified as the father by the mother in a written, sworn statement, and any person who filed an acknowledgement of paternity with the putative father registry.

[1] In 1990, the Court of Appeals found unconstitutional the part of the statute that requires an unmarried father to live with the mother or child as a precondition to securing the right to veto a proposed adoption of a child less than six months of age. *See Matter of Raquel Marie X.*, 76 N.Y.2d 387 (1990). The Court chose not to sever the clause it found wanting, but instead struck down DRL § 111(1)(e) in its entirety. *Id.* at 406-07. Pending new legislation, the Court gave guidance to lower courts on what to consider when unmarried fathers challenge the adoption of children placed before six months of age, instructing courts to "include such considerations as [the birth father's] public acknowledgement of paternity, payment of pregnancy and birth expenses, steps taken to establish legal responsibility for the child, and other factors evincing a commitment to the child." *Id.* at 408. Because the legislature has not yet enacted a new version of DRL § 111(1)(e), the rights of some unmarried fathers whose children are placed for adoption prior to six months are still governed by the "interim" standards set forth in *Raquel Marie X.*

Effect of the prior version of DRL § 111 on unmarried fathers of children in foster care:

Adoptions out of foster care almost never involve children less than six months old in New York. Thus, prior to enactment of PEA, the rights of unmarried fathers of children in foster care were almost always governed by DRL § 111(1)(d). Moreover, because their children had been removed by the State and placed into foster care, such fathers had not been residing with the child for six months within the year immediately preceding the child's placement for adoption.[2] As a result, the rights of unmarried fathers whose children were being placed for adoption out of foster care depended on a finding that they had both maintained contact with *and* paid child support for their children.[3] And because their children were in foster care, the relevant inquiry was deemed to be whether these fathers paid child support *to the foster care agency*—something that was difficult if not impossible for parents to do in many parts of New York State.

How the Parental Equity Act amended the prior law:

The Parental Equity Act was enacted in 2022. The law made significant changes to the definition of a "consent father" with regard to children who are placed for adoption out of foster care. It did not alter the state of the law with regard to children who are placed for adoption privately.
The new law broadened the definition of who counts as a "consent father," and thus gave more fathers the legal right to consent to or oppose their children's adoptions, if those children are being adopted out of the foster care system. Pursuant to the newly-amended DRL § 111, when a foster care agency is seeking to place a child for adoption, it now must establish a substantive cause of action to terminate the parental rights of or obtain a voluntary surrender from:

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[2] This is because children are not considered "placed for adoption" at the time that they go into foster care. Some courts considered children to be placed for adoption when the permanency goal was officially changed to adoption, while others said that placement for adoption occurred when a termination of parental rights petition was filed or sustained. *See, e.g., In re Leake & Watts Servs. Inc. (Kevin G.)*, 2016 N.Y. Slip Op. 50447(U), at *7 (Fam. Ct., Bx. Cnty Apr. 5, 2016); *In re St. Vincent's Servs., Inc.*, 841 N.Y.S.2d 834, 844-45 (Fam. Ct., Kings Cnty 2007). These events almost always occur after children have been in foster care for over a year. *See e.g.*, *In re Shatavia Jeffeysha J.*, 100 A.D.3d 501 (1st Dep't 2012) (although father established that he had lived with the child and openly held himself out to be her father for two or three years preceding her placement in foster care, he had not lived with her for at least six months during the year immediately preceding her placement for adoption, and could not be deemed to have maintained substantial and continuous contact with her).

[3] *See, e.g.*, *In re Ericka Stacey B.*, 27 A.D.3d 245 (1st Dep't 2006); *In re Jonathan Logan P.*, 309 A.D.2d 576 (1st Dep't 2003); *In re Savannah Love Joy F.*, 110 A.D.3d 529 (1st Dep't 2013); *In re Star Natavia B.*, 141 A.D.3d 430, (1st Dep't 2016); *In re Latricia M.*, 56 A.D.3d 275 (1st Dep't 2008); *In re Jamize G.*, 40 A.D.3d 543 (1st Dep't 2007).

- all mothers;[4]
- fathers who were married to their child's mother at the time of the child's birth;[5]
- anyone adjudicated by a court (NYS or otherwise) to be the child's father prior to the filing of the TPR petition or surrender application;[6]
- anyone who filed a parentage (paternity) petition in family court with regard to the child prior to the filing of the TPR petition or surrender application, provided that the petition was resolved in their favor OR the petition remains pending;[7]
- anyone who executed an acknowledgement of parentage (formerly known as an acknowledgment of paternity) prior to the filing of the TPR petition or surrender application, provided that the acknowledgment of parentage has not been vacated (which would be done through a court action and decision);[8]
- anyone who has filed an unrevoked notice of intent to claim parentage with the putative father registry prior to the filing of the TPR petition or surrender application.[9]

The important thing to keep in mind is that the operative date is the *filing of the TPR petition or application to execute a voluntary surrender*. In order to be deemed a "consent father," the father needs to have taken one of these steps prior to the date that the TPR petition or surrender is filed.

The other thing that PEA did was eliminate the concept of a "notice father" with regard to children being placed for adoption out of foster care.[10] Thus, following enactment of PEA, the father of a child in foster care is either a consent father with full rights to consent or oppose his child's adoption or has no rights at all with regard to the child's placement for adoption.

[4] DRL § 111(c)-(d).
[5] DRL § 111(d).
[6] DRL § 111(e)(i).
[7] DRL § 111(e)(ii).
[8] DRL § 111(e)(iii).
[9] DRL § 111(e)(iv).
[10] *See* DRL § 111-a(1).

New York Official Reports

156 A.D.3d 543, 67 N.Y.S.3d 195, 2017 N.Y. Slip Op. 08890

**1 In the Matter of Jayden N.H., an Infant. Alex H., Appellant-Respondent; Catholic Guardian Services, Respondent-Appellant.

Supreme Court, Appellate Division, First Department, New York
5260, 5261
December 21, 2017

CITE TITLE AS: Matter of Jayden N.H. (Alex H.)

HEADNOTES

Adoption
Consent

Father's Failure to Maintain Substantial and Continuous or Repeated Contact with Child

Parent, Child and Family
Termination of Parental Rights

Abandonment

Law Office of Thomas R. Villecco, P.C., Jericho (Thomas R. Villecco of counsel), for Alex H., appellant/respondent.
Magovern & Sclafani, Mineola (Frederick J. Magovern of counsel), for Catholic Guardian Services, respondent/appellant.
Tennille M. Tatum-Evans, New York, attorney for the child.

Order, Family Court, Bronx County (Carol R. Sherman, J.), entered on or about September 2, 2016, which, following a hearing, found that respondent father's consent to the adoption of the subject child was not required, pursuant to Domestic Relations Law § 111 (1) (d), and that respondent abandoned the child, sub silentio granting the petition to transfer and commit the custody and guardianship of the child to petitioner and the Commissioner of Social Services of the City of New York, unanimously affirmed, without costs. Order, same court (Monica D. Shulman, J.), entered on or about January 19, 2017, which denied petitioner agency's motion to expedite the child's adoption, and dismissed the adoption petition with leave to re-file when the appeal from the September 2, 2016 order has been resolved, unanimously affirmed, without costs.

Respondent failed to show that he "maintained substantial and continuous or repeated contact" with the child by way of payment toward the support of the child and either visiting the child at least monthly or communicating with him regularly, so as to demonstrate that his consent to the adoption of the child was required (Domestic Relations Law § 111 [1] [d]; *see Matter of Maxamillian*, 6 AD3d 349 [1st Dept 2004]). With respect to the support of the child, the record establishes that respondent was gainfully employed while at liberty but did not provide meaningful support for the child. Respondent's claim that he bought clothes and other such things for the child is unsubstantiated in the record. Respondent also claims to have given the mother a $2,700 debit card in 2013, when his incarceration was imminent, but, even if this one-time payment constituted sufficient financial support, there is no evidence that respondent made the payment.

With respect to contact and communication with the child, respondent did not legalize his parental relationship with the child for 10 years, and then only after the instant custody and guardianship petition had been filed. Nor is there any evidence to support his claim that he has had contact with the child throughout the child's life. Respondent claims that while he ***544** was in prison he spoke with the child in three-way conversations facilitated by the mother, but the mother's trial testimony was stricken. Respondent did not have copies of any of the letters or cards he claimed to have written to the child on a regular basis, and the agency's witness testified that the agency did not receive any such letters or cards. Respondent also was unable to proffer any meaningful details of the

child's life, including the child's multiple hospitalizations.

**2 The court's alternative finding, that respondent abandoned the child, is supported by clear and convincing evidence (*see* Social Services Law § 384-b [5] [a]; *Matter of Annette B.*, 4 NY3d 509, 514 [2005]). Respondent failed to establish that the hardship resulting from his incarceration during the six months preceding the filing of the petition "so permeated his life that contact [with the child] was not feasible" (*Matter of Anthony M.*, 195 AD2d 315, 316 [1st Dept 1993]). The revocation of his phone privileges in prison did not prevent him from writing to the child or to the agency, but there is no evidence that he wrote to either. Respondent made only "[s]poradic and minimal attempts" to communicate with the child (*see Matter of Jahnel B. [Carlene Elizabeth B.]*, 143 AD3d 416, 417 [1st Dept 2016] [internal quotation marks omitted]).

The court correctly denied the petition to expedite the adoption on the ground that the relevant Family Court rules provide that an adoption petition may not be filed until after an appeal from the order committing custody and guardianship is "finally resolved" (18 NYCRR 421.19 [i] [5] [i]; 22 NYCRR 205.53 [b] [10]).

We have considered the parties' remaining arguments for affirmative relief and find them unavailing. Concur—Tom, J.P., Friedman, Renwick, Kahn and Kern, JJ.

End of Document

51 Misc.3d 1207(A)
Unreported Disposition
(The decision is referenced in the New York Supplement.)
Family Court, Bronx County, New York.

In the Matter of the Application of LEAKE AND WATTS SERVICES, INC. FOR the CUSTODY AND GUARDIANSHIP OF KEVIN G. "No Given Name" G., a/k/a Kayden G., Children under the Age of Eighteen Years, Pursuant to the Provisions of § 384–b of the Social Services Law of the State of New York.

Nos. B–XXXX/14, B–XXXX/14.
|
April 5, 2016.

Attorneys and Law Firms

James M. Abramson, Esq., Law Offices of James M. Abramson, PLLC, New York, NY, for Leake and Watts Services, Inc.

Elizabeth M. Johanns, Esq., Bronx, NY, for the Respondent Father.

Patricia B. DeCola, Esq., Bronx, NY, for the Child Kevin G.

Alison Holstein, Esq. Legal Aid Society—Juvenile Rights Practice, Bronx, NY, for the Child Kayden G.

Opinion

ROBERT D. HETTLEMAN, J.

***1** This is a written decision memorializing the oral decision I gave in court on February 24, 2016, after a fact finding trial on petitions filed by Leake and Watts Services, Inc. ("Agency") for two siblings, Kevin G. (DOB _/_/ 2011) ("Kevin") and Kayden G. (DOB _/_/2013) ("Kayden"). The Agency filed two petitions seeking the termination of parental rights ("TPR"), one for each child, against Ms. Jennifer G., the mother of both children, and Mr. Kevin S., whose parental status is discussed below. Kevin's petition was filed on March 25, 2014; Kayden's was filed on August 26, 2014. On June 9, 2015, while the fact finding was in progress, Ms. G. voluntarily surrendered her parental rights (on certain conditions, including that the children be adopted by their current foster parents), and accordingly the trial did not continue with respect to her. Thus, this decision relates only to Mr. S.

I. SUMMARY OF DECISION

The TPR petition for Kevin alleges that (1) Mr. S. is not is not a person whose consent is required for Kevin's adoption, pursuant to Domestic Relations Law § 111(1)(d) and that instead, Mr. S. is only entitled to notice of these proceedings pursuant to DRL § 111–a and Social Services Law § 384–c; and (2) as an alternative cause of action, Mr. S. permanently neglected Kevin within the meaning of SSL § 384–b(7).

The TPR petition for Kayden alleges that (1) there is no individual alleged to be Kayden's father who is entitled to notice of these proceedings pursuant to DRL § 111–a and SSL § 384–c; and (2) Mr. S permanently neglected Kayden within the meaning of SSL § 384–b(7).

In short, I was asked to determine Mr. S.'s legal standing and status with respect to both children, and also to determine whether those children were permanently neglected by Mr. S. With respect to Kevin, I find that the Agency established by clear and convincing evidence that there is no male whose consent is required under DRL § 111(1)(d) for his adoption and that Mr. S. is only entitled to notice of these proceedings pursuant to DRL § 111–a and SSL § 384–c. With respect to Kayden, I find that there is no male whose consent is required under DRL § 111(1)(d) for his adoption, and that there is no man entitled to notice of these proceedings pursuant to DRL § 111–a and Social Services Law § 384–c. In addition, and in the alternative, I find that even if Mr. S.'s consent were required for the adoption of the children, the Agency proved by clear and convincing evidence that Mr. S. permanently neglected both children as defined by SSL § 384–b(7).

II. THE TRIAL

The trial on both petitions began on January 21, 2015, and continued on January 30, April 27, June 9, June 23, September 1, September 3, and October 14, 2015. After the conclusion of the evidence in the trial, the parties submitted written summations and legal arguments to the Court. On February 24, 2016, I issued an oral decision on the record in court.

***2** At trial, the Agency called one witness, Stacey St. Jean, a Case Planner at Leake and Watts. In addition, they introduced into evidence Petitioner's Exhibits ("Pet.Ex.") 1 and 2, the birth certificates for the subject children Kevin and Kayden; Pet. Ex. 3, case notes from Leake and Watts covering the time period of June 14, 2011 through August 29, 2014; Pet. Ex. 4, Leake and Watts written referrals provided to the respondents in this case; and Pet. Ex. 5, the Dispositional Order, dated September 17, 2013, from the neglect case relating to the child Kayden and his mother. The attorneys for the children did not call any witnesses or introduce any evidence.

Mr. S. and his attorney called as witnesses Ms. Maxine K. (Mr. S.'s mother) and the respondent himself. In addition, Mr. S. introduced into evidence Respondent's Exhibit ("Resp.Ex.") A, an Order of Filiation for the child Kevin; and Resp. Ex. B, a paternity petition for Kayden that Mr. S. filed on September 24, 2015 and that remains pending at this time.

A. The Testimony of Stacy St. Jean, Case Planner

Ms. St. Jean testified that she was assigned to this family at Leake and Watts when Kevin first came into foster care in 2011, and she has been the worker on the case since then. Kevin came into foster care on June 14, 2011, and Kayden on May 28, 2013, and both children have been continuously placed with the Agency since those dates. From the time that Kevin first came into foster care, Ms. St. Jean regularly met with Mr. S. at visits, conferences, and meetings. She advised Mr. S. about his service plan, which originally included treatment for substance abuse, domestic violence counseling or services, completion of an anger management class, and completion of a parenting class. On numerous occasions, Ms. St. Jean described to Mr. S. that he needed to follow his service plan in order to be able to have Kevin, and later Kayden, put into his care. Further, she repeatedly warned him that if he did not comply with his service plan, a TPR could be filed once either child was in foster care for 15 out of any 22 months.

Throughout 2011 and 2012, Ms. St. Jean referred Mr. S. to numerous service providers, including Argus, Vertex, Palladia, Odyssey House, and Exodus. By his own admission, Mr. S. did not meaningfully engage in services at any of them. Ms. St. Jean repeatedly re-advised him of the possible consequences of his failure to do so, and she continued to make referral after referral. At one point in June of 2012, Ms. St. Jean reminded Mr. S. that Kevin soon would have been in foster care for 15 months, and thus the Agency would be authorized to change the permanency goal for Kevin to adoption. Mr. S. still failed to fully engage in his services at that time. However, towards the end of 2012 and into 2013, Mr. S. began to successfully engage in and complete the services. By January of 2014, Mr. S. had completed a drug treatment program at the Osbourne Association, anger management and parenting classes, and domestic violence services. In addition, Mr. S. submitted to drug tests requested by the Agency and tested negative.

***3** Throughout the cases, the Agency scheduled visits on a regular basis for Mr. S. with Kevin, and then with both children after Kayden was born. Mr. S.'s attendance at supervised Agency visits was somewhat inconsistent after Kevin first came into care, including a two-and-a-half-month period from January through mid-March 2012 when he did not attend any visits at the Agency at all (although he did say he had been seeing Kevin in the community during that period). However, from that time onward, Mr. S.'s attendance at Agency visits was good. Mr. S. brought the children food, played games, read with them, and fostered a good relationship. Over time, the agency raised a few concerns about Mr. S.'s behavior or parenting skills, but for the most part, the interactions with the children were good.

As Mr. S. continued to make progress, Ms. St. Jean advised Mr. S. that if he wished for either or both

children to have overnight visits or to reside with him in the future, he would have to maintain a stable source of income and housing suitable for himself and the children. Throughout the entire case, Mr. S. stated that he was not regularly employed and did not receive public assistance, and he said that he sometimes resided with his mother (Ms. K.) or with a girlfriend. Nevertheless, on November 21, 2013, the agency held a Trial Discharge Conference with Mr. S. and his mother. The Agency offered a trial discharge of Kevin only, and they communicated to Mr. S. and Ms. K. the conditions that (1) Mr. S. and Kevin were to reside with Mr. S.'s mother, Ms. K.; (2) Mr. S. was permitted to supervise community visits between Ms. G. and Kevin; but (3) that Mr. S. was not permitted to leave Kevin alone with Ms. G. at any time. Mr. S. and Ms. K. agreed to these conditions, and on November 23, 2013, the agency began the trial discharge of Kevin to Mr. S.

Ms. St. Jean testified that in December of 2013, she made several visits to Ms. K.'s house in order to observe the home and the family. On those occasions, she never saw Mr. S. or Kevin there. On December 11th, Ms. St. Jean observed that neither Mr. S. nor Kevin were present at Ms. K.'s home, and Ms. St. Jean noticed a bed the family appeared to have prepared for Kevin. At some point, Ms. St. Jean suspected that Mr. S. and Kevin were not residing with Ms. K. at all but rather with Ms. G. On December 17th, Ms. St. Jean again went to Ms. K.'s home, and again Mr. S. and the child were not there. Ms. K. was present, and Ms. St. Jean observed the child's bed to be in the very same condition it had been on December 11th—still made and as if it had not been slept in. Notably, Ms. St. Jean did notice an odor in the home as if floor work was being done.

Due to her suspicion that Mr. S. was inappropriately spending time at the home of Ms. G., Ms. St. Jean arranged for a different worker to go to Ms. G.'s home at that same time on December 17th. While Ms. St. Jean was at the home of Ms. K., she received a call from the other worker, stating that the child Kevin was at Ms. G.'s home, in the care of Ms. G. alone.[1] When Ms. St. Jean arrived at Ms. G.'s home a short time later, the police, Ms. G. and Kevin were coming out of the home. Ms. St. Jean was again informed that Mr. S. had left Kevin with Ms. G.[2] Ms. St. Jean called Mr. S.'s cellphone five or six times over the next hour, but he did not answer. Around 5:30pm, Ms. St. Jean finally spoke with him on the telephone, whereupon Mr. S. provided several statements about what had happened. At one point, he said that he and Kevin had been staying at Ms. G.'s since December 15th. At another point, he said that during the trial discharge, he and Kevin had been staying with Mr. S.'s girlfriend, Christine R., and not at Ms. K.'s. When Ms. St. Jean asked him for Ms. R.'s address, Mr. S. refused provide it.

***4** As a result of the events on December 17th, the agency ended the trial discharge, and Kevin returned to foster care and lived in the same foster home as his brother Kayden.

In January of 2014, the Agency held a Goal Change Conference with Mr. S. and Ms. K. During this conference, the events of December 17th were discussed. When asked about where he and Kevin had resided during the trial discharge, Mr. S. described that he had been living with his mother, Ms. K. In response, Ms. St. Jean reminded Mr. S. that he had told her, on December 17th, that he and Kevin had been residing with his girlfriend. Mr. S. responded that Ms. St. Jean was lying and that such a conversation never occurred. Also during the conference, Ms. St. Jean asked Mr. S. why it was that Kevin was alone with Ms. G. on December 17th, in violation of the conditions of the trial discharge and the court's order. Mr. S. replied that on the morning of December 17th, he had found a job shoveling snow and needed to earn some money. At that point, he felt that Ms. G. was the only person with whom he could leave Kevin, so he did so. In concluding the conference, Ms. St. Jean again discussed with Mr. S. the laws about permanency and the possible consequences of failing to comply with the agency's service plan and conditions.

Following the failed trial discharge, Mr. S. continued to visit the children regularly, including eventually having unsupervised day visits with them. For the most part, these visits went very well. However, right up until August 26, 2014, the filing date of the TPR relating to Kayden, Ms. St. Jean regularly and repeatedly asked Mr. S. where he was living. In response, he continued to tell her that he had been living at Ms. K.'s house during the trial discharge, that he wanted to move into a home of his own, and that he regularly stayed with either his mother or his girlfriend. However, Mr. S. never provided detailed contact information, a date of birth, or an address for Ms. R., despite Ms. St.

Jean's warning that if the agency could not "clear" or approve a home and all of the adults in it, this failure would be a barrier to Mr. S. being able to live with either or both of the children. At one point after the failed trial discharge, Mr. S. brought Ms. R. to the Agency, and the Agency workers spoke to her about being cleared and having her fill out the necessary paperwork. The paperwork was never returned to the Agency, Ms. R. never made any further contact with the Agency, and Mr. S. did not offer any reason for this. When asked about what assistance the Agency provided Mr. S. with respect to housing, Ms. St. Jean described that she and Mr. S. spoke about public assistance and the need for him to have an income in order for the Agency to help him find housing other than public housing. Ms. St. Jean related that Mr. S. never inquired about whether he could move into the shelter system or other public or subsidized housing with the children, nor did Ms. St. Jean ever tell him that he could not do so. Finally, Ms. St Jean testified that Mr. S. never paid any financial support for the children to the Agency.

B. The Testimony of Maxine K., Mr. S.'s Mother

***5** Ms. K. testified that she is Mr. S.'s mother and the grandmother of the child Kevin. Professionally, she described herself as a social worker and a CASAC worker (relating to substance abuse assessments) who was very familiar with Family Court and the child protection system.

She said that she was present at the trial discharge Conference on November 23, 2013, along with Mr. S., Ms. G. and the workers assigned to the case. She recalled that it was made clear that the trial discharge was conditioned upon Mr. S. and Kevin residing at Ms. K.'s home and that Kevin was not to be left alone with Ms. G. Both Mr. S. and Ms. K. agreed to those conditions. She said that Mr. S. and Kevin did reside with her during the trial discharge, but that they were not home when Ms. St. Jean visited prior to December 17th. She said that on the Sunday before December 17th (which would have been December 15th), she told Mr. S. to take Kevin elsewhere because Ms. K. was going to have her floors done, which she feared would be problematic for Kevin, who has asthma. She said that Mr. S., Kevin, and Ms. K.'s daughter left the home that Sunday at about 8:00pm.

On December 17th, Ms. St. Jean visited Ms. K.'s home, and Ms. K. explained the situation. Later that day, Ms. K. was notified by Ms. G. that Kevin had been taken by the foster care agency. Ms. K. tried to reach Mr. S. on the phone, but without success. She testified that at some point on a later date, she did ask Mr. S. why he had left Kevin with Ms. G., to which Mr. S. replied that he had not felt like going to his sister's house, so he and Kevin spent the night at Ms. G.'s home. He further told her that the next morning, he got the snow removal job and left Kevin with Ms. G.

Ms. K. also described that over the time that Kevin was in foster care, she knew of Mr. S.'s service plan and wanted to help him. Thus, she regularly provided information to him about various drug treatment programs, parental support programs, and parenting classes.

Additionally, she said that she has always put herself forward as a resource for Kevin but that she "withdrew" each time that it seemed like the children were heading back to be with one of their parents. When the children were placed in the same foster home after the failed trial discharge, she said she went to the foster care agency but did not remember if she went to court. When the agency began discussing the filing of the TPRs, Ms. K. said that they would not have a meaningful discussion with her about being a resource for the children. At some point later, she again came to court, but she testified that she was not sure if she withdrew a petition for guardianship or if it was dismissed.

Ms. K. then stated that in the months leading up to the trial discharge, Mr. S. lived with Ms. K. He was not employed at the time, and she supported him financially. She testified that Mr. S. did not claim Kayden as his son when Kayden was born, but that she believes Mr. S. may have done so during court proceedings at some point *after* the trial discharge had failed.

C. Kevin S., the Respondent Father

***6** Mr. S. testified that he is the father of both children. In the past, he had done some college and trade school, but he was unemployed for most of the recent years. He described that since he was a teenager, he suffered from cellulitis, Milroy's

disease, or lymphedema—all words for the same thing where the symptoms include swollen legs, redness to the feet, fever, and an inability to stand for long periods of time.

He stated that when Kevin was born in 2011, ACS was at the hospital, but that Kevin was not placed into foster care until a few months later. In 2011, he was still planning to be with Ms. G. and to care for Kevin together with her. However, he had stopped living with her when he found out that she was pregnant with Kayden, and Ms. G. "pretty much" lived by herself for that whole pregnancy. Notably, later in his testimony, he stated that he lived with Ms. G. up until "a little after" Kayden was born, but that he did not "fully live there," and that he and Ms. G. "weren't together." Regardless of their living situation, by the time Kayden was born in 2013, Mr. S. was no longer planning jointly with Ms. G. Mr. S. had some concerns about whether or not he was the father of Kayden. In addition, he did not sign Kayden's birth certificate, stating that he was told that if he did so, he would be accused as a respondent in a neglect proceeding for Kayden. Nevertheless, Mr. S. said he visited Kayden in the hospital every day.

When Kayden initially was placed in foster care, Mr. S. was in favor of the children being returned to Ms. G.'s care, but that never occurred. When Kayden was born, Mr. S. learned that cocaine was found in the child's system. He also knew that as a result of this, Ms. G.'s unsupervised visits with Kevin were suspended at that time. When Kayden left the hospital and went to reside in the foster home where Kevin was placed, Mr. S. visited both children in that home. However, Mr. S. testified that because he had not signed the birth certificate for Kayden, he "couldn't do much" with Kayden during the visitation time. Accordingly, he took only Kevin out to the park, movies, to play, and to see family members, and he only visited with Kayden in the foster home.

Regarding his service plan with the Agency, Mr. S. knew that he was required to engage in programming for anger management, parenting, domestic violence, and a substance abuse program. He acknowledged that the case planners at the Agency made many referrals for him to attend numerous drug treatment programs and that he did not follow through with them. However, in late 2012 and then in 2013, he did engage in services and eventually completed them, including finishing the drug treatment program in 2013 and testing negative for drugs.

As his progress improved, Mr. S. began to get unsupervised visits with Kevin, and the agency began exploring a trial discharge of Kevin to Mr. S. He remembered the trial discharge conference, including the specific conditions that (1) he was required to live with Kevin at Ms. K.'s home; and (2) he was allowed to supervise Ms. G. visiting with Kevin in the community, but that he was not to leave Kevin alone with Ms. G.

***7** Mr. S. described the incident in December leading to the end of the trial discharge. He testified that he went to Ms. G.'s home because Ms. K.'s floors were getting redone. He and Kevin spent the night there, and in the morning, Mr. S. received a phone call with a job offer to shovel snow. Mr. S. said that because he had spent the night in Ms. G.'s home, he knew that she had not used drugs or had any alcohol, so he thought it would be okay to leave Kevin with her while he went to work.

On cross-examination, Mr. S. conceded that he could have gone to his sister's that night, rather than to Ms. G.'s, but did not do so. Likewise, he admitted that he did not inform the Agency or seek permission to stay with Ms. G., but he stated that he did not believe he was required to do so.

Regarding his finances, Mr. S. testified that although he did not work regularly, he supported himself by getting help from his mother and that he received two cash settlements from two different accidents in previous years. In one incident, he was hit by a school bus, and in the other, he was hit by a car. He received approximately $36,000 in one settlement and between $10–15,000 for the other. He put this money in the bank at the time. He initially said that he knew that one of these incidents had occurred around 2006, but he was not sure about the timing of the other one. On cross-examination, however, he admitted that he received the $36,000 check when Kevin was already in foster care—at that time, in his third foster home.

Mr. S. recalled that at some point, when the agency began to ask about his finances, he tried to apply for welfare. However, he said that his application was denied because the public assistance authorities said he had too much money in the bank

to qualify for public assistance. He claims to have shown the authorities paperwork proving that his finances were depleted but that his application was still rejected. He testified that he has never received disability or public assistance of any kind, and that in addition to the settlement money, he has earned some money through worK. at times. He stated that over the years, he had some of his own money in the bank and also got help and support from his mother.

When asked about whether he paid support for either of the children, he testified that he bought brought the children wipes, milk, "pampers," "clothes, toys, sneakers," and "things like that" for one or both of the children, but acknowledged that he never provided any financial support of any kind, attempted to do so nor inquired about how such support payments might be made.

When asked about the paternity of Kayden, Mr. S. testified that he never signed an acknowledgement of paternity for Kayden, but that he did acknowledge being the father in court proceedings. He further testified that he never filed a paternity petition relating to Kayden,[3] although he did so for Kevin at some point. He said that Kevin had lived with him for a month or two after his birth, but that Kayden never lived with him. He stated that when Kayden was placed into foster care after leaving the hospital, Mr. S. initially did not go to any court proceedings or seek to establish paternity. He admitted that, during the proceedings here in Bronx Family Court, he told a referee that he was not sure if Kayden was his child, and on cross-examination, he conceded that he suspected that Ms. G. had cheated on him, resulting in the pregnancy with Kayden. After Kayden was removed from Ms. G. in the hospital, Mr. S. did not remember if he knew what Ms. G.'s service plan was relating to the foster placement of Kayden.

***8** Mr. S. testified that after the failed trial discharge, he believed that he asked for overnight visitation for both children. He also stated that he asked the Agency for help getting into a shelter or some type of residence so that he could be with the children. He said that he asked them for a child care voucher, but that the foster care agency told him he was not eligible for one because he neither worked nor went to school.

In response to direct questions on the issue of his residence, Mr. S.'s testimony was inconsistent. As stated above, at one point, he testified that he lived with Ms. G. from before Kevin's birth up until "a little after" Kayden was born in May of 2013. However, at another time, he also testified that he did not "fully live there" and that he and Ms. G. "weren't together." He testified that from May of 2013 through March of 2014, he was living with his mother Ms. K., and after that lived with his girlfriend Ms. R. However, he then back-tracked and said he was not sure of the dates. Overall, he was very vague and even evasive about the dates and timeframes of where he lived when and with whom. Mr. S. was not sure of when the Agency wanted to start overnight visits for him with Kevin and did not recall them telling him he needed an address or a cleared residence for overnight visits to begin. Mr. S. specifically recalled telling the agency more than once that he was willing to go into a shelter with Kevin. Mr. S. also denied refusing to provide the address of Ms. R.'s apartment, and he denied that Ms. R. refused to plan for the children to live with her and Mr. S.

D. Pet's Ex. 3—The Progress Notes from the Case.
The progress notes in evidence are voluminous and detailed, but I will summarize the main points relevant to this decision. They describe that the Agency repeatedly referred Mr. S. to numerous treatment programs from 2011 to 2013. During this same time period, he tested positive for marijuana on many occasions and for cocaine at least once, and he was discharged from several programs for failing to attend regularly. He gave a variety of reasons for not following through with the programs, and he often asked for new referrals.

Regarding visitation, when Mr. S. did visit with Kevin in 2011 and 2012, those visits went well. However, he missed many visits at times, including going over two entire months without visiting in January and February of 2012. Regarding income, Mr. S. always told the Agency that he was not worK. and did not have any income, but he said that he had some money of his own and received support from his mother.

In 2012, Mr. S. acknowledged to the Agency that he and Ms. G. were arguing violently and that Mr. S. stated that if Ms. G. were found to be positive for HIV, he would hurt her.

By November of 2013, Mr. S. was doing well in his services and visiting Kevin regularly. He did not have stable housing or income, but he was able to live with his mother. Accordingly, the trial discharge of Kevin began with the conditions described above, and the notes also reflect the incident of December 17th.

III. LEGAL ANALYSIS

A. Mr. S.'s Consent Is Not Required for the Adoption of Either Child under Domestic Relations Law § 111

***9** DRL § 111 sets forth the categories of fathers who have the right to consent to an adoption proceeding. Importantly, while the Agency has bears the initial burden of going forward to establish that an alleged father's consent is not required, it is the alleged father who bears the ultimate burden of proof. *See Matter of Dominique P .,* 24 AD3d 335, 336 (1st Dept.2005); *see also Matter of De'Von M .F.C.,* 105 AD3d 738 (2nd Dept.2013) (respondent has the burden of proof); *Matter of Taylor R.,* 290 A.D.2d 830 (3rd Dept.2002) (respondent has burden).

As an initial matter, it is undisputed that Mr. S. was never married to Ms. G. For children born out of wedlock, DRL § 111 sets forth different methods for a father establish that he is a so-called "consent father," depending in part upon the child's age when he or she was "placed for adoption" or "placed with the adoptive parents." Mr. S. and Ms. G. were living together when Kevin was born, and Kevin was removed from their care when he was approximately two months old. When Kayden was born, Mr. S. was no longer living with Ms. G., and Kayden was removed from Ms. G.'s care when he was approximately three days old. However, for the purposes of DRL § 111, the children would not be considered "placed for adoption" or "placed with the adoptive parents" on the date they were removed from their parents' care, as for some time after that the goal was still for them to be reunited. *See Matter of Vanessa Ann G.-L.,* 50 AD3d 1036, 1038 (2nd Dept.2008) (citing *Matter of Ericka Stacey B.,* 27 AD23d 245, 246 (1st Dept.2006)); *Matter of Shatavia Jeffeysha J.,* 100 AD3d 501 (1st Dept.2012); *Matter of Tasha M.,* 33 AD3d 387 (1st Dept.2006). For Kevin, the goal was changed after the failed trial discharge when he was around two years and nine months old, and the TPR was filed when he was almost three years old. For Kayden, his goal was changed to adoption sometime in August of 2014 when he was around fifteen months old, and his TPR was filed when he was approximately thirteen months old. Therefore, for each child, DRL § 111(1)(d) controls. *Id.; see also In re Heart Share Human Services of New York,* 28 Misc.3d 1107, 1118 (Qns.Cty.Fam.Ct.2010), *reversed on factual grounds; Matter of Charle Chiedu E.,* 87 AD3d 1140 (2nd Dept.2011) (upholding that DRL § 111(1)(d) is the appropriate section for analysis).

Regardless of whether Mr. S. is the biological father of the children, in order to be a consent father under DRL § 111(1)(d), Mr. S. would need to establish that he:

> maintained substantial and continuous or repeated contact with the child as manifested by: (i) the payment toward the support of the child of a fair and reasonable sum, according to [his] means, and either (ii) visiting the child at least monthly when physically and financially able to do so and not prevented from doing so by the person or authorized agency having lawful custody of the child, or (iii) regular communication with the child or with the person or agency having the care or custody of the child, when physically and financially unable to visit the child or prevented from doing so by the person or authorized agency having lawful custody of the child.

***10** DRL § 111(1)(d).[4] The provision goes on to state that:

> [t]he subjective intent of the father, whether expressed or otherwise, unsupported by evidence of the acts specified above manifesting such intent, shall not preclude a determination that the father failed to maintain substantial and continuous or repeated contact with the child. In making such a determination, the court shall not require a showing of diligent efforts by any person or agency to encourage the father to perform the acts specified in this paragraph. *Id.*

Based upon the evidence in the case, I find that Mr. S. has failed to establish that his consent would be required for either child's adoption. The first part of the test set forth in DRL § 111(1)(d) requires the payment by the putative father toward the support of the child a fair and reasonable sum, according to

the father's means. In *Matter of Andrew Peter H.T.,* 64 N.Y.2d 1090 (1985), the Court of Appeals deemed this to be a "threshold" provision and that the support provision must be satisfied before a court even begins to consider a putative father's communication with the child or agency. *Matter of Andrew Peter H.T.,* 64 N.Y.2d at 1090; *see also In re Clarence Davion M.,* 124 AD3d 469 (1st Dept.2015).

A record of paying *some* child support, but not showing a consistent or reliable record of support, is insufficient to meet the requirements of DRL § 111(1)(d). *Matter of Maxamillian,* 6 AD3d 349 (1st Dept.2004). Indeed, this requirement is applied so strictly that even where a respondent is incarcerated, the failure to provide support is fatal to a claim of being a consent father. *In re Isaac Ansimeon F.,* 128 AD3d 232 (1st Dept.2015); *In re Aaron P.,* 61 AD3d 448 (1st Dept.2009). Moreover, the law is clear that at foster care agency is not obligated in any way to inform a parent of his obligation to provide support, or even obligated to encourage him to do so. DRL § 111(1)(d); *see In re Marc Jaleel G.,* 74 AD3d 689 (1st Dept.2010); *Matter of Bella FF .,* 130 AD3d 1187, 1188 (3rd Dept.2015).

Mr. S.'s own testimony was that he never paid support of any kind to the agency or anyone else for either Kevin or Kayden nor attempted to do so. He did say that he bought some wipes, milk, "pampers," "clothes, toys, sneakers," and "things like that" for one or both of the children at various times. However, he was vague and unspecific about the timing, frequency or amount of these purchases, and he did not submit any receipts, documentation, or other proof of any kind.

At the same time, his testimony as to his income and access to funds was at times inconsistent and not entirely credible. He testified that he was trained in construction and occasionally worked in construction, carpentry, or shoveling snow. He claimed that he had a medical condition that occasionally required his hospitalization and prevented him from working or even standing for long periods of time, yet he testified that he was able to perform manual labor at times. Moreover, despite claiming to have a condition that severely limited his ability to work, Mr. S. never filed for or received disability benefits. Indeed, he testified that he never received any kind of government benefits or support but that he was still able to support himself. He received the two large cash settlements from negligence suits, at least one of them, for $36,000, came to him while Kevin had already been in foster care for some time. He said that at the time Kevin was born, he had his "own money," and he said his mother helped him financially whenever he needed it. When asked on the stand where all of his money went, Mr. S. said he said he "[bought] his kids stuff," continuing "I bought Kevin a lot of stuff. Half—mostly all his clothes and this [sic] other things I used for my kids."

***11** Mr. S. also testified that he did apply for public assistance at some point—at the Agency's urging—but was turned down because "they said [he] had too much money." In court, he said that he did not actually have money at that time and that he showed documentation of this to the public benefits authorities but was still denied. He provided no proof or documentation for any of this at the trial, and moreover, there is no evidence that he appealed his denial of public assistance or followed up with the government or the Agency about this in any way.

Therefore, the evidence proved that Mr. S. had means, whether on his own or through support from others, but that he failed to establish that he provided "reasonable child support according to [his] means" to satisfy the requirements of DRL § 111(1)(d). His self-serving testimony that he spent some money on clothing and other items for the children is insufficient under the law, *In re Tiara J.,* 118 AD3d 545 (1st Dept.2014) (citing cases), and overall, his testimony as to providing any support to these children was so vague and undetailed that it cannot be credited. *See Aaron P.,* 61 AD3d at 448 (finding the respondent's testimony was too muddled and contradictory to adequately support his claim of being a consent father).

I will note that Mr. S.'s attorney raised in summation the point that in many of the cases cited by the petitioner to support the notion that the lack of support payments precludes me from finding that Mr. S. is a "consent" father, the father or putative father was also failing to visit or communicate with the child regularly. In this case, although Mr. S. may have missed some visits at various times during the children's foster care placements, no one is disputing that he maintained regular contact with the children and the Agency and visited the children regularly after mid–2012.

But the overwhelming weight of authority and the plain language of DRL § 111(1)(d) militate a finding that Mr. S. is not a consent father, despite his maintaining contact with the children. *See In re Latricia M.,* 56 AD3d 1784 (1st Dept.2008) (where father provided financial support to child for first four months of her life, then ceased paying support following the child's placement in foster care, father not entitled to consent pursuant to DRL § 111(1)(d) notwithstanding his visiting the child weekly).

Accordingly, I find by clear and convincing evidence that Mr. S.'s consent is not required for the adoption of either of the children under the Domestic Relations Law.

B. Mr. S. Is Entitled to Notice for Proceedings Relating to the Adoption of Kevin under Domestic Relations Law § 111–a(2)(a) and Social Services Law § 384–c, but Is Not Entitled to Such Notice for Kayden

1. With respect to Kevin, Resp's Ex. A is an Order of Filiation declaring Mr. S. to be Kevin's legal father. All parties concede that Mr. S. is entitled to notice of the proceedings involving Kevin under DRL § 111–a(2)(a) and SSL § 384–c.

***12** 2. With respect to Kayden, although all parties stipulated in court that Mr. S. is Kayden's biological father *for purposes of the trial,* there is no evidence before me to support that he is entitled to notice of these proceedings under either the DRL or the SSL.

As an initial matter, no one is listed as the father on Kayden's birth certificate, and no one has registered as Kayden's father on the putative father registry. There is no evidence from the trial that any man filed a notice of intent to claim paternity of the child,[5] that Ms. G. filed a written sworn statement identifying the child's father, that Ms. G. was married at the time of the child's birth, or that she was married within six months after the child's birth.

To the contrary, Mr. S. acknowledged on the witness stand that for much of Kayden's life, he equivocated as to whether he believed Kayden was his child. Indeed, he chose to move out of Ms. G.'s home prior to the birth and then refused to sign the birth certificate. On September 24, 2015, Mr. S. finally filed and followed through with a paternity petition for Kayden, but as of the close of this trial, Mr. S. had not sought DNA testing nor established himself as a notice father with respect to Kayden in accordance with DRL § 111–a or SSL § 384–c.

Interestingly, and perhaps to the Agency's credit, despite Mr. S.'s failure to claim Kayden as his child, the Agency permitted him to visit and plan for Kayden. Indeed, the Agency has stated that it "desired" to give notice of Kayden's proceedings to Mr. S. anyway, and I expect that they will continue to do so and that he will be allowed to be heard in those proceedings. Nevertheless, the clear and convincing evidence establishes that Mr. S. is not legally entitled to notice of adoption proceedings related to Kayden.

C. Mr. S. Permanently Neglected both Children

1. Definitions relating to Permanent Neglect.

Even if Mr. S.'s consent were required for the adoption of either child, I find that the evidence proves clearly and convincingly that Mr. S. permanently neglected both children as defined by SSL § 384–b(7).

SSL § 384–b(7) defines a "permanently neglected child" as:

> a child who is in the care of an authorized agency and whose parent or custodian has failed for a period of either at least one year or fifteen out of the most recent twenty-two months following the date such child came into the care of an authorized agency substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so, notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship when such efforts will not be detrimental to the best interests of the child.

SSL § 384–b(7). Accordingly, in order for the Agency to prove that Mr. S. permanently neglected the children, two things must be established. First, the Agency must show that it made diligent efforts to encourage and strengthen the parental

relationship. Second, it must establish that despite these efforts, Mr. S. failed to substantially and continuously or repeatedly maintain contact with or plan for the future of the children for a period of more than one year or fifteen out of the twenty-two months following the date they came into foster care.

***13** "Diligent efforts" are defined in SSL § 384–b(7)(f) as reasonable attempts to assist, develop, and encourage a meaningful relationship between the parent and children by consultation and cooperation with the parent in developing a plan for appropriate services for the children and the family; making suitable visitation arrangements; providing services and other assistance to the parent so that the problems preventing the discharge of the children from foster care can be resolved or ameliorated; and informing the parent at appropriate intervals of the children's progress, development, and health. *Id.* The Agency is not charged with guaranteeing that the parent succeeds in overcoming his or her predicaments. *Matter of Christina Ann B.,* 114 AD3d 407 (1st Dept.2014). Once an agency has embarked on a diligent course, but faces an utterly uncooperative or indifferent parent, it should nevertheless be deemed to have fulfilled its duty. *Matter of Byron Christopher Malik J.,* 309 A.D.2d 669 (1st Dept.2003). Ultimately, the parent must assume "a measure of initiative and responsibility." *Id.*

"Plan for the future" of the children is defined by SSL § 384–b(7)(c) as taking such steps as may be necessary to provide an adequate, stable home and parental care for the children within a period of time which is reasonable under the financial circumstances available to the parent. The plan must be realistic and feasible, and the parent's good faith effort shall not, in and of itself, be determinative. *Id.* Importantly, if an agency seeks to establish the failure of the parent to plan for a "one year period" under the statute, it need not be the one year period *immediately prior* to the filing of the termination of parental rights petition. Rather, it can be *any* one year period that the child is in foster care prior to the filing. *See Matter of Star Leslie W.,* 63 N.Y.2d 136 (1984).

2. Credibility findings from the trial.

I credit the testimony of the Agency case planner, Ms. St. Jean. She knew Mr. S. and this family's history well, and she had a decent factual memory of the events from some time ago. She did not seem to exaggerate or be biased in any way, and she readily acknowledged the positives about Mr. S., his eventual completion of the service plan, and his visits with the children. She had to refresh her recollection on occasion, which is understandable given the time frame of the allegations, and occasionally her testimony on cross differed from her direct—for example, about how many times she looked for Mr. S. and Kevin during the trial discharge before December 17th. But her testimony was also corroborated by the other witnesses and evidence in the case, and indeed Mr. S.'s testimony confirmed the majority of Ms. St. Jean's.

As for Mr. S.'s testimony, I found it credible in some parts but incredible in others. He was most straightforward and direct when talking about the children, their interests and needs, and spending time with them. He struck me as sincere in his love for both children, and no party disputes that Kevin and Kayden value Mr. S. in their lives. However, Mr. S. became very evasive on many topics, particularly during cross-examination by various attorneys. At times he stopped answering questions in a factual manner, instead asking questions back to the examiners, laughing, and editorializing about what others might have done in similar situations. In several areas, his testimony varied considerably between direct and cross—for example, on the issues of his finances, where and with whom he was living, and his evolving position over time about the paternity of Kayden. And some of his answers appeared plainly to be untrue—for example, that he did not think he needed to notify the Agency or seek permission to deviate from the conditions of the trial discharge.

***14** I found Ms. K., too, to be credible in parts and less so in others. She presented as an intelligent woman who had tried to support her son over the years. And to her credit, she acknowledged that she expressed exasperation with Mr. S. when Mr. S. chose to spend the night with Ms. G. on the night the trial discharge failed. Further, she admitted that she was at the trial discharge conference and that the conditions were made completely clear. And she also conceded that Mr. S. did not claim Kayden as his son when Kayden was born and only began to seek to do so after the failure of the trial discharge. On the other hand, Ms. K. seemed to get very upset during parts of cross-examination and

demonstrated significant hostility towards the Agency. She claimed that her efforts to plan for the children were rebuffed at many turns, although she was very vague or unable to remember what specific efforts she made to get involved. Of course, this area of her testimony was not directly relevant to the issues in the trial anyway.

3. The Agency made diligent efforts in this case.

Based on all of the evidence in the case, I find that the Agency made diligent efforts to encourage and strengthen the parental relationship between the Mr. S. and both children, even while Mr. S. was equivocating as to his parentage of Kayden. Those efforts included repeated and constant referrals for Mr. S. to engage in all the services in his service plan, including domestic violence counseling, parenting skills, random drug testing and substance abuse treatment. Additionally, the Agency set up regularly scheduled visitation for Mr. S. and the children. Indeed, Mr. S. himself detailed in his testimony that the Agency made consistent, repeated efforts to work with him and never inhibited or precluded him from visiting, having access to the children, or engaging in services. In addition, the testimony and case notes make clear that Ms. St. Jean repeatedly encouraged Mr. S. to comply with his service plan and obtain suitable housing and income in order to have the children put into his care, and in fact, despite him not having his own housing or income, they trial discharged Kevin to Mr. S.

Of course, that trial discharge failed after Mr. S. left Kevin alone with Ms. G., despite the Agency making clear that he was not permitted to do so. Interestingly, Mr. S.'s counsel in summation cites the failed trial discharge as evidence of the Agency *failing* to exercise diligent efforts to return the children to Mr. S.'s care, arguing that the Agency should not have discharged Kevin "to a residence where [the case planner] did not think Mr. S. lived." However, it would be perverse to fault the Agency for crafting a meaningful and safe way to accomplish a trial discharge, notifying all parties about the very specific conditions of that plan, and getting explicit consent from Mr. S. and Ms. K. to abide by those conditions. Given Mr. S.'s long history of failing to obtain stable housing and income on his own—for over two years he either lived with Ms. G. (despite multiple allegations of domestic violence) or had no permanent address or plan to live in a home suitable for the children and with adults *cleared* by the Agency. Plainly, if Mr. S. was dishonest in his intention to remain living with his mother during the trial discharge, that is not a failing attributable to the Agency.

4. Mr. S. failed to meaningfully plan for the return of the children.

a. From June of 2011 through late 2012, Mr. S. failed to engage in any of his service plan at all.

***15** It is clear that at some point in mid- to late–2012, Mr. S. began to engage in his service plan, and that by January of 2014, he had completed all of the services asked of him. However, Kevin was placed into foster care on June 14, 2011, and for the entire year following that placement, Mr. S. did not engage in any of his services. The case notes and testimony, including his own admissions in court, make clear that he was referred to numerous program providers on multiple occasions during that time period. He occasionally began intake or a session of one thing or another, but he never followed through at all. Sometimes he asked for new referrals; sometimes the agency prompted him with new ones of their own. Sometimes he gave reasons why he wanted to delay starting the services; other times he provided no excuse at all. All the while, Kevin was languishing in multiple foster homes, yet Mr. S. failed to even begin to do what he needed to in order to plan for the child, which can on its own constitute permanent neglect under the statute. *See In re Michenella I.,* 74 AD3d 1784 (1st Dept.2005).

b. From 2012 until the filing of both TPRs, Mr. S. never obtained appropriate and suitable housing and income.

Even after Mr. S. eventually began to engage in services and visit regularly, he still needed to provide a suitable and cleared residence in order for the children to be in his care. And for the entire time from when the children entered foster care

through the time of the filing of the TPRs in April of 2014, he failed to do so. The failure to maintain appropriate housing is a basis for permanent neglect. *See Matter of James Roosevelt H.,* 261 A.D.2d 337 (1st Dept.1999); *Matter of Veronica T.,* 244 A.D.2d 654 (3rd Dept.1997); *Matter of Merle C.,* 222 A.D.2d 1061 (4th Dept.1995).

At the beginning of Kevin's life, Mr. S. testified that he was living with Ms. G. That relationship was unstable and marred by acrimony and some violence. And Mr. S. admitted that when he learned of Ms. G.'s pregnancy with Kayden, he suspected that she was unfaithful and eventually moved out. He was not clear about the timing of when he left, but by Kayden's birth in May of 2013, Mr. S. was not living with Ms. G. Since that point, Mr. S. has consistently been unwilling or unable to provide a permanent address. He has said at times that he has stayed with friends, lived with a girlfriend, or stayed with his mother, Ms. K. And of course, at one point he spent at least one night in Ms. G.'s home against Agency directives. His dealings with the Agency on this point were frustrating, as he would not provide an address or meaningful clearance information for his girlfriend. Even on the witness stand at trial, he appeared evasive, inconsistent and incredible on this topic.

Nevertheless, in November of 2013, after Kevin had been in foster care for over two years, and when Mr. S. could or would not provide an address of his own, the Agency still devised the trial discharge plan wherein Mr. S. and Kevin could live with Ms. K. But this plan failed because Mr. S. and Kevin did not appear to be living with Ms. K. for the entire time, and they certainly spent at least one night at Ms. G.'s home. Notably, I do not find that this incident, even with Mr. S. having left Kevin alone with Ms. G. for almost an entire day, constitutes permanent neglect on its own, but it is a factor in this decision. *C.f., In re Marcus BB.,* 130 AD3d 1211 (3rd Dept.2015) (mother permitted father to visit child in violation of court order, resulting in failed trial discharge. But where mother *had otherwise addressed underlying concerns of the case,* to find permanent neglect would be to "hold respondent to an unreasonable standard and ignore well-settled precedent requiring only evidence of meaningful steps toward amelioration of the original condition, not proof of perfect compliance with petitioner's mandates").

***16** However, even after the failed trial discharge, Mr. S. still failed to establish that he had appropriate housing for the children. He continued to profess that he lived with his mother or with his girlfriend, who at that point was Ms. R. But he would not and did not provide Ms. R.'s address or clearance information to the agency at any point prior to the filing of the TPRs.

For the entire time the children have been in foster care, Mr. S. displayed no effort to obtain suitable housing for himself and his children. He testified that he asked that he be permitted to move into a shelter with the children. But Ms. St. Jean did not recall this conversation, and she was clear that she never told him he would *not* be able to move into a shelter with the children. Notably, though, given his finances, it is not clear that he would have been eligible for a public shelter or housing placement. In any event, even if the agency could have done more to assist Mr. S. in moving into the shelter system, that does not excuse Mr. S.'s utter failure to plan with respect to housing. *See In re Aidan D.* 58 AD3d 906 (3rd Dept.2009) (failure to plan found due to insufficient income and housing); *TPR Proceeding Lakeside, etc. v. Conchita J.,* 10 Misc.3d 1060(A) (Qns.Cty.2005) (permanent neglect in part due to refusal to provide address).

Finally, with respect to Kayden, Mr. S.'s permanent neglect contains one additional aspect. Ms. St. Jean's uncontroverted testimony, supported by the case notes in evidence, was that from the time Kayden was placed in foster care in May of 2013, until the filing of the TPR in August of 2014, Mr. S. never expressed any real interest in having Kayden in his care. In court, he acknowledged that he had not wanted to identify himself as Kayden's father because he believed that if he did, ACS would have filed a neglect petition against him. In addition, he testified that at times he was not sure if he was Kayden's father. Ultimately, by the time of the trial, Mr. S. did claim to be Kayden's biological father, a fact stipulated to by all parties. But as discussed above, as relevant to establishing himself as a "notice" or "consent" father with respect to Kayden, Mr. S. did not take any steps to establish himself as Kayden's legal parent, thereby entitling to have him in his care. Notwithstanding the Agency's diligent efforts to strengthen the familial relationship between Kayden and Mr. S., Mr. S. deliberately chose to remain a *legal* stranger to that child. As a matter of pure logic, that constitutes a failure to plan for Kayden's future.

For all of these reasons, I find that the Agency established by clear and convincing evidence that, despite its diligent efforts, Mr. S. failed for multiple one year periods and for more than 15 out of 22 months during Kevin's time in foster care, and for the entire 13–month period from Kayden's placement in care up to the time the petition was filed, to plan for the future of the children within the meaning of SSL § 384b–7. Thus, both Kevin and Kayden are permanently neglected within the meaning of that section.

***17** Accordingly, I find by clear and convincing evidence that (1) for Kevin, Mr. S. is entitled to notice of adoption proceedings, but his consent is not required for an adoption; (2) for Kayden, Mr. S. is not entitled to notice or consent of any such proceedings; and (3) Mr. S. permanently neglected both children.

This constitutes the decision and order of the court.

All Citations

51 Misc.3d 1207(A), 37 N.Y.S.3d 207 (Table), 2016 WL 1367913, 2016 N.Y. Slip Op. 50447(U)

IV. CONCLUSION

Footnotes

1 The substance of what was told to Ms. St. Jean was hearsay and thus not admitted for its truth. However, as described later, admissible evidence of these same facts came out at the trial.

2 *See* FN 1.

3 Notably, the court's computer system reflects that in 2013, Mr. S. did file a paternity petition for Kayden, but that the petition was dismissed. This was never discussed or addressed in any way by any party during the trial, and I have no further information about it.

4 DRL § 111(1)(d) also sets forth a different standard for a father of a child born out of wedlock where the father has lived with the child for six months within the one year period immediately preceding the placement of the child for adoption. This is inapplicable to Mr. S. because he only lived with Kevin for two months and never lived with Kayden.

5 As noted in FN 3, the court's file reflects a paternity petition filed by Mr. S. with respect to Kayden in 2013. However, that claim was dismissed without any finding in his favor. And well after that time period, as noted throughout this opinion, he never accepted or claimed with any certainty that he was Kayden's father.

End of Document

ICPC Regulations

Regulation No. 0.01.

Forms

1. To promote efficiency in processing placements pursuant to the Interstate Compact on the Placement of Children (ICPC) and to facilitate communication among sending agencies, states and other concerned persons, the forms promulgated by the compact administrators, acting jointly, shall be used by all sending agencies, sending and receiving states, and others participating in the arranging, making, processing and supervision of placements.

2. ICPC forms shall be uniform as to format and substance, and each state shall make available a reference to where its forms may be obtained by the public.

3. The mandatory forms currently in effect are described below. These forms shall be reproduced in sufficient supply by each of the states to meet its needs and the needs of persons and agencies required to use them. Forms referenced in the preceding sentence, above, currently in effect are the following:

ICPC-100A "Interstate Compact Placement Request;"

ICPC-100B "Interstate Compact Report on Child's Placement Status;"

ICPC-100C "Quarterly Statistical Report: Placements Into An ICPC State;"

ICPC-100D "Quarterly Statistical Report: Placements Out Of An ICPC State;" and

ICPC-101 "Sending State's Priority Home Study Request."

4. Form ICPC-102 "Receiving State's Priority Home Study Request" is an optional form that is available for use.

5. Words and phrases used in this regulation have the same meanings as in the Compact, unless the context clearly requires another meaning.

6. This regulation is adopted pursuant to Article VII of the Interstate Compact on the Placement of Children by action of the Association of Administrators of the Interstate Compact on the Placement of Children at its annual meeting of April 29 through May 2, 2001; the regulation, as amended, was approved May 2, 2001, and is effective as of July 2, 2001.

Regulation No. 1

Conversion of Intrastate Placement into Interstate Placement;

Relocation of Family Units

. Regulation No. 1 as first effective May 1, 1973, amended April 1999, is repealed and is replaced by the following:

The following regulation was amended by the Association of Administrators of the Interstate Compact on the Placement of Children on April 18, 2010, and is declared to be effective as amended as of October 1, 2010.

A placement initially intrastate in character becomes an interstate placement subject to the Interstate Compact on the Placement of Children (ICPC) if the child's principal place of abode is moved to another state, except as set forth herein.

2. Intent: This Regulation addresses the request for approval for placement of a child in an approved placement resource in the receiving state where the sending state has already approved the placement in the sending state and the resource now desires to move to the receiving state. The intent of Regulation 1 is to ensure that an already safe and stable placement made by a sending agency in the sending state will continue if the child is relocated to the receiving state. Additionally, it is the intent of this Regulation for supervision of the placement to be uninterrupted, for the family to comply with the requirements of the receiving state, and for both states to comply with all applicable state and federal laws, rules and regulations.

3. Applicability to Relocation: This Regulation shall apply to relocation of a child and the placement resource where supervision is ongoing. A request for a home study solely for the purpose of a periodic assessment of the placement where there is no on-going supervision shall not be governed by this regulation and shall be a matter of courtesy between the states. Nothing shall prohibit a sending state from contracting privately for a periodic assessment of the placement.

4. Applicability to Temporary Relocation: If a child is brought into the receiving state by an approved placement resource for a period of ninety (90) days or less and remains with the approved placement resource, approval of the receiving state is not required. Either the sending or receiving state may request approval of the placement, and, if the request is made, the sending and receiving states shall take the necessary action to process the request if the sending and receiving states agree to do so. Supervision by the receiving state is not required for a temporary relocation of ninety (90) days or fewer; however, pursuant to section 422(b)(17) of the Social Security Act 422 U.S.C. 622, supervision by the sending agency is required. Supervision may be provided as a courtesy to the sending state. If supervision is requested, the sending state shall provide a Form 100B and the information required in Section 5(b) below. If a child is brought into the receiving state by an approved placement resource for a temporary placement in excess of ninety (90) days or if the temporary relocation will recur, full compliance with this regulation is required. The public child placing agency in the sending state is responsible to take action to ensure the ongoing safety of a child placed in a receiving state pursuant to an approved placement under Article III(d) of the ICPC, including return of the child to the sending state as soon as possible when return is requested by the receiving state.

5. Provisional Approval:

(a) In any instance where the decision to relocate into another state is made or it is intended to send or bring the child to the receiving state, or the child and existing family unit have already been sent or brought into the receiving state, an ICPC-100A and its supporting documentation shall be prepared immediately upon the making of the decision, processed within five (5) business days by the sending agency's state compact administrator and transmitted to the receiving state compact administrator with notice of the intended placement date. The sending agency's state compact administrator shall request that the receiving state respond to the case within five (5) business days of receipt of the request and with due regard for the desired time for the child to be sent or brought to the receiving state. If the family unit and child are already present in the receiving state, the receiving state's compact administrator shall determine within five (5) business days of receipt of the

100A and complete home study request packet whether provisional approval shall be granted and provide the decision in writing to the sending state compact administrator by facsimile, mail, overnight mail or electronic transmission, if acceptable.

(b) The documentation provided with a request for prompt handling shall include:

1. A form ICPC-100A fully completed.
2. A form 100B if the child is already present in the receiving state
3. A copy of the court order pursuant to which the sending agency has authority to place the child or, if authority does not derive from a court order, a statement of the basis on which the sending agency has authority to place the child and documentation that supervision is on-going.
4. A case history for the child, including custodial and social history, chronology of court involvement, social dynamics and a description of any special needs of the child.
5. In any instance where the sending state has required licensure, certification or approval, a copy of the most recent license, certificate or approval of the qualification of the placement resource(s) and/or their home showing the status of the placement resource(s), as qualified placement resource(s).
6. A copy of the most recent home study of the placement resource(s) and any updates thereof.
7. Copies of the progress reports on the family unit for the last six months and the most recent judicial review court report and court order completed in the sending state.
8. A copy of the child's case/services/permanency plan and any supplements to that plan, if the child has been in care long enough for such a plan to be required.
9. An explanation of the current status of the child's Title IV-E eligibility under the Federal Social Security Act.

(c) Requests for prompt handling shall be as provided in paragraph 5(a) hereof. Some or all documents may be communicated by express mail or any other recognized method for expedited communication, including electronic transmission, if acceptable. The receiving state shall recognize and give effect to any such expedited transmission of an ICPC-100A and/or supporting documentation, provided that it is legible and appears to be a complete representation of the original. However, the receiving state may request and shall be entitled to receive originals or duly certified copies if it considers them necessary for a legally sufficient record under its laws.

(d) In an instance where a placement resource(s) holds a current license, certificate or approval from the sending state evidencing qualification as a foster parent or other placement resource, the receiving state shall give effect to such license, certificate or approval as sufficient to support a determination of qualification pursuant to Article III(d) of the ICPC, unless the receiving state compact administrator has substantial evidence that the license, certificate, or approval is expired or otherwise not valid. If the receiving state requires licensure as a condition of placement approval, or the receiving state compact administrator determines that the license, certificate, or approval from the sending state has expired or otherwise is not valid, both the sending state and the placement resource shall state in writing that the placement resource will become licensed in the receiving state.

(e) The receiving state shall recognize and give effect to evidence that the placement resource has satisfactorily completed required training for foster parents or other parent training. Such recognition and effect shall be given if:

1. the training program is shown to be substantially equivalent to training offered for the same purpose in the receiving state; and
2. the evidence submitted is in the form of an official certificate or document identifying the training.

6. Initial Home Study Report:

(a) Pursuant to the Safe and Timely Interstate Placement of Foster Children Act of 2006, within sixty (60) days after receiving a home study request, the receiving state shall directly or by contract conduct, complete, and return a report to the sending state on the results of the study of the home environment for purposes of assessing the safety and suitability of the child remaining in the home. The report shall address the extent to which placement in the home would meet the needs of the child. In the event the parts of the home study involving the education and training of the placement resource remain incomplete, the report shall reference such items by including a prospective date of completion.

(b) Approval of the request may be conditioned upon compliance by the placement resource with any licensing or education requirement in the receiving state. If such condition is placed upon approval, a reasonable date for compliance with the education or licensing requirement shall be set forth in the documentation granting approval.

7. Final Approval or Denial:

(a) Pursuant to Article III(d), final approval or denial of the placement resource request shall be provided by the receiving state compact administrator as soon as practical but no later than one-hundred and eighty days (180) days from receipt of the initial home study request.

(b) If necessary or helpful to meet time requirements, the receiving state may communicate its determination pursuant to Article III(d) to the sending agency and the sending agency's state compact administrator by "FAX" or other means of facsimile transmission or electronic transmission, if acceptable. However, this may not be done before the receiving state compact administrator has actually recorded the determination on the ICPC-100A. The written notice (the completed ICPC-100A) shall be mailed, sent electronically, if acceptable, or otherwise sent promptly to meet Article III(d) written notice requirements.

8. Nothing in this regulation shall be construed to alter the obligation of a receiving state to supervise and report on the placement; nor to alter the requirement that the placement resource(s) comply with the licensing and other applicable laws of the receiving state after arrival therein.

9. A favorable determination made by a receiving state pursuant to Article III(d) of the ICPC and this regulation means that the receiving state is making such determination on the basis of the best evidence available to it in accordance with the requirements of paragraph 5(a) of this regulation and does not relieve any placement resource or other entity of the obligation to comply with the laws of the receiving state as promptly as possible after arrival of the child in the receiving state.

10. The receiving state may decline to provide a favorable determination pursuant to Article III(d) of the Compact if the receiving state compact administrator finds that the child's needs cannot be met under the circumstances of the proposed relocation or until the compact administrator has the documentation identified in subparagraph 5(b) hereof.

11. If it is subsequently determined by the receiving state Compact Administrator that the placement in the receiving state appears to be contrary to the best interest of the child, the receiving state shall notify the sending agency that approval is no longer given and the sending state shall arrange to return the child or make an alternative placement as provided in Article V(a) of the ICPC.

12. Supervision: Within thirty (30) days of the receiving state compact administrator being notified by the sending state compact administrator or by the placement resource that the placement resource and the child have arrived in the receiving state, the appropriate personnel of the receiving state shall visit the child and the placement resource in the home to

ascertain conditions and progress toward compliance with applicable federal and state laws and requirements of the receiving state. Subsequent supervision must include face-to-face visits with the child at least once each month. A majority of visits must occur in the child's home. Face-to-face visits must be performed by a Child Welfare Caseworker in the receiving state. Such supervision visits shall continue until supervision is terminated by the sending state. Concurrence of the receiving state compact administrator for termination of supervision should be sought by the sending state prior to termination. Reports of supervision visits shall be provided to the sending state in accordance with applicable federal laws and as set forth elsewhere in these regulations. The public child placing agency in the sending state is responsible to take action to ensure the ongoing safety of a child placed in a receiving state pursuant to an approved placement under Article III(d) of the ICPC, including return of the child to the sending state as soon as possible when return is requested by the receiving state.

13. Words and phrases used in this regulation have the same meanings as in the Compact, unless the context clearly requires another meaning.

14. This regulation is adopted pursuant to Article VII of the Interstate Compact on the Placement of Children by action of the Association of Administrators of the Interstate Compact on the Placement of Children at its annual meeting of April 2010.

Regulation No. 2

Public Court Jurisdiction Cases: Placements for Public Adoption or Foster Care in Family Settings and/or with Parents, Relatives

Regulation No. 2, as adopted on May 25, 1977 by the Association of Administrators of the Interstate Compact on the Placement of Children, was repealed April 1999 and is replaced by the following:

The following regulation, adopted by the Association of Administrators of the Interstate Compact on the Placement of Children, is declared to be in effect on and after October 1, 2011. Words and phrases used in this regulation have the same meanings as in the Compact, unless the context clearly requires another meaning. If a court or other competent authority invokes the Compact, the court or other competent authority is obligated to comply with Article V (Retention of Jurisdiction) of the Compact.

1. Intent of Regulation No. 2: The intent of this regulation is to provide at the request of a sending agency, a home study and placement decision by a receiving state for the proposed placement of a child with a proposed caregiver who falls into the category of: placement for public adoption, or foster care and/or with parents, or relatives.

2. Regulation No. 2 does apply to cases involving children who are under the jurisdiction of a court for abuse, neglect or dependency, as a result of action taken by a child welfare agency: The court has the authority to determine supervision, custody and placement of the child or has delegated said authority to the child welfare agency, and the child is being considered for placement in another state.

(a) Children not yet placed with prospective placement resource: This Regulation covers consideration of a placement resource where the child has not yet been placed in the home. ICPC Regulation No. 7 Expedited Home Study can be used instead of Regulation No. 2 for this category when requirements are met for an expedited home study request.

(b) Change of status for children who have already been placed with ICPC approval: This regulation is used when requesting a new home study on the current approved placement resource. This might include an upgrade from unlicensed relative to licensed foster home or to adoption home placement category (see Regulation No. 3 section 2(a) Types of

Placement Categories).

(c) Child already placed without ICPC approval, except when the child has relocated with the caregiver to the receiving state pursuant to Regulation 1: When a child has been placed in a receiving state prior to ICPC approval, the case is considered a violation of ICPC and the placement is made with the sending state bearing full liability and responsibility for the safety of the child. The receiving state may request immediate removal of the child until the receiving state has made a decision per ICPC. The receiving state is permitted to proceed, but not required to proceed with the home study/ICPC decision process, as long as the child is placed in violation of ICPC. The receiving state may choose to open the case for ICPC courtesy supervision but is not required to do so, as is required under ICPC Regulation No. 1 Relocation of Family Unit Cases.

3. Placements made without ICPC protection: Regulation No. 2 does not apply to:

(a) A placement with a parent from whom the child was not removed: When the court places the child with a parent from whom the child was not removed, and the court has no evidence that the parent is unfit, does not seek any evidence from the receiving state that the parent is either fit or unfit, and the court relinquishes jurisdiction over the child immediately upon placement with the parent, the receiving state shall have no responsibility for supervision or monitoring for the court having made the placement.

(b) Sending court makes parent placement with courtesy check: When a sending court/agency seeks an independent (not ICPC-related) courtesy check for placement with a parent from whom the child was not removed, the responsibility for credentials and quality of the courtesy check rests directly with the sending court/agency and the person or party in the receiving state who agree to conduct the courtesy check without invoking the protection of the ICPC home study process. This would not prohibit a sending state from requesting an ICPC.

4. Definitions and placement categories: (See Regulation No. 3)

5. Sending state case documentation required with ICPC-100A request: The documentation provided with a request for prompt handling shall be current and shall include:

(a) A Form ICPC-100A fully completed.

(b) A Form ICPC-100B if the child is already placed without prior approval in the receiving state. The receiving state is not obligated to provide supervision until the placement has been approved with an ICPC-100A signed by the receiving state ICPC office, unless provisional approval has been granted.

(c) A copy of the current court order pursuant to which the sending agency has authority to place the child or, if authority does not derive from a court order, a statement of the basis on which the sending agency has authority to place the child and documentation that supervision is on-going.

(d) Signed statement required from assigned sending agency case manager:

1. confirming the potential placement resource is interested in being a placement resource for the child and is willing to cooperate with the ICPC process.
2. including the name and correct physical and mailing address of the placement resource and all available telephone numbers and other contact information for the potential placement resource.

3. describing the number and type of bedrooms in the home of the placement resource to accommodate the child under consideration and the number of people, including children, who will be residing in the home.
4. confirming the potential placement resource acknowledges that he/she has sufficient financial resources or will access financial resources to feed, clothe, and care for the child, including child care, if needed.
5. that the placement resource acknowledges that a criminal records and child abuse history check will be completed for any persons residing in the home required to be screened under the law of the receiving state.

(e) A current case history for the child, including custodial and social history, chronology of court involvement, social dynamics and a description of any special needs of the child.

(f) Any child previously placed with placement resource in sending state: If the placement resource had any child placed with them in the sending state previously, the sending agency shall provide all relevant information regarding said placement to the receiving state, if available.

(g) Service (case) Plan: A copy of the child's case/service/permanency plan and any supplements to that plan, if the child has been in care long enough for a permanency plan to be required.

(h) Title IV-E Eligibility verification: An explanation of the current status of the child's Title IV-E eligibility under the Federal Social Security Act and Title IV-E documentation, if available. Documentation must be provided before placement is approved.

(i) Financial/Medical Plan: A detailed plan of the proposed method for support of the child and provision of medical services.

(j) A copy of the child's Social Security card or official document verifying correct Social Security Number, if available, and a copy of the child's birth certificate, if available.

6. Methods for transmission of documents: Some or all documents may be communicated by express mail or any other recognized method for expedited communication, including FAX and/or electronic transmission, if acceptable by both sending and receiving state. The receiving state shall recognize and give effect to any such expedited transmission of an ICPC-100A and/or supporting documentation, provided that it is legible and appears to be a complete representation of the original. However, the receiving state may request and shall be entitled to receive originals or duly certified copies of any legal documents if it considers them necessary for a legally sufficient record under its laws. All such transmissions must be sent in compliance with state laws and/or regulations related to the protection of confidentiality.

7. Safe and Timely Interstate Home Study Report to be completed within sixty (60) calendar days. This report is not equivalent to a placement decision.

(a) Timeframe for completion of Safe and Timely Interstate Home Study Report: As quickly as possible, but not more than sixty (60) calendar days after receiving a home study request, the receiving state shall, directly or by contract, complete a study of the home environment for purposes of assessing the safety and suitability of the child being placed in the home. The receiving state shall return to the sending state a report on the results of the home study that shall address the extent to which placement in the home would meet the needs of the child. This report may, or may not, include a decision approving or denying permission to place the child. In the event the parts of the home study involving the education and training of the placement resource remain incomplete, the report shall reference such items by including an anticipated date of completion.

(b) Receiving state placement decision may be postponed: If the receiving state cannot provide a decision regarding

approval or denial of the placement at the time of the safe and timely home study report, the receiving state should provide the reason for delay and an anticipated date for a decision regarding the request. Reasons for delay may be such factors as receiving state requires all relatives to be licensed as a foster home therefore ICPC office cannot approve an unlicensed relative placement request until the family has met licensing requirements. If such condition must be met before approval, a reasonable date for compliance shall be set forth in the receiving state transmittal accompanying the initial home study, if possible.

8. Decision by receiving state to approve or deny placement resource (100A).

(a) Timeframe for final decision: Final approval or denial of the placement resource request shall be provided by receiving state Compact Administrator in the form of a signed ICPC-100A, as soon as practical but no later than one hundred and eighty (180) calendar days from receipt of the initial home study request. This six (6)-month window is to accommodate licensure and/or other receiving state requirements applicable to foster or adoption home study requests.

(b) Expedited communication of decision: If necessary or helpful to meet time requirements, the receiving state ICPC office may communicate its determination pursuant to Article III(d) to the sending agency's state Compact Administrator by FAX or other means of facsimile transmission or electronic transmission, if acceptable to both receiving and sending state. However, this may not be done before the receiving state Compact Administrator has actually recorded the determination on the ICPC-100A. The written notice (the completed ICPC-100A) shall be mailed, sent electronically, if acceptable, or otherwise sent promptly to meet Article III(d) written notice requirements. The receiving state home study local agency shall not send the home study and/or recommendation directly to the sending state local agency without approval from the sending and receiving state ICPC offices.

(c) Authority of receiving state to make final decision: The authority of the receiving state is limited to the approval or denial of the placement resource. The receiving state may decline to provide a favorable determination pursuant to Article III(d) of the Compact if the receiving state Compact Administrator finds that based on the home study, the proposed caregiver would be unable to meet the individual needs of the child, including the child's safety, permanency, health, well-being, and mental, emotional and physical development.

(d) Authority of sending court/placing agency: When the receiving state has approved a placement resource, the sending court/placing agency has the final authority to determine whether to use the approved placement resource in the receiving state. The receiving state ICPC-100A approval expires six months from the date the 100A was signed by receiving state.

9. Reconsideration of an ICPC denial: (requested by the sending ICPC Office)

(a) Sending state may request reconsideration of the denial within 90 days from the date 100A denying placement is signed by receiving state. The request can be with or without a new home study, see items 9(a)(1) and 9(a)(2) below. After 90 days there is nothing that precludes the sending state from requesting a new home study.

1. Request reconsideration without a new home study: The sending ICPC office can request that the receiving state ICPC office reconsider the denial of placement of the child with the placement resource. If the receiving state ICPC office chooses to overturn the denial it can be based on review of the evidence presented by the sending ICPC office and any other new information deemed appropriate. A new 100A giving an approval without a new home study will be signed.
2. Request new home study re-examining reasons for original denial: A sending ICPC office may send a new ICPC home study request if the reason for denial has been corrected; i.e., move to new residence with adequate bedrooms. The receiving state ICPC office is not obligated to activate the new home study request, but it may agree to proceed with a

new home study to reconsider the denial decision if it believes the reasons for denial have been corrected. This regulation shall not conflict with any appeal process otherwise available in the receiving state.

(b) Receiving state decision to reverse a prior denied placement: The receiving state ICPC office has 60 days from the date formal request to reconsider denial has been received from the sending state ICPC office. If the receiving state ICPC administrator decides to change the prior decision denying the placement, an ICPC transmittal letter and the new 100A shall be signed reflecting the new decision.

10. Return of child to sending state/Receiving state requests to return child to sending state:

(a) Request to return child to sending state at time of ICPC denial of placement: If the child is already residing in the receiving state with the proposed caregiver at the time of the above decision, and the receiving state Compact Administrator has denied the placement based on 8(c) then the receiving state Compact Administrator may request the sending state to arrange for the return of the child as soon as possible or propose an alternative placement in the receiving state as provided in Article V(a) of the ICPC. That alternative placement resource must be approved by the receiving state before placement is made. Return of the child shall occur within five (5) working days from the date of notice for removal unless otherwise agreed upon between the sending and receiving state ICPC offices.

(b) Request to return child to sending state after receiving state ICPC had previously approved placement: Following approval and placement of the child, if the receiving state Compact Administrator determines that the placement no longer meets the individual needs of the child, including the child's safety, permanency, health, well-being, and mental, emotional, and physical development, then the receiving state Compact Administrator may request that the sending state arrange for the return of the child as soon as possible or propose an alternative placement in the receiving state as provided in Article V(a) of the ICPC. That alternative placement resource must be approved by the receiving state before placement is made. Return of the child shall occur within five (5) working days from the date of notice for removal unless otherwise agreed upon between the sending and receiving state ICPC offices.

The receiving state request for removal may be withdrawn if the sending state arranges services to resolve the reason for the requested removal and the receiving and the sending state Compact Administrators mutually agree to the plan.

11. Supervision for approved placement should be conducted in accordance with ICPC Regulation No. 11.

12. Words and phrases used in this regulation have the same meanings as in the Compact, unless the context clearly requires another meaning.

13. This regulation is adopted pursuant to Article VII of the Interstate Compact on the Placement of Children by action of the Association of Administrators of the Interstate Compact on the Placement of Children at its annual meeting, April 30–May 1, 2011.

Regulation No. 3

Definitions and Placement Categories: Applicability and Exemptions

This Regulation No. 3 is adopted pursuant to Article VII of the Interstate Compact on the Placement of Children.

This Regulation No. 3 as first effective July 2, 2001, was amended by the Association of Administrators of the Interstate Compact on the Placement of children on May 1, 2011 and is declared to be effective as of October 1, 2011.

1. Intent of Regulation No. 3: To provide guidance in navigating the ICPC regulations and to assist its users in understanding which interstate placements are governed by, and which are exempt from, the ICPC.

(a) Nothing in this regulation shall be construed to alter the obligation of a receiving state to supervise and report on the placement; nor to alter the requirement that the placement resource(s) comply with the licensing and other applicable laws of the receiving state after placement of the child in the receiving state.

(b) Age restrictions: The ICPC Articles and Regulations do not specify an age restriction at time of placement, but rather use the broad definition of "child." The sending state law may permit the extension of juvenile court jurisdiction and foster care maintenance payments to eligible youth up to age 21. Consistent with Article V, such youth should be served under ICPC if requested by the sending agency and with concurrence of the receiving state.

2. Placement categories requiring compliance with ICPC: Placement of a child requires compliance with the Compact if such placement is made under one of the following four types of placement categories:

(a) Four types of placement categories:

1. Adoptions: Placement preliminary to an adoption (independent, private or public adoptions)
2. Licensed or approved foster homes (placement with related or unrelated caregivers)
3. Placements with parents and relatives when a parent or relative is not making the placement as defined in Article VIII (a) "Limitations"
4. Group homes/residential placement of all children, including adjudicated delinquents in institutions in other states as defined in Article VI and Regulation No. 4.

(b) Court involvement and court jurisdiction legal status: The above placement categories may involve placement by persons and/or agencies that at the time of placement may not have any court involvement (i.e., private/independent adoptions and residential placements). Where there is court jurisdiction with an open court case for dependency, abandonment, abuse and/or neglect, the case is considered a public court jurisdiction case, which requires compliance with ICPC Article III (see Regulations No. 1, No. 2, No. 7 and No. 11) note exemption for selected "parent" cases as described below in Section 3, "cases that are exempt from ICPC regulations. In most public court jurisdiction cases the court has taken guardianship and legal custody away from the "offending" caregiver and has given it to a third party at the time placement of the child is made with an alternative caregiver. However, in select cases identified below, the sending court may not have taken guardianship or legal custody away from the parent/guardian, when the ICPC-100A requesting permission to place is sent to the receiving state. Those cases are identified on the ICPC-100A with the legal status of "court jurisdiction only" as explained below.

(c) Court jurisdiction only: The sending court has an open abuse, neglect or dependency case that establishes court jurisdiction with the authority to supervise, remove and/or place the child. Although the child is not in the guardianship/custody of an agency or the court at the time of completing ICPC-100A, the agency or the court may choose to exert legal authority to supervise and or remove and place the child and therefore is the sending agency. As the sending agency/court it would have specified legal responsibilities per ICPC Article V, including the possible removal of the child if placement in the receiving state disrupts or the receiving state requests removal of the child. There are several possible situations where "court jurisdiction only" might be checked as the "legal status" on the ICPC-100A:

1. Residential placement (Regulation No. 4): The court has jurisdiction, but in some situations, such as with some probation (delinquent) cases, guardianship remains with the parent/relative, but the court/sending agency is seeking approval to place in a receiving state residential treatment program, and has authority to order placement and removal.

2. Contingency/concurrent request in cases where removal may become necessary (Regulations No. 2 or No. 7): The child may be in the custody of the offending parent or relative while the public agency tries to bring the family into compliance with court orders and or agency service (case) plan. (Some states call this an order of "protective supervision" or "show cause.") The court may have requested an ICPC home study on a possible alternative caregiver in a receiving state. It is understood at time of placement the court would have guardianship/legal custody and Article V would be binding.
3. Parent/relative relocated to receiving state (Regulation No. 1): If the sending court selects to invoke ICPC Article V and to retain court jurisdiction even though the family/relative has legal guardianship/custody and has moved to the receiving state, then the sending court may request a home study on the parent/relative who has moved with the child to the receiving state. By invoking ICPC the sending court is bound under Article V. If the receiving state determines the placement to be contrary to the interests of the child, the sending court must order removal of the child and their return to the sending state or utilize an alternative approved placement resource in the receiving state. The ICPC-100A must be signed by the sending judge or authorized agent of the public agency on behalf of the sending court in keeping with ICPC Article V.

3. Placements made without ICPC protection:

(a) A placement with a parent from whom the child was not removed: When the court places the child with a parent from whom the child was not removed, and the court has no evidence that the parent is unfit, does not seek any evidence from the receiving state that the parent is either fit or unfit, and the court relinquishes jurisdiction over the child immediately upon placement with the parent. Receiving state shall have no responsibility for supervision or monitoring for the court having made the placement.

(b) Sending court makes parent placement with courtesy check: When a sending court/agency seeks an independent (not ICPC related) courtesy check for placement with a parent from whom the child was not removed, the responsibility for credentials and quality of the "courtesy check" rests directly with the sending court/agency and the person or party in the receiving state who agree to conduct the "courtesy" check without invoking the protection of the ICPC home study process. This would not prohibit a sending state from requesting an ICPC.

(c) Placements made by private individuals with legal rights to place: Pursuant to Article VIII (a), this Compact does not apply to the sending or bringing of a child into a receiving state by the child's parent, stepparent, grandparent, adult brother or sister, adult uncle or aunt, or the child's non-agency guardian and leaving the child with any such parent, relative or non-agency guardian in the receiving state, provided that such person who brings, sends, or causes a child to be sent or brought to a receiving state is a person whose full legal right to plan for the child: (1) has been established by law at a time prior to initiation of the placement arrangement, and (2) has not been voluntarily terminated, or diminished or severed by the action or order of any court.

(d) Placements handled in divorce, paternity or probate courts: The compact does not apply in court cases of paternity, divorce, custody, and probate pursuant to which or in situations where children are being placed with parents or relatives or non-relatives.

(e) Placement of children pursuant to any other Compact: Pursuant to Article VIII (b), the Compact does not apply to any placement, sending or bringing of a child into a receiving state pursuant to any other interstate Compact to which both the state from which the child is sent or brought and the receiving state are party, or to any other agreement between said states which has the force of law.

4. Definitions: The purpose of this section is to provide clarification of commonly used terms in ICPC. Some of these words and definitions can also be found in the Interstate Compact on the Placement of Children, ICPC Regulations, Interstate Compact on Juveniles, and federal statutes and regulations.
(Note: source of definition is identified right after the word prior to the actual definition.)

1. Adoption: the method provided by state law that establishes the legal relationship of parent and child between persons who are not so related by birth or some other legal determination, with the same mutual rights and obligations that exist between children and their birth parents. This relationship can only be termed adoption after the legal process is complete (see categories or types of ICPC adoptions below).
2. Adoption categories:

   (a) Independent adoption: adoptions arranged by a birth parent, attorney, other intermediary, adoption facilitator or other person or entity as defined by state law.

   (b) Private agency adoption: an adoption arranged by a licensed agency whether domestic or international that has been given legal custody or responsibility for the child including the right to place the child for adoption.

   (c) Public adoption: Adoptions for public court jurisdiction cases.

3. Adoption home study: (definition listed under "home studies")
4. Adjudicated delinquent: a person found to have committed an offense that, if committed by an adult, would be a criminal offense.
5. Adjudicated status offender: a person found to have committed an offense that would not be a criminal offense if committed by an adult.
6. Age of majority: the legally defined age at which a person is considered an adult with all the attendant rights and responsibilities of adulthood. The age of majority is defined by state laws, which vary by state and is used in Article V, "…reaches majority, becomes self-supporting or is discharged with the concurrence of the appropriate authority in the receiving state" (see definition below of "child" as it appears in Article II).
7. Approved placement: the receiving state Compact Administrator has determined that "the proposed placement does not appear to be contrary to the interests of the child."
8. Boarding home: as used in Article II (d) of the ICPC, means the home of a relative or unrelated individual whether or not the placement recipient receives compensation for care or maintenance of the child, foster care payments, or any other payments or reimbursements on account of the child's being in the home of the placement recipient (has same meaning as family free).
9. Case history: an organized record concerning an individual, their family and environment that includes social, medical, psychological and educational history and any other additional information that may be useful in determining appropriate placement.
10. Case plan: (see "service plan" definition)
11. Central Compact office: the office that receives ICPC placement referrals from sending states and sends ICPC placement referrals to receiving states. In states that have one central Compact office that services the entire state, the term "central Compact office" has the same meaning as "central state Compact office" as described in Regulation No. 5 of the ICPC. In states in which ICPC placement referrals are sent directly to receiving states and received directly from sending states by more than one county or other regional area within the state, the "central Compact office" is the office within each separate county or other region that sends and receives ICPC placement referrals.
12. Certification: to attest, declare or swear to before a judge or notary public.
13. Child: a person, who by reason of minority, is legally subject to parental guardianship or similar control.

14. Child welfare caseworker: a person assigned to manage the cases of dependency children who are in the custody of a public child welfare agency and may include private contract providers of the responsible state agency.
15. Concurrence to discharge: is when the receiving ICPC office gives the sending agency written permission to terminate supervision and relinquish jurisdiction of its case pursuant to Article V leaving the custody, supervision and care of the child with the placement resource.
16. Concurrence: is when the receiving and sending Compact Administrator agree to a specific action pursuant to ICPC, i.e., decision as to providers.
17. Conditions for placement: as established by Article III apply to any placement as defined in Article II(d) and regulations adopted by action of the Association of Administrators of the Interstate Compact on the Placement of Children.
18. Courtesy: consent or agreement between states to provide a service that is not required by ICPC.
19. Courtesy check: Process that does not involve the ICPC, used by a sending court to check the home of a parent from whom the child was not removed.
20. Court jurisdiction only cases: The sending court has an open abuse, neglect or dependency case that establishes court jurisdiction with the authority to supervise and/or remove and place the child for whom the court has not taken guardianship or legal custody.
21. Custody: (see physical custody, see legal custody)
22. Emancipation: the point at which a minor becomes self-supporting, assumes adult responsibility for his or her welfare, and is no longer under the care of his or her parents or child placing agency, by operation of law or court order.
23. Emergency placement: a temporary placement of 30 days or less in duration.
24. Family free: as used in Article II (d) of the ICPC means the home of a relative or unrelated individual whether or not the placement recipient receives compensation for care or maintenance of the child, foster care payments, or any other payments or reimbursements on account of the child's being in the home of the placement recipient (has same meaning as boarding home).
25. Family unit: a group of individuals living in one household.
26. Foster care: If 24-hour-a-day care is provided by the child's parent(s) by reason of a court-ordered placement (and not by virtue of the parent-child relationship), the care is foster care. In addition to the federal definition (45 C.F.R. § 1355.20 "Definitions") this includes 24-hour substitute care for children placed away from their parents or guardians and for whom the state agency has placement and care responsibility. This includes, but is not limited to, placements in foster family homes, foster homes of relatives, group homes, emergency shelters, residential facilities, child care institutions and pre-adoptive homes. A child is in foster care in accordance with this definition regardless of whether the foster care facility is licensed and payments are made by the state or local agency for the care of the child, whether adoption subsidy payments are being made prior to the finalization of an adoption, or whether there is federal matching of any payments that are made.
27. Foster home study: (see definition under home studies)
28. Foster parent: a person, including a relative or non-relative, licensed to provide a home for orphaned, abused, neglected, delinquent or disabled children, usually with the approval of the government or a social service agency.
29. Guardian [see ICPC Regulation No. 10 section 1(a)]: a public or private agency, organization or institution that holds a valid and effective permanent appointment from a court of competent jurisdiction to have custody and control of a child, to plan for the child, and to do all other things for or on behalf of a child for which a parent would have authority and responsibility for doing so by virtue of an unrestricted parent-child relationship. An appointment is permanent for the purposes of this paragraph if the appointment would allow the guardianship to endure until the child's age of majority without any court review, subsequent to the appointment, of the care that the guardian provides or the status of other permanency planning that the guardian has a professional obligation to carry out.
30. Home Study (see Safe and Timely Interstate Placement of Foster Children Act of 2006): an evaluation of a home environment conducted in accordance with applicable requirements of the state in which the home is located, to

determine whether a proposed placement of a child would meet the individual needs of the child, including the child's safety, permanency, health, well-being, and mental, emotional and physical development.

(a) Adoption home study: a home study conducted for the purpose of placing a child for adoption with a placement resource. The adoption home study is the assessment and evaluation of a prospective adoptive parent(s).

(b) Foster home study: a home study conducted for the purpose of placing a child with a placement resource who is required to be licensed or approved in accordance with federal and/or receiving state law.

(c) Interstate home study (see Federal Safe and Timely Act): a home study conducted by a state at the request of another state, to facilitate an adoptive or foster care placement in the state of a child in foster care under the responsibility of the state [see foster care definition(s)].

(d) Parent home study: applies to the home study conducted by the receiving state to determine whether a parent placement meets the standards as set forth by the requirements of the receiving state.

(e) Relative home study: a home study conducted for the purpose of placing a child with a relative. Such a home study may or may not require the same level of screening as required for a foster home study or an adoptive home study depending upon the applicable law and/or requirements of the receiving state.

(f) Non-relative home study: a home study conducted for the purpose of placing a child with a non-relative of the child. Such a home study may or may not require the same level of screening as required for a foster home study or an adoptive home study depending upon the applicable law and/or requirements of the receiving state.

(g) Safe and Timely Interstate Home Study Report (see Federal Safe and Timely Act): an interstate home study report completed by a state if the state provides to the state that requested the study, within 60 days after receipt of the request, a report on the results of the study. The preceding sentence shall not be construed to require the state to have completed, within the 60-day period, the parts of the home study involving the education and training of the prospective foster or adoptive parents.

31. ICPC: The Interstate Compact on the Placement of Children is a Compact between states and parties pursuant to law, to ensure protection and services to children who are placed across state lines.
32. Independent adoption entity: any individual authorized in the sending state to place children for adoption other than a state, county or licensed private agency. This could include courts, private attorneys and birth parents.
33. Intrastate: existing or occurring within a state.
34. Interstate: involving, connecting or existing between two or more states.
35. Interstate home study: (see definition under Home studies)
36. Jurisdiction: the established authority of a court to determine all matters in relation to the custody, supervision, care and disposition of a child.
37. Legal custody: court-ordered or statutory right and responsibility to care for a child either temporarily or permanently.
38. Legal guardianship (see 45 C.F.R. § 1355.20 "Definitions"): a judicially created relationship between child and caretaker that is intended to be permanent and self-sustaining as evidenced by the transfer to the caretaker of the following parental rights with respect to the child: protection, education, care and control of the person, custody of the person, and decision-making. The term legal guardian means the caretaker in such a relationship.
39. Legal risk placement (legal risk adoption): a placement made preliminarily to an adoption where the prospective adoptive parents acknowledge in writing that a child can be ordered returned to the sending state or the birth mother's

state of residence, if different from the sending state, and a final decree of adoption shall not be entered in any jurisdiction until all required consents or termination of parental rights are obtained or are dispensed with in accordance with applicable law.

40. Member state: a state that has enacted this Compact (see also definition of state).
41. Non-agency guardian [see ICPC Regulation No. 10 section 1(b)]: an individual holding a currently valid appointment from a court of competent jurisdiction to have all of the authority and responsibility of a guardian as defined in ICPC Regulation No. 10 section 1(a).
42. Non-custodial parent: a person who, at the time of the commencement of court proceedings in the sending state, does not have sole legal custody of the child or physical custody of a child.
43. Non-offending parent: the parent who is not the subject of allegations or findings of child abuse or neglect.
44. Non-relative: a person not connected to the child by blood, marriage or adoption, or otherwise defined by the sending or receiving state.
45. Parent: a biological, adoptive parent or legal guardian as determined by applicable state law and is responsible for the care, custody and control of a child or upon whom there is legal duty for such care.
46. Parent home study: (see definition under home studies)
47. Physical custody: Person or entity with whom the child is placed on a day-to-day basis.
48. Placement (see ICPC Article II (d) "Definitions"): the arrangement for the care of a child in a family free, in a boarding home or in a child-caring agency or institution, but does not include any institution caring for the mentally ill, mentally defective or epileptic, or any institution primarily educational in character, and any hospital or other medical facility.
49. Placement resource: the person(s) or facility with whom the child has been or may be placed by a parent or legal custodian; or, placed by the court of jurisdiction in the sending state; or, for whom placement is sought in the receiving state.
50. Progress report: (see "supervision report" definition)
51. Provisional approval: an initial decision by the receiving state that the placement is approved subject to receipt of required additional information before final approval is granted.
52. Provisional denial: the receiving state cannot approve a provisional placement pending a more comprehensive home study or assessment process due to issues that need to be resolved.
53. Provisional placement: a determination made in the receiving state that the proposed placement is safe and suitable and, to the extent allowable, the receiving state has temporarily waived its standards or requirements otherwise applicable to prospective foster or adoptive parents so as to not delay the placement. Completion of the receiving state requirements regarding training for prospective foster or adoptive parents shall not delay an otherwise safe and suitable placement.
54. Public child-placing agency: any government child welfare agency or child protection agency or a private entity under contract with such an agency, regardless of whether they act on behalf of a state, county, municipality or other governmental unit and which facilitates, causes or is involved in the placement of a child from one state to another.
55. Receiving state (see ICPC Article II (c) "Definitions"): the state to which a child is sent, brought or caused to be sent or brought, whether by public authorities or private persons or agencies, and whether for placement with state or local public authorities or for placement with private agencies or persons.
56. Relative: a birth or adoptive brother, sister, stepparent, stepbrother, stepsister, uncle, aunt, first cousin, niece, nephew, as well as relatives of half blood or marriage and those denoted by the prefixes of grand and great, including grandparent or great grandparent, or as defined in state statute for the purpose of foster and or adoptive placements.
57. Non-relative: a person not connected to the child by blood, marriage or adoption.
58. Relative home study: (see definition under home studies)
59. Relocation: the movement of a child or family from one state to another.

60. Residential facility or residential treatment center or group home: a facility providing a level of 24-hour, supervised care that is beyond what is needed for assessment or treatment of an acute condition. For purposes of the Compact, residential facilities do not include institutions primarily educational in character, hospitals or other medical facilities (as used in Regulation 4, they are defined by the receiving state).
61. Return: the bringing or sending back of a child to the state from which they came.
62. Sending agency: (see ICPC Article II (b) "Definitions"): a party state, officer or employee thereof; a subdivision of a party state, or officer or employee thereof; a court of a party state; a person, corporation, association, charitable agency or other entity having legal authority over a child who sends, brings, or causes to be sent or brought any child to another party state.
63. Sending state: the state where the sending agency is located, or the state in which the court holds exclusive jurisdiction over a child, which causes, permits or enables the child to be sent to another state.
64. Service (case) plan: a comprehensive individualized program of action for a child and his/her family establishing specific goals and objectives and deadlines for meeting these goals and objectives.
65. State: a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, the Northern Marianas Islands, and any other territory of the United States.
66. State court: a judicial body of a state that is vested by law with responsibility for adjudicating cases involving abuse, neglect, deprivation, delinquency or status offenses of individuals who have not attained the age of eighteen (18) or as otherwise defined by state law.
67. Stepparent: a man or woman married to a parent of a child at the time of the intended placement or as otherwise defined by the sending and/or receiving state laws, rules and/or regulations.
68. Supervision: monitoring of the child and the child's living situation by the receiving state after a child has been placed in a receiving state pursuant to a provisional approval or an approved placement under Article III(d) of the ICPC or pursuant to a child's relocation to a receiving state in accordance with Regulation No. 1 of the ICPC.
69. Supervision report: provided by the supervising case worker in the receiving state; a written assessment of a child's current placement, school performance and health and medical status, a description of any unmet needs and a recommendation regarding continuation of the placement.
70. Timely Interstate Home Study: (see definition under home studies)
71. Visit: as defined in Regulation No. 9.

Regulation No. 4

Residential Placement

Regulation No. 4, as adopted by the Association of Administrators of the Interstate Compact on the Placement of Children on April 20, 1983, was readopted in 1999 and amended in 2001, and is replaced by the following:

The following regulation, adopted by the Association of Administrators of the Interstate Compact on the Placement of Children, is declared to be in effect on and after October 1, 2012. Words and phrases used in this regulation have the same meaning as in the Compact, unless the context clearly requires another meaning. If a court or other competent authority invokes the Compact, the court or other competent authority is obligated to comply with Article V (Retention of Jurisdiction) of the Compact.

1. Intent of this Regulation: It is the intent of Regulation No. 4 to provide for the protection and safety of children being placed in a residential facility in another state. Residential facility is further defined in Section 3 below.

(a) Approval by receiving state prior to placement: Approval prior to placement is required for the protection of the child and the sending agency making the placement. Sending agency includes the parent, guardian, court, or agency ultimately responsible for the planning, financing, and placement of the child as designated in section I of the form 100A. (See Article II(b) or Regulation 3, Section 4. (62) for full definition of sending agency.)

(b) Monitoring residential facility while child is placed: While children are placed in the receiving state, the receiving state ICPC office shall keep a record of all children currently placed at the residential facility through the ICPC process. The receiving state ICPC office shall notify the sending state ICPC office of any significant change of status at the residential facility that may be "contrary to the interests of the child" (Article III(d) or may place the safety of the child at risk of which the receiving state ICPC office becomes aware.

(c) Prevent children from being abandoned in receiving state: Once the sending agency makes a residential facility placement, the sending agency remains obligated under Article V to retain jurisdiction and responsibility for the child while the child remains in the receiving state until the child becomes independent, self-supporting, or the case is closed in concurrence with both the receiving and sending state ICPC offices. The role of the sending and receiving state ICPC offices is to promote compliance with Article V that children are not physically or financially abandoned in a receiving state.

2. Categories of children: This regulation applies to cases involving children who are being placed in a residential facility by the sending agency, regardless of whether the child is under the jurisdiction of a court for delinquency, abuse, neglect, or dependency, or as a result of action taken by a child welfare agency.

Age restrictions: (Regulation No. 3 Section 1(b)) The ICPC articles and regulations do not specify an age restriction at time of placement, but rather use the broad definition of "child." The sending state law may permit the extension of juvenile court jurisdiction and foster care maintenance payments to eligible youth up to age 21. Consistent with Article V, such youth should be served under ICPC if requested by the sending agency and with concurrence of the receiving state.

(a) Delinquent Child: Placement by a sending agency involving a delinquent child must comply with Article VI, Institutional Care of Delinquent Children, which reads as follows: "A child adjudicated delinquent may be placed in an institution in another party jurisdiction pursuant to this compact but no such placement shall be made unless the child is given a court hearing on notice to the parent or guardian with the opportunity to be heard prior to his being sent to such other party jurisdiction for institutional care and the court finds that:

(1) Equivalent facilities for the child are not available in the sending agency's jurisdiction; and

(2) Institutional care in the other jurisdiction is in the best interest of the child and will not produce undue hardship. (Hardship may apply to the child and his/her family.)

(b) A child not yet placed in a residential facility in another state: The primary application of this regulation is to request approval to place prior to placement at the residential facility.

(c) Change of status for a child: A new ICPC 100A and documents listed in Section 5 are required for a child who has been placed with prior ICPC approval, but now needs to move to a residential facility in this or another state, other than the child's state of origin.

(d) Child already placed without ICPC approval: For the safety and protection of all involved, placement in a residential facility should not occur until after the receiving state has approved the placement pursuant to Article III (d). When a child has been placed in a receiving state prior to ICPC approval, the case is considered a violation of ICPC, and the placement is made with the sending agency and residential facility remaining liable and responsible for the safety of the child. The receiving state may request immediate removal of the child until the receiving state has made a decision per ICPC, in

addition to any other remedies available under Article IV. The receiving state is permitted to proceed with the residential facility request for approval, but is not required to proceed as long as the child is placed in violation of ICPC.

3. Definition of "Residential Facility" covered by this regulation:

(a) Definition in ICPC Regulation No. 3 Section 4.(60) Residential facility or residential treatment center or group home: a facility providing a level of 24-hour, supervised care that is beyond what is needed for assessment or treatment of an acute condition. For purposes of the compact, residential facilities do not include institutions primarily educational in character, hospitals, or other medical facilities (as used in Regulation 4, they are defined by the receiving state). Residential facilities may also be called by other names in the receiving state, such as those listed under "Type of Care Requested on the ICPC 100A: Group Home Care, Residential Treatment Center, Child Caring Institution, and Institutional Care (Article VI), Adjudicated Delinquent."

(b) The type of license, if any, held by an institution is evidence of its character but does not determine the need for compliance with ICPC. Whether an institution is either generally exempt from the need to comply with the Interstate Compact on the Placement of Children or exempt in a particular instance is to be determined by the services it actually provides or offers to provide. In making any such determinations, the criteria set forth in this regulation shall be applied.

(c) The type of funding source or sources used to defray the costs of treatment or other services does not determine whether the Interstate Compact on the Placement of Children applies.

4. Definition of institutional facilities not covered by this regulation: In determining whether the sending or bringing of a child to another state is exempt from the provisions of the Interstate Compact on the Placement of Children by reason of the exemption for various classes of institutions in Article II(d), the following concepts and terms shall have the following meanings:

(a) "Primarily educational institution" means an institution that operates one or more programs that can be offered in satisfaction of compulsory school attendance laws, in which the primary purpose of accepting children is to meet their educational needs; and the educational institution does not do one or more of the following. (Conditions below would require compliance with this Regulation.)

(1) accepts responsibility for children during the entire year;

(2) provide or hold itself out as providing child care constituting nurture sufficient to substitute for parental supervision and control or foster care;

(3) provide any other services to children, except for those customarily regarded as extracurricular or co-curricular school activities, pupil support services, and those services necessary to make it possible for the children to be maintained on a 24-hour residential basis in the aforementioned school program or programs.

(b) "Hospital or other medical facility" means an institution for the acutely ill that discharges its patients when they are no longer acutely ill, which does not provide or hold itself out as providing child care in substitution for parental care or foster care, and in which a child is placed for the primary purpose of treating an acute medical problem.

(c) "Institution for the mentally ill or mentally defective" minors means a facility that is responsible for treatment of acute conditions, both psychiatric and medical, as well as such custodial care as is necessary for the treatment of such acute conditions of the minors who are either voluntarily committed or involuntarily committed by a court of competent jurisdiction to reside in it. Developmentally disabled has the same meaning as the phrase "mentally defective."

(d) Outpatient Services: If the treatment and care and other services are entirely out-patient in character, an institution for the mentally ill or developmentally disabled may accept a child for treatment and care without complying with ICPC.

5. Sending state case documentation for Residential Facility Request: The documentation provided with a request for prompt handling shall be current and shall include:

(a) Form ICPC-100A fully completed (required for all residential facility requests).

(b) Form ICPC-100B required for all residential facility requests, if the child is already placed without prior approval in the receiving state.

(c) Court or other authority to place the child:

(1) Delinquent child—a copy of the court order indicating the child has been adjudicated delinquent stating that equivalent facilities are not available in the sending agency's jurisdiction and that institutional care in the receiving state is in the best interest of the child and will not produce undue hardship. (See Article VI or Section 2.A above.)

(2) Public agency child—For public court jurisdiction cases, the current court order is required indicating the sending agency has authority to place the child or, if authority does not derive from a court order, a written legal document executed in accordance with the laws of the sending state that provides the basis for which the sending agency has authority to place the child and documentation that supervision is on-going or a copy of the voluntary placement agreement, as defined in Section 472(f)(2) of the Social Security Act executed by the sending agency and the child's parent or guardian.

(3) Child in the custody of a relative or legal guardian—a current court order or legal document is required indicating the sending agency has the authority to place the child.

(4) Parent placement (no court involvement)—The 100A is required and must be signed by the sending agency with the box checked under legal status indicating the parent has custody or guardianship and any additional documents required by the sending or receiving state.

(d) Letter of acceptance from the residential facility: For some receiving states this is a mandatory document for all placement requests, including those submitted by a parent or guardian. It provides the receiving state ICPC office with indication that the residential facility has screened the child as an appropriate placement for their facility.

(e) A current case history for the child: (optional for placements requested under 5. (c) (3) and (4)), including custodial and social history, chronology of court involvement, social dynamics and a description of any special needs of the child.

(f) Service (case) plan: (optional for placements requested under 5.C(3) and (4))—A copy of the child's case or service or permanency plan and any supplements to that plan, if the child has been in care long enough for a permanency plan to be required.

(g) Financial and medical plan: A written description of the responsibility for payment of the cost of placement of the child in the facility, including the name and address of the person or entity that will be making the payment and the person or entity who will be otherwise financially responsible for the child. It is expected that the medical coverage will be arranged and confirmed between the sending agency and the residential facility prior to the placement.

(h) Title IV-E eligibility verification: (not required for parent placements)—An explanation of the current status of the child's Title IV-E eligibility under the Federal Social Security Act and Title IV-E documentation, if available. Documentation must be provided before placement is approved.

(i) Placement Disruption Agreement: Some states may require a signed Placement Disruption Agreement indicating who will be responsible for the return of the child to the sending state if the child disrupts or a request is made for the child's removal and return to the sending state.

6. Methods for transmission of documents: Some or all documents may be communicated by express mail or any other recognized method for expedited communication, including FAX and electronic transmission, if acceptable by both the sending and the receiving state. The receiving state shall recognize and give effect to any such expedited transmission of an ICPC-100A and supporting documentation, provided that it is legible and appears to be a complete representation of the original. However, the receiving state may request and shall be entitled to receive originals or duly certified copies of any legal documents if it considers them necessary for a legally sufficient record under its laws. All such transmissions must be sent in compliance with state laws and regulations related to the protection of confidentiality.

7. Decision by receiving state to approve or deny placement resource (100A).

(a) Receiving state decision process: The receiving state ICPC office reviews the child specific information and the current status of the residential facility. The receiving state ICPC office approves or denies the placement based on a determination that "the proposed placement does not appear to be contrary to the interests of the child" (ICPC Article III(d)). The ICPC office may as part of its review process verify that the residential facility is properly licensed and not under an investigation by law enforcement, child protection, or licensing staff for unfit conditions or illegal activities that might place the child at risk of harm.

(1) Receiving state ICPC office may check to make sure the child is an appropriate match for the category of residential facility program.

(2) Receiving state ICPC office may check with the residential facility program to ensure that the request to place the child has been fully reviewed and officially accepted before ICPC approval is granted.

(b) Time frame for final decision: Final approval or denial of the placement resource request shall be provided by the receiving state compact administrator in the form of a signed ICPC 100A as soon as practical, but no later than three (3) business days from receipt of the complete request by the receiving state ICPC office. It is recognized that some state ICPC offices must obtain clearances from child protection, residential facility licensing and law enforcement before giving approval for a residential facility placement.

(c) Expedited communication of decision: If necessary or helpful to meet time requirements, the receiving state ICPC office may communicate its determination pursuant to Article III(d) to the sending agency's state Compact Administrator by FAX or other means of electronic transmission, if acceptable to both receiving and sending state. However, this may not be done before the receiving state Compact Administrator has actually recorded the determination on the ICPC 100A. The written notice (the completed ICPC100A) shall be mailed, sent electronically, if acceptable, or otherwise sent promptly to meet Article III(d) written notice requirements.

(d) Authority of receiving state to make final decision: The authority of the receiving state is limited to the approval or denial of the placement resource. The receiving state may approve or deny the placement resource if the receiving state Compact Administrator finds based upon the review of the child specific information and on the review of the current status of the residential facility, "the proposed placement does not appear to be contrary to the interests of the child." (ICPC Article III.(d))

(e) Emergency Residential Facility Placement Temporary Decision: Occasionally residential facility placements need to be made on an emergency basis. In those limited cases, sending and receiving state offices may, with mutual agreement, proceed to authorize emergency placement approval. Such emergency placement decision must be made within one business day or other mutually agreed timeframe, based upon receipt by the receiving state of the ICPC-100A request and

any other document required by the receiving state to consider such emergency placement; e.g., a financial medical plan and a copy of a court order or other authority to make the placement. If emergency placement approval is temporarily granted, the formal ICPC placement approval will not be final until there has been full compliance with Sections 5 and 7 of this regulation.

8. Authority of sending agency: When the receiving state has approved a placement resource, the sending agency has the final authority to determine whether to use the approved placement resource in the receiving state. The receiving state ICPC-100A approval for placement in a residential facility expires thirty calendar days from the date the 100A was signed by the receiving state. The thirty (30) calendar day timeframe can be extended upon mutual agreement between the sending and receiving state ICPC offices.

9. Submission of ICPC-100B: Upon determination by the sending agency to use the approved resource, the sending agency is responsible for filing an ICPC-100B Notice of Placement with the Sending State ICPC office within three (3) business days of the actual placement. That notice is to be submitted to the receiving state ICPC office, who is to forward the ICPC-100B to the residential facility within five (5) business days of receipt of the ICPC-100B.

10. Supervision Expectations:

(a) Residential Facility: The residential facility is viewed as the agency responsible for the 24-hour care of a child away from the child's parental home. In that capacity the residential facility is responsible for the supervision, protection, safety, and well-being of the child. The sending agency making the placement is expected to enter into an agreement with the residential facility as to the program plan or expected level of supervision and treatment and the frequency and nature of any written progress or treatment reports.

(b) Receiving state local child welfare workers and probation staff are not expected to provide any monitoring or supervision of children placed in residential facility programs. The one exception are those children who may become involved in an incident or allegation occurring in the receiving state that may involve the receiving state law enforcement, probation, child protection or, ultimately, the receiving state court.

(c) "Sending" agency making placement: The frequency and nature of monitoring visits by the sending agency or individual making the placement are determined by the sending agency in accordance with applicable laws.

11. Return of child to sending state at the request of receiving state:

(a) Request to return child to sending state at time of ICPC denial of placement: If the child is already placed in the receiving state residential facility at the time of the decision, and the receiving state Compact Administrator has denied the placement, then the receiving state Compact Administrator may request the sending state ICPC office to facilitate with the sending agency for the return of the child as soon as possible or propose an alternative placement in the receiving state as provided in Article V(a) of the ICPC. The alternative placement resource must be approved by the receiving state before placement is made. Return of the child shall occur within five (5) business days from the date of notice for removal unless otherwise agreed upon between the sending and receiving state ICPC offices.

(b) Request to return child to sending state after receiving state ICPC had previously approved placement: Following approval and placement of the child in the residential facility, if the receiving state Compact Administrator determines that the placement "appears to be contrary to the interests of the child," then the receiving state Compact Administrator may request that the sending state ICPC office facilitate with the sending agency for the return of the child as soon as possible or propose an alternative placement in the receiving state as provided in Article V(a) of the ICPC. That alternative placement resource must be approved by the receiving state before placement is made. Return of the child shall occur within five (5) business

days from the date of notice for removal, unless otherwise agreed upon between the sending and receiving state ICPC offices.

The receiving state ICPC office's request for removal may be withdrawn if the sending agency arranges services to resolve the reason for the requested removal and the receiving and the sending state Compact Administrators mutually agree to the plan.

12. Words and phrases used in this regulation have the same meanings as in the Compact, unless the context clearly requires another meaning.

13. This regulation was amended pursuant to Article VII of the Interstate Compact on the Placement of Children by action of the Association of Administrators of the Interstate Compact on the Placement of Children at its annual meeting May 4 through 7, 2012; such amendment was approved on May 5, 2012 and is effective as of October 1, 2012.

Regulation No. 5

Central State Compact Office

Regulation No. 5, ("Central State Compact Office"), as first effective April 20, 1982, amended as of April 1999 and April 2002, is amended to read as follows:

1. It shall be the responsibility of each state party to the Interstate Compact on the Placement of Children to establish a procedure by which all Compact referrals from and to the state shall be made through a central state compact office. For those states that have decentralized specific activities regarding Compact referrals from the central state compact office to a county, local office, or designated agency, the county, local office, or designated agency shall have the same authority and responsibility with respect to those specific activities regarding Compact referrals as if it were the central state compact office. The Compact office shall also be a resource for inquiries into requirements for placements into the state for children who come under the purview of this Compact.

2. The Association of Administrators of the Interstate Compact on the Placement of Children deems certain appointments of officers who are general coordinators of activities under the Compact in the party states to have been made by the executive heads of states in each instance wherein such an appointment is made by a state official who has authority delegated by the executive head of the state to make such an appointment. Delegated authority to make the appointments described above in this paragraph will be sufficient if it is either: specifically described in the applicable state's documents that establish or control the appointment or employment of the state's officers or employees; a responsibility of the official who has the delegated authority that is customary and accepted in the applicable state; or consistent with the personnel policies or practices of the applicable state. Any general coordinator of activities under the Compact who is or was appointed in compliance with this paragraph is deemed to be appointed by the executive head of the applicable jurisdiction regardless of whether the appointment preceded or followed the adoption of this paragraph. No person within an agency so designated by the appropriate authority in a state to make recommendations for or against placement of a child, as evidenced by signing Form 100A, shall also conduct the home study upon which such recommendation is made.

3. Words and phrases used in this regulation have the same meaning as in the Compact, unless the context clearly requires another meaning.

4. This regulation was amended pursuant to Article VII of the Interstate Compact on the Placement of Children by action of the Association of Administrators of the Interstate Compact on the Placement of Children at its annual meeting May 4 through 7, 2012; such amendment was approved on May 5, 2012 and is effective as of July 1, 2012.

Regulation No. 6

Permission to Place Child: Time Limitations, Reapplication

The following regulation, originally adopted in 1991 by the Association of Administrators of the Interstate Compact on the Placement of Children, is amended in 2001 and declared to be in effect, as amended, on and after July 2, 2001.

1. Permission to place a child given pursuant to Article III (d) of the Interstate Compact on the Placement of Children shall be valid and sufficient to authorize the making of the placement identified in the written document ICPC-100A, by which the permission is given for a period of six (6) months commencing on the date when the receiving state compact administrator or his duly authorized representative signs the aforesaid ICPC-100A.

2. If the placement authorized to be made as described in Paragraph 1. of this Regulation is not made within the six (6) months allowed therein, the sending agency may reapply. Upon such reapplication, the receiving state may require the updating of documents submitted on the previous application, but shall not require a new home study unless the laws of the receiving state provide that the previously submitted home study is too old to be currently valid.

3. If a foster care license, institutional license or other license, permit or certificate held by the proposed placement recipient is still valid and in force, or if the proposed placement recipient continues to hold an appropriate license, permit or certificate, the receiving state shall not require that a new license, permit or certificate be obtained in order to qualify the proposed placement recipient to receive the child in placement.

4. Upon a reapplication by the sending agency, the receiving state shall determine whether the needs or condition of the child have changed since it initially authorized the placement to be made. The receiving state may deny the placement if it finds that the proposed placement is contrary to the interests of the child.

5. Words and phrases used in this regulation have the same meanings as in the Compact, unless the context clearly requires another meaning.

6. This regulation was readopted pursuant to Article VII of the Interstate Compact on the Placement of Children by action of the Association of Administrators of the Interstate Compact on the Placement of Children at its annual meeting of April 1999; it is amended pursuant to Article VII of the Interstate Compact on the Placement of Children by action of the Association of Administrators of the Interstate Compact on the Placement of Children at its annual meeting of April 29 through May 2, 2001, was approved May 2, 2001, and is effective in such amended form as of July 2, 2001.

Regulation No. 7

Expedited Placement Decision

The following regulation adopted by the Association of Administrators of the Interstate Compact on the Placement of Children as Regulation No. 7, Priority Placement, as first adopted in 1996, is amended to read as follows:

1. Words and phrases used in this regulation shall have the same meanings as those ascribed to them in the Interstate Compact on the Placement of Children (ICPC). A word or phrase not appearing in ICPC shall have the meaning ascribed to it by special definition in this regulation or, where not so defined, the meaning properly ascribed to it in common usage.

2. This regulation shall hereafter be denoted as Regulation No. 7 for Expedited Placement Decision.

3. Intent of Regulation No. 7: The intent of this regulation is to expedite ICPC approval or denial by a receiving state for the placement of a child with a parent, stepparent, grandparent, adult uncle or aunt, adult brother or sister, or the child's

guardian, and to:

(a) Help protect the safety of children while minimizing the potential trauma to children caused by interim or multiple placements while ICPC approval to place with a parent or relative is being sought through a more comprehensive home study process.

(b) Provide the sending state court and/or sending agency with expedited approval or denial. An expedited denial would underscore the urgency for the sending state to explore alternative placement resources.

4. This regulation shall not apply if:

(a) the child has already been placed in violation of the ICPC in the receiving state, unless a visit has been approved in writing by the receiving state Compact Administrator and a subsequent order entered by the sending state court authorizing the visit with a fixed return date in accordance with Regulation No. 9.

(b) the intention of the sending state is for licensed or approved foster care or adoption. In the event the intended placement [must be parent, stepparent, grandparent, adult aunt or uncle, adult brother or sister, or guardian as per Article VIII(a)] is already licensed or approved in the receiving state at the time of the request, such licensing or approval would not preclude application of this regulation.

(c) the court places the child with a parent from whom the child was not removed, the court has no evidence the parent is unfit, does not seek any evidence from the receiving state the parent is either fit or unfit, and the court relinquishes jurisdiction over the child immediately upon placement with the parent.

5. Criteria required before Regulation No. 7 can be requested: Cases involving a child who is under the jurisdiction of a court as a result of action taken by a child welfare agency, the court has the authority to determine custody and placement of the child or has delegated said authority to the child welfare agency, the child is no longer in the home of the parent from whom the child was removed, and the child is being considered for placement in another state with a parent, stepparent, grandparent, adult uncle or aunt, adult brother or sister, or the child's guardian, must meet at least one of the following criteria in order to be considered a Regulation No. 7 case:

(a) unexpected dependency due to a sudden or recent incarceration, incapacitation or death of a parent or guardian. Incapacitation means a parent or guardian is unable to care for a child due to a medical, mental or physical condition of a parent or guardian, or

(b) the child sought to be placed is four years of age or younger, including older siblings sought to be placed with the same proposed placement resource; or

(c) the court finds that any child in the sibling group sought to be placed has a substantial relationship with the proposed placement resource. Substantial relationship means the proposed placement has a familial or mentoring role with the child, has spent more than cursory time with the child, and has established more than a minimal bond with the child; or

(d) the child is currently in an emergency placement.

6. Provisional approval or denial:

(a) Upon request of the sending agency and agreement of the receiving state to make a provisional determination, the receiving state may, but is not required to, provide provisional approval or denial for the child to be placed with a parent or

relative, including a request for licensed placement if the receiving state has a separate licensing process available to relatives that includes waiver of non-safety issues.

Upon receipt of the documentation set forth in Section 7 below, the receiving state shall expedite provisional determination of the appropriateness of the proposed placement resource by:

1. performing a physical "walk through" by the receiving state's caseworker of the prospective placement's home to assess the residence for risks and appropriateness for placement of the child,
2. searching the receiving state's child protective services data base for prior reports/investigations on the prospective placement as required by the receiving state for emergency placement of a child in its custody,
3. performing a local criminal background check on the prospective placement,
4. undertaking other determinations as agreed upon by the sending and receiving state Compact Administrators, and
5. providing a provisional written report to the receiving state Compact Administrator as to the appropriateness of the proposed placement.

(b) A request by a sending state for a determination for provisional approval or denial shall be made by execution of an Order of Compliance by the sending state court that includes the required findings for a Regulation No. 7 request and a request for provisional approval or denial.

(c) Determination made under a request for provisional approval or denial shall be completed within seven (7) calendar days of receipt of the completed request packet by the receiving state Compact Administrator. A provisional approval or denial shall be communicated to the sending state Compact Administrator by the receiving state Compact Administrator in writing. This communication shall not include the signed Form 100A until the final decision is made pursuant to Section 9 below.

(d) Provisional placement, if approved, shall continue pending a final approval or denial of the placement by the receiving state or until the receiving state requires the return of the child to the sending state pursuant to paragraph 12 of this regulation.

(e) If provisional approval is given for placement with a parent from whom the child was not removed, the court in the sending state may direct its agency to request concurrence from the sending and receiving state Compact Administrators to place the child with the parent and relinquish jurisdiction over the child after final approval is given. If such concurrence is not given, the sending agency shall retain jurisdiction over the child as otherwise provided under Article V of the ICPC.

(f) A provisional denial means that the receiving state cannot approve a provisional placement pending the more comprehensive home study or assessment process due to issues that need to be resolved.

7. Sending agency steps before sending court enters Regulation No. 7 Order of Compliance: In order for a placement resource to be considered for an ICPC expedited placement decision by a receiving state, the sending agency shall take the following minimum steps prior to submitting a request for an ICPC expedited placement decision:

(a) Obtain either a signed statement of interest from the potential placement resource or a written statement from the assigned case manager in the sending state that following a conversation with the potential placement resource, the potential placement resource confirms appropriateness for the ICPC expedited placement decision process. Such statement shall include the following regarding the potential placement resource:

1. s/he is interested in being a placement resource for the child and is willing to cooperate with the ICPC process.

2. s/he fits the definition of parent, stepparent, grandparent, adult brother or sister, adult aunt or uncle, or his or her guardian, under Article VIII(a) of the ICPC.
3. the name and correct address of the placement resource, all available telephone numbers and other contact information for the potential placement resource, and the date of birth and social security number of all adults in the home.
4. a detail of the number and type of rooms in the residence of the placement resource to accommodate the child under consideration and the number of people, including children, who will be residing in the home.
5. s/he has financial resources or will access financial resources to feed, clothe and care for the child.
6. if required due to age and/or needs of the child, the plan for child care, and how it will be paid for.
7. s/he acknowledges that a criminal records and child abuse history check will be completed on any persons residing in the home required to be screened under the law of the receiving state and that, to the best knowledge of the placement resource, no one residing in the home has a criminal history or child abuse history that would prohibit the placement.
8. whether a request is being made for concurrence to relinquish jurisdiction if placement is sought with a parent from whom the child was not removed.

(b) The sending agency shall submit to the sending state court:

1. the signed written statement noted in 7a, above, and
2. a statement that based upon current information known to the sending agency, that it is unaware of any fact that would prohibit the child being placed with the placement resource and that it has completed and is prepared to send all required paperwork to the sending state ICPC office, including the ICPC-100A and ICPC Form 101.

8. Sending state court orders: The sending state court shall enter an order consistent with the Form Order for Expedited Placement Decision adopted with this modification of Regulation No. 7 subject to any additions or deletions required by federal law or the law of the sending state. The order shall set forth the factual basis for a finding that Regulation No. 7 applies to the child in question, whether the request includes a request for a provisional approval of the prospective placement and a factual basis for the request. The order must also require completion by the sending agency of ICPC Form 101 for the expedited request.

9. Time frames and methods for processing of ICPC expedited placement decision:

(a) Expedited transmissions: The transmission of any documentation, request for information under paragraph 10, or decisions made under this regulation shall be by overnight mail, facsimile transmission, or any other recognized method for expedited communication, including electronic transmission, if acceptable. The receiving state shall recognize and give effect to any such expedited transmission of an ICPC-100A and/or supporting documentation provided it is legible and appears to be a complete representation of the original. However, the receiving state may request and shall be entitled to receive originals or duly certified copies if it considers them necessary for a legally sufficient record under its laws. Any state Compact Administrator may waive any requirement for the form of transmission of original documents in the event he or she is confident in the authenticity of the forms and documents provided.

(b) Sending state court orders to the sending state agency: The sending state court shall send a copy of its signed order of compliance to the sending state agency within two (2) business days of the hearing or consideration of the request. The order shall include the name, mailing address, e-mail address, telephone number and FAX number of the clerk of court or a designated court administrator of the sending state court exercising jurisdiction over the child.

(c) Sending agency sends ICPC request to sending state ICPC office: The sending state court shall direct the sending

agency to transmit to the sending state Compact Administrator within three (3) business days of receipt of the signed Order of Compliance, a completed ICPC-100A and Form 101, the statement required under Paragraph 7 above and supporting documentation pursuant to ICPC Article III.

(d) Sending State ICPC office sends ICPC Request to Receiving State ICPC office: Within two (2) business days after receipt of a complete Regulation 7 request, the sending state Compact Administrator shall transmit the complete request for the assessment and for any provisional placement to the receiving state Compact Administrator. The request shall include a copy of the Order of Compliance rendered in the sending state.

(e) Timeframe for receiving state ICPC office to render expedited placement decision: no later than twenty (20) business days from the date that the forms and materials are received by the receiving state Compact Administrator, the receiving state Compact Administrator shall make his or her determination pursuant to Article III(d) of the ICPC and shall send the completed 100-A to the sending state Compact Administrator by expedited transmission.

(f) Timeframe for receiving state ICPC office to send request packet to receiving local agency: The receiving state Compact Administrator shall send the request packet to the local agency in the receiving state for completion within two (2) business days of receipt of the completed packet from the sending state Compact Administrator.

(g) Timeframe for receiving state local agency to return completed home study to central office: The local agency in the receiving state shall return the completed home study to the receiving state Compact Administrator within fifteen (15) business days (including date of receipt) of receipt of the packet from the receiving state Compact Administrator.

(h) Timeframe for receiving state ICPC Compact Administrator to return completed home study to sending state: Upon completion of the decision process under the timeframes in this regulation, the receiving state Compact Administrator shall provide a written report, a 100A approving or denying the placement, and a transmittal of that determination to the sending state Compact Administrator as soon as possible, but no later than three (3) business days after receipt of the packet from the receiving state local agency and no more than twenty (20) business days from the initial date that the complete documentation and forms were received by the receiving state Compact Administrator from the sending state Compact Administrator.

10. Recourse if sending or receiving state determines documentation is insufficient:

(a) In the event the sending state Compact Administrator finds that the ICPC request documentation is substantially insufficient, s/he shall specify to the sending agency what additional information is needed and request such information from the sending agency.

(b) In the event the receiving state Compact Administrator finds that the ICPC request documentation is substantially insufficient, he or she shall specify what additional information is needed and request such information from the sending state Compact Administrator. Until receipt of the requested information from the sending state Compact Administrator, the receiving state is not required to continue with the assessment process.

(c) In the event the receiving state Compact Administrator finds that the ICPC request documentation is lacking needed information but is otherwise sufficient, s/he she shall specify what additional information is needed and request such information from the sending state Compact Administrator. If a provisional placement is being pursued, the provisional placement evaluation process shall continue while the requested information is located and provided.

(d) Failure by a Compact Administrator in either the sending state or the receiving state to make a request for additional documentation or information under this paragraph within two (2) business days of receipt of the ICPC request and accompanying documentation by him or her shall raise a presumption that the sending agency has met its requirements under the ICPC and this regulation.

11. Failure of receiving state ICPC office or local agency to comply with ICPC Regulation No. 7: Upon receipt of the Regulation No. 7 request, if the receiving state Compact Administrator determines that it will not be possible to meet the timeframes for the Regulation No. 7 request, whether or not a provisional request is made, the receiving state Compact Administrator shall notify the sending state Compact Administrator as soon as practical and set forth the receiving state's intentions in completing the request, including an estimated time for completion or consideration of the request as a regular ICPC request. Such information shall also be transmitted to the sending agency by the sending state Compact Administrator for it to consider other possible alternatives available to it. If the receiving state Compact Administrator and/or local state agency in the receiving state fail(s) to complete action for the expedited placement request as prescribed in this regulation within the time period allowed, the receiving state shall be deemed to be out of compliance with this regulation and the ICPC. If there appears to be a lack of compliance, the sending state court that sought the provisional placement and expedited placement decision may so inform an appropriate court in the receiving state, provide that court with copies of relevant documentation and court orders entered in the case, and request assistance. Within its jurisdiction and authority, the requested court may render such assistance, including the holding of hearings, taking of evidence, and the making of appropriate orders, for the purpose of obtaining compliance with this regulation and the ICPC.

12. Removal of a child: Following any approval and placement of the child, if the receiving state Compact Administrator determines that the placement no longer meets the individual needs of the child, including the child's safety, permanency, health, well-being, and mental, emotional, and physical development, then the receiving state Compact Administrator may request the sending state Compact Administrator arrange for the immediate return of the child or make alternative placement as provided in Article V (a) of the ICPC. The receiving state request for removal may be withdrawn if the sending state arranges services to resolve the reason for the requested removal and the receiving and sending state Compact Administrators mutually agree to the plan. If no agreement is reached, the sending state shall expedite return of the child to the sending state within five (5) business days unless otherwise agreed in writing between the sending and receiving state Compact Administrators.

13. This regulation as first effective October 1, 1996, and readopted pursuant to Article VII of the Interstate Compact on the Placement of Children by action of the Association of Administrators of the Interstate Compact on the Placement of Children at its annual meeting of April 1999, is amended pursuant to Article VII of the Interstate Compact on the Placement of Children by action of the Association of Administrators of the Interstate Compact on the Placement of Children at its annual meeting of May 1, 2011; the regulation, as amended was approved on May 1, 2011 and is effective as of October 1, 2011.

Regulation No. 8

Change of Placement Purpose

1. An ICPC-100B should be prepared and sent in accordance with its accompanying instructions whenever there is a change of purpose in an existing placement, e.g., from foster care to preadoption even though the placement recipient remains the same. However, when a receiving state or a sending state requests a new ICPC-100A in such a case, it should be provided by the sending agency and transmitted in accordance with usual procedures for processing of ICPC-100As.

2. Words and phrases used in this regulation have the same meanings as in the Compact, unless the context clearly requires another meaning.

3. This regulation is effective on and after April 30, 2000, pursuant to Article VII of the Interstate Compact on the Placement of Children by action of the Association of Administrators of the Interstate Compact on the Placement of Children at its annual meeting of April 30–May 3, 2000.

Regulation No. 9

Definition of a Visit

Regulation No. 9 ("Definition of a Visit"), as first adopted in 1999, is amended to read as follows:

1. A visit is not a placement within the meaning of the Interstate Compact on the Placement of Children (ICPC). Visits and placements are distinguished on the basis of purpose, duration, and the intention of the person or agency with responsibility for planning for the child as to the child's place of abode.

2. The purpose of a visit is to provide the child with a social or cultural experience of short duration, such as a stay in a camp or with a friend or relative who has not assumed legal responsibility for providing child care services.

3. It is understood that a visit for twenty-four (24) hours or longer will necessarily involve the provision of some services in the nature of child care by the person or persons with whom the child is staying. The provision of these services will not, of itself, alter the character of the stay as a visit.

4. If the child's stay is intended to be for no longer than thirty (30) days and if the purpose is as described in Paragraph 2, it will be presumed that the circumstances constitute a visit rather than a placement.

5. A stay or proposed stay of longer than thirty (30) days is a placement or proposed placement, except that a stay of longer duration may be considered a visit if it begins and ends within the period of a child's vacation from school as ascertained from the academic calendar of the school. A visit may not be extended or renewed in a manner which causes or will cause it to exceed thirty (30) days or the school vacation period, as the case may be. If a stay does not from the outset have an express terminal date, or if its duration is not clear from the circumstances, it shall be considered a placement or proposed placement and not a visit.

6. A request for a home study or supervision made by the person or agency which sends or proposes to send a child on a visit and that is pending at the time that the visit is proposed will establish a rebuttable presumption that the intent of the stay or proposed stay is not a visit.

7. A visit as defined in this regulation is not subject to the Interstate Compact on the Placement of Children.

8. Words and phrases used in this regulation have the same meanings as in the Compact, unless the context clearly requires another meaning.

9. This regulation was first adopted as a resolution effective April 26, 1983; was promulgated as a regulation as of April 1999; and is amended by the Compact Administrators, acting jointly and pursuant to Article VII of the Interstate Compact on the Placement of Children, at their annual meeting of April 2002, with such amendments effective after June 27, 2002.

Regulation No. 10

Guardians

Regulation No. 10 ("Guardians"), as first adopted in 1999, is amended to read as follows:

1. Guardian Defined.

As used in the Interstate Compact on the Placement of Children (ICPC) and in this Regulation:

(a) "Guardian" means a public or private agency, organization or institution which holds a valid and effective permanent appointment from a court of competent jurisdiction to have custody and control of a child, to plan for the child, and to do all other things for or on behalf of a child which a parent would have authority and responsibility for doing by virtue of an unrestricted parent-child relationship. An appointment is permanent for the purposes of this paragraph if the appointment would allow the guardianship to endure until the child's age of majority without any court review, subsequent to the appointment, of the care that the guardian provides or the status of other permanency planning which the guardian has a professional obligation to carry out. Guardian also means an individual who is a non-agency guardian as defined in subparagraph (b) hereof.

(b) "Nonagency guardian" means an individual holding a currently valid appointment from a court of competent jurisdiction to have all of the authority and responsibility of a guardian as defined in subparagraph (a) hereof.

2. Prospective Adoptive Parents Not Guardians.

An individual with whom a child is placed as a preliminary to a possible adoption cannot be considered a non-agency guardian of the child, for the purpose of determining applicability of ICPC to the placement, unless the individual would qualify as a lawful recipient of a placement of the child without having to comply with ICPC as provided in Article VIII (a) thereof.

3. Effect of Guardianship on ICPC Placements.

(a) An interstate placement of a child with a nonagency guardian, whose appointment to the guardianship existed prior to consideration of the making of the placement, is not subject to ICPC if the sending agency is the child's parent, stepparent, grandparent, adult brother or sister, or adult uncle or aunt.

(b) An appropriate court of the sending agency's state must continue its jurisdiction over a non-exempt placement until applicability of ICPC to the placement is terminated in accordance with Article V (a) of ICPC.

4. Permanency Status of Guardianship.

(a) A state agency may pursue a guardianship to achieve a permanent placement for a child in the child welfare system, as required by federal or state law. In the case of a child who is already placed in a receiving state in compliance with ICPC, appointment of the placement recipient as guardian by the sending state court is grounds to terminate the applicability of the ICPC when the sending and receiving state compact administrators concur on the termination pursuant to Article V (a). In such an instance, the court which appointed the guardian may continue its jurisdiction if it is maintainable under another applicable law.

(b) If, subsequent to the making of an interstate placement pursuant to ICPC, a court of the receiving state appoints a non-agency guardian for the child, such appointment shall be construed as a request that the sending agency and the receiving state concur in the discontinuance of the application of ICPC to the placement. Upon concurrence of the sending and receiving states, the sending agency and an appropriate court of the sending state shall close the ICPC aspects of the case and the jurisdiction of the sending agency pursuant to Article V (a) of ICPC shall be dismissed.

5. Guardian Appointed by Parent.

If the statutes of a jurisdiction so provide, a parent who is chronically ill or near death may appoint a guardian for his or her children, which guardianship shall take effect on the death or mental incapacitation of the parent. A nonagency guardian so appointed shall be deemed a nonagency guardian as that term is used in Article VIII (a) of ICPC, provided that such

nonagency guardian has all of the powers and responsibilities that a parent would have by virtue of an unrestricted parent-child relationship. A placement with a nonagency guardian as described in this paragraph shall be effective for the purposes of ICPC without court appointment or confirmation unless the statute pursuant to which it is made otherwise provides and if there is compliance with procedures required by the statute. However, the parent must be physically present in the jurisdiction having the statute at the time that he or she makes the appointment or expressly submits to the jurisdiction of the appointing court.

6. Other Definitions of Guardianship Unaffected.

The definitions of "guardian" and "nonagency guardian" contained in this regulation shall not be construed to affect the meaning or applicability of any other definitions of "guardian" or "nonagency guardian" when employed for purposes or to circumstances not having a bearing on placements proposed to be made or made pursuant to ICPC.

7. Words and phrases used in this regulation have the same meanings as in the Compact, unless the context clearly requires another meaning.

8. This regulation was first promulgated in April 1999; it is amended by the Compact Administrators, acting jointly and pursuant to Article VII of the Interstate Compact on the Placement of Children, at their annual meeting of April 2002, with such amendments effective after June 27, 2002.

Regulation No. 11

Responsibility of States to Supervise Children

The following regulation was adopted by the Association of Administrators of the Interstate Compact on the Placement of Children on April 18, 2010 and is declared to be in effect on and after October 1, 2010.

1. Words and phrases used in this regulation have the same meanings as those ascribed to them in the Interstate Compact on the Placement of Children (ICPC). A word or phrase not defined in the ICPC shall have the same meaning ascribed to it in common usage.

2. Definitions:

(a) “Central Compact Office” means the office that receives ICPC placement referrals from sending states and sends ICPC placement referrals to receiving states. In states that have one central compact office that services the entire state, the term “central compact office” has the same meaning as “central state compact office” as described in Regulation 5 of the ICPC. In states in which ICPC placement referrals are sent directly to receiving states and received directly from sending states by more than one county or other regional area within the state, the “central compact office” is the office within each separate county or other region that sends and receives ICPC placement referrals.

(b) “Child Welfare Caseworker” means a person assigned to manage the cases of dependency children who are in the custody or under the supervision of a public child welfare agency.

(c) “Public Child Placing Agency” means any government child welfare agency or child protection agency or a private entity under contract with such an agency, regardless of whether they act on behalf of a state, county, municipality or other governmental unit and which facilitates, causes or is involved in the placement of a child from one state to another.

(d) “Supervision” means monitoring of the child and the child’s living situation by the receiving state after a child has been placed in a receiving state pursuant to an approved placement under Article III(d) of the ICPC or pursuant to a child’s relocation to a receiving state in accordance with Regulation 1 of the ICPC.

3. A receiving state must supervise a child placed pursuant to an approved placement under Article III(d) of the Interstate Compact on the Placement of Children (ICPC) if supervision is requested by the sending state, and;

(a)the sending agency is a public child placing agency, and

(b)the agency that completed the home study for placement of the child in the receiving state is a public child placing agency, and

(c)the child's placement is not in a residential treatment center or a group home.

4. Supervision must begin when the child is placed in the receiving state pursuant to an approved placement under Article III(d) of the ICPC and the receiving state has received a form 100B from the sending state indicating the date of the child's placement. Supervision can and should begin prior to receipt of the form 100B if the receiving state has been informed by other means that the child has been placed pursuant to an approved placement under Article III(d) of the ICPC.

5. (a) Supervision must continue until:

1. the child reaches the age of majority or is legally emancipated; or
2. the child's adoption is finalized; or
3. legal custody of the child is granted to a caregiver or a parent and jurisdiction is terminated by the sending state; or
4. the child no longer resides at the home approved for placement of the child pursuant to Article III(d) of the ICPC; or
5. jurisdiction over the child is terminated by the sending state; or
6. legal guardianship of the child is granted to the child's caregiver in the receiving state; or
7. the sending state requests in writing that supervision be discontinued, and the receiving state concurs.

(b)Supervision of a child in a receiving state may continue, notwithstanding the occurrence of one of the events listed above in 5(a)(1–7), by mutual agreement of the sending and receiving state's central compact offices.

6. Supervision must include face-to-face visits with the child at least once each month and beginning no later than 30 days from the date on which the child is placed, or 30 days from the date on which the receiving state is notified of the child's placement, if notification occurs after placement. A majority of visits must occur in the child's home. Face-to-face visits must be performed by a Child Welfare Caseworker in the receiving state. The purpose of face-to-face visits is to help ensure the on-going safety and well being of the child and to gather relevant information to include in written reports back to the Public Child Placing Agency in the sending state. If significant issues of concern are identified during a face-to-face visit or at any time during a child's placement, the receiving state shall promptly notify the central compact office in the sending state in writing.

7. The Child Welfare Caseworker assigned to supervise a child placed in the receiving state shall complete a written supervision report at least once every ninety (90) days following the date of the receipt of the form 100B by the receiving state's central compact office notifying the receiving state of the child's placement in the receiving state. Completed reports shall be sent to the central compact office in the sending state from the central compact office in the receiving state. At a minimum such reports shall include the following:

(a) Date and location of each face-to-face contact with the child since the last supervision report was completed.

(b) A summary of the child's current circumstances, including a statement regarding the on-going safety and well-being of the child.

(c) If the child is attending school, a summary of the child's academic performance along with copies of any available report cards, education-related evaluations or Individual Education Program (IEP) documents.

(d) A summary of the child's current health status, including mental health, the dates of any health-related appointments that have occurred since the last supervision report was completed, the identity of any health providers seen, and copies of any available health-related evaluations, reports or other pertinent records.

(e) An assessment of the current placement and caretakers (e.g., physical condition of the home, caretaker's commitment to child, current status of caretaker and family, any changes in family composition, health, financial situation, work, legal involvement, social relationships; child care arrangements).

(f) A description of any unmet needs and any recommendations for meeting identified needs.

(g) If applicable, the supervising caseworker's recommendation regarding continuation of the placement, return of legal custody to a parent or parents with whom the child is residing and termination of the sending state's jurisdiction, finalization of adoption by the child's current caretakers or the granting of legal guardianship to the child's current caretakers.

8. (a) The receiving state shall respond to any report of abuse or neglect of a child placed in the receiving state pursuant to an approved placement under Article III(d) of the ICPC and will respond in the same manner as it would to a report of abuse or neglect of any other child residing in the receiving state.

(b) If the receiving state determines that a child must be removed from his or her home in order to be safe, and it is not possible for the child placing agency in the sending state to move the child at the time that the receiving state makes this determination, the receiving state shall place the child in a safe and appropriate setting in the receiving state. The receiving state shall promptly notify the sending state if a child is moved to another home or other substitute care facility.

(c) The receiving state shall notify the central compact office in the sending state of any report of child abuse or neglect of a child placed in the receiving state pursuant to an approved placement under Article III(d) of the ICPC, regardless of whether or not the report is substantiated. Notification of the central compact office in the sending state will occur as soon as possible after such a report is received.

(d) It is the responsibility of the public child placing agency in the sending state to take action to ensure the ongoing safety of a child placed in a receiving state pursuant to an approved placement under Article III(d) of the ICPC, including return of the child to the sending state as soon as possible when return is requested by the receiving state.

(e) Pursuant to Article V of the ICPC, it is the responsibility of the public child placing agency in the sending state to take timely action to relieve the receiving state of any financial burden the receiving state has incurred as a result of placing a child into substitute care after removing the child from an unsafe home in which the child was previously placed by the public child placing agency in the sending state pursuant to Article III(d) of the ICPC.

9. (a) The child placing agency in the sending state is responsible for case planning for any child placed in a receiving state by the child placing agency in the sending state pursuant to an approved placement under Article III(d) of the ICPC.

(b) The child placing agency in the sending state is responsible for the ongoing safety and well-being of any child placed in a receiving state by the child placing agency in the sending state pursuant to an approved placement under Article III(d) of the ICPC and is responsible for meeting any identified needs of the child that are not being met by other available means.

(c) The receiving state shall be responsible to assist the sending state in locating appropriate resources for the child and/or the placement resource.

(d) The receiving state shall notify the central compact office in the sending state in writing of any unmet needs of a child placed in the receiving state pursuant to an approved placement under Article III(d) of the ICPC.

(e) If the child's needs continue to be unmet after the notification described in (d) above has occurred, the receiving state may require the child placing agency in the sending state to return the child to the sending state. Before requiring the return of the child to the sending state, the receiving state shall take into consideration the negative impact on the child that may result from being removed from his or her home in the receiving state and shall weigh the potential for such negative impact against the potential benefits to the child of being returned to the sending state. Notwithstanding the requirement to consider the potential for such negative impact, the receiving state has sole discretion in determining whether or not to require return of a child to the sending state.

Regulation No. 12

Private/Independent Adoptions

The following regulation, as adopted by the Association of Administrators of the Interstate Compact on the Placement of Children, is declared to be in effect on and after October 1, 2012. Words and phrases used in this regulation have the same meanings as in the Compact, unless the context clearly requires another meaning. If a court or other competent authority invokes the Compact, the court or other competent authority is obligated to comply with Article V (Retention of Jurisdiction) of the Compact.

1. Definitions:

(a) "Adoption" is the method provided by state law that establishes the legal relationship of parent and child between persons who are not so related by birth or some other legal determination, with the same mutual rights and obligations that exist between children and their birth parents. This relationship can only be termed "adoption" after the legal process for adoption finalization is complete.

(b) "Adoption Home Study" is a home study conducted for the purpose of placing a child for adoption with a placement resource. The adoption home study is the assessment and evaluation of a potential adoptive parent.

(c) "Adoption Facilitator" is an individual that is not licensed or approved by a state as an adoption agency, child-placing agency, or attorney, and who is engaged in the matching of birth parents with adoptive parents.

(d) "Independent Adoption" is an adoption arranged by a birth parent or other person or entity as designated, defined, and authorized by the laws of the applicable state or states, to take custody of and to place children for adoption.

(e) "Independent Adoption Entity" is any individual or entity authorized by the law of the applicable state or states to take custody of and to place children for adoption and to place children for adoption other than a state, county, or licensed private agency.

(f) "Intermediary" is any person or entity who is not an Independent Adoption Entity as defined above, but who acts for or between any parent and any prospective parent, or acts on behalf of either, in connection with the placement of the parent's child born in one state, for adoption by a prospective parent in a different state.

(g) "Legal Risk Placement" means a placement made preliminary to an adoption where the prospective adoptive parents acknowledge in writing that a child can be ordered returned to the sending state or the birth mother's state of residence, if different from the sending state, and a final decree of adoption shall not be entered in any jurisdiction until all required consents or termination of parental rights are obtained or are dispensed with in accordance with applicable law.

(h) "Legal Risk Medical Statement" is an acknowledgment by the prospective adoptive parents that known physical, emotional, or other relevant history of the child has been disclosed.

(i) "Private Agency" is a licensed or state approved agency whether domestic or international that has been given legal authority to place a child for adoption.

(j) "Private Agency Adoption" is an adoption arranged by a licensed or approved agency whether domestic or international that has been given legal custody or responsibility for the child including the right to place the child for adoption.

2. Intent of Regulation No. 12: The intent of this regulation is to provide guidance and ICPC requirements for the processing of private agency or independent adoptions. The ICPC process exists to ensure protection and services to children and families involved in executing adoptions across state lines and to ensure that the placement is in compliance with all applicable requirements. It is further the intent of Regulation No. 12 for the sending agency to comply with each and every requirement set forth in Article III of the ICPC that governs the placement of children therein.

3. Application of Regulation No. 12: This regulation applies to children being placed for private adoption or independent adoption whether being placed by a private agency or by an Independent Adoption Entity, as defined herein, or with the assistance of an Intermediary, as defined herein, and as in compliance with the other articles and regulations.

4. Conditions for placement as stated in ICPC Article III: Prior to sending, bringing, or causing any child to be sent or brought into a receiving state for placement in foster care or as a preliminary to a possible adoption, the sending agency shall furnish the appropriate public authorities in the receiving state written notice of the intention to send, bring, or place the child in the receiving state. The notice shall contain:

(a) The name, date, and place of birth of the child.

(b) The identity and address or addresses of the parents or legal guardian. If the identity or address of a birth parent and/or legal parent is not provided, an explanation as to why it has not been provided shall be included to the extent that it is consistent with the laws of the applicable state.

(c) The name and address of the person, agency, or institution to or with which the sending agency proposes to send, bring, or place the child.

(d) A full statement of the reasons for such proposed action and evidence of the authority pursuant to which the placement is proposed to be made.

Compliance with this requirement may be met by submission of the documentation required under Section 6 below.

5. Legal and financial responsibility during placement: For placement of a child by a private agency for independent adoption, the private agency shall be:

(a) Legally responsible for the child, including return of the child to the sending state if the adoption does not occur during the period of placement.

(b) Financially responsible for the child absent a contractual agreement to the contrary or a statement by the prospective adoptive parent or parents that they will assume financial responsibility.

6. Sending agency or party case documentation required with ICPC-100A private agency/independent adoption request:

(a) For placement by a private agency or independent entity, the required content to accompany a request packet for approval shall include all of the following:

(1) ICPC-100A: Form requesting ICPC approval to make placement;

(2) Cover letter: A request for approval signed by the person requesting approval identifying the child, birth parent(s), the prospective adoptive parent(s), a statement as to how the match was made, name of the intermediary, if any, and the name of the supervising agency and address;

(3) Consent or relinquishment: signed by the parents in accordance with the law of the sending state, and, if requested by the receiving state, in accordance with the laws of the receiving state. If a parent is permitted and elects to follow the laws of a state other than his or her state of residence, then he or she should specifically waive, in writing, the laws of his or her state of residence and acknowledge that he or she has a right to sign a consent under the law of his or her state of residence. The packet shall contain a statement detailing how the rights of all parents shall be legally addressed;

(4) Certification by a licensed attorney or authorized agent of a private adoption agency or independent entity that the consent or relinquishment is in compliance with the applicable laws of the sending state, or where requested, the laws of the receiving state;

(5) Verification of compliance with Indian Child Welfare Act (25 U.S.C. 1901, et. seq.);

(6) Legal risk acknowledgement signed by the prospective adoptive parents, if applicable in either the sending or receiving state;

(7) Statement of authority: A copy of the current court order pursuant to which the sending agency has authority to place the child or, if the authority does not derive from a court order, a statement of the basis on which the sending agency has authority to place the child and documentation that supervision is on-going;

(8) Current case history for the child, including custodial and social history, chronology of court involvement, social dynamics, education information (if applicable), and a description of any special needs of the child. If an infant, at a minimum, a copy of the medical records of the birth and hospital discharge summary for the child, if the child has been discharged;

(9) Foster home license: If the receiving state placement resource previously lived in the sending state and that state has required licensure, certification, or approval, a copy of the most recent license, certificate, or approval of the qualification of the placement resource(s) and/or their home showing the status of the placement resource as a qualified placement resource, if available. If the receiving state placement resource was previously licensed, certified, or approved as a foster or adoptive parent in the sending state and such license, certificate, or approval was involuntarily revoked, a statement of when such revocation occurred and the reasons for such revocation;

(10) Adoptive home study or approval: A copy of the most recent adoption home study or approval of the prospective adoptive family must be provided, including, in accordance with the law of the receiving state, verification of compliance with federal and state background clearances, including FBI fingerprint and Child Abuse/Neglect clearances and Sex Offender Registry clearance, a copy of any court order approving the adoptive home (if entered), and a statement by the person or entity that the home is approved or a revised current home study update if the home study is more than 12 months old;

(11) A copy of the Order of Appointment of Legal Guardian, if applicable;

(12) Affidavit of Expenses, if applicable; and

(13) Copy of sending agency's license or certification, if applicable;

(14) Biological parents' information—social history, medical history, ethnic background, reasons for adoption plan, and circumstances of proposed placement. If the child was previously adopted, the adoptive parents shall provide the information set forth in this section for the biological parents, if available;

(15) A written statement from the person or entity that will be providing post-placement supervision (may be included in adoption home study) acknowledging the obligation to provide post-placement supervision; and

(16) Authority for the prospective adoptive parents to provide medical care, if applicable.

(b) If a home study is completed by a licensed private agency in the receiving state, the sending state shall not impose any additional requirements to complete the home study that are not required by the receiving state unless the adoption is finalized in the sending state.

7. Authorization to travel: Additional documents may be requested

(a) Except as set forth herein, the child shall not be sent, brought, or caused to be sent or brought into the receiving state until the appropriate public authorities in the receiving state shall notify the sending agency, in writing, to the effect that the proposed placement does not appear to be contrary to the interests of the child. Art. III(d).

(b) The sending and receiving state ICPC office may request additional information or documents prior to finalization of an approved placement. Travel by the prospective adoptive parents into the receiving state with the child shall not occur until the required content of the request packet for approval has been submitted, received and reviewed by the sending and receiving ICPC offices and approval to travel has been given, provided, however, a receiving state may, at its sole discretion, approve travel while awaiting provision of additional documentation requested.

8. Approval by the receiving state ICPC office: A provisional or final approval for placement must be obtained in writing from the receiving state ICPC office in accordance with the Interstate Compact on the Placement of Children. A signed Form 100A must be provided by the receiving state if the writing was in any other form. In any event, approval or denial must be given within three (3) business days of the receipt of the completed packet by the receiving state Compact Administrator.

9. Upon placement of a child by the sending agency following approval by the receiving state Compact Administrator, the sending agency shall, within five (5) business days of placement of the child, submit a completed 100B form confirming placement to the sending state Compact Administrator. Upon finalization of the adoption, if the sending agency is a private adoption agency, the private adoption agency shall provide to the sending state Compact Administrator a copy of the final judgment of adoption together with a 100B form for closure, which shall then be sent to the receiving state Compact Administrator within thirty (30) business days of entry of judgment. Upon finalization of an independent adoption, the sending agency or entity shall provide a copy of the final judgment of adoption together with a 100B form for closure within thirty (30) business days of entry of judgment to the sending state Compact Administrator who shall then send it to the receiving state Compact Administrator.

10. Notification if child placed in violation of Article III: A child placed into the receiving state prior to a decision for placement constitutes a violation of Article III and the laws respecting the placement of children of both states; subject to liability cited in Article IV. Penalty for Illegal Placement. All parties to the placement arrangements, including prospective resource parents, the sending agency, private licensed child-placing agency or legal counsel are responsible for notifying the appropriate ICPC authorities in both states of the circumstances and to coordinate action to provide for the safety and well-being of the child pending further action. If a child has been placed in the receiving state in violation of Article III, a Form 100B indicating the date the child was placed in the prospective adoptive home, together with items listed in Section 6 above, shall then be filed with the sending state Compact Administrator who shall forward them to the receiving state's Compact Administrator. If all required documents are provided, the sending state and the receiving state shall give due and appropriate consideration to placement as permitted under the sending and receiving state laws.

11. This regulation is adopted pursuant to Article VII of the Interstate Compact on the Placement of Children by action of the Association of Administrators of the Interstate Compact on the Placement of Children at its annual meeting May 4 through 7, 2012; such adoption was approved on May 6, 2012 and is effective as of October 1, 2012.

42 U.S.C.A. § 12131

§ 12131. Definitions

Currentness

As used in this subchapter:

(1) Public entity

The term "public entity" means--

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 24102(4) of Title 49).

(2) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

CREDIT(S)

(Pub.L. 101-336, Title II, § 201, July 26, 1990, 104 Stat. 337.)

EXECUTIVE ORDERS

EXECUTIVE ORDER NO. 13217

<June 18, 2001, 66 F.R. 33155>

Community-Based Alternatives for Individuals with Disabilities

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to place qualified individuals with disabilities in community settings whenever appropriate, it is hereby ordered as follows:

Section 1. Policy. This order is issued consistent with the following findings and principles:

(a) The United States is committed to community-based alternatives for individuals with disabilities and recognizes that such services advance the best interests of Americans.

(b) The United States seeks to ensure that America's community-based programs effectively foster independence and participation in the community for Americans with disabilities.

(c) Unjustified isolation or segregation of qualified individuals with disabilities through institutionalization is a form of disability-based discrimination prohibited by Title II of the Americans With Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 et seq. States must avoid disability-based discrimination unless doing so would fundamentally alter the nature of the service, program, or activity provided by the State.

(d) In Olmstead v. L.C., 527 U.S. 581 (1999) (the "Olmstead decision"), the Supreme Court construed Title II of the ADA to require States to place qualified individuals with mental disabilities in community settings, rather than in institutions, whenever treatment professionals determine that such placement is appropriate, the affected persons do not oppose such placement, and the State can reasonably accommodate the placement, taking into account the resources available to the State and the needs of others with disabilities.

(e) The Federal Government must assist States and localities to implement swiftly the Olmstead decision, so as to help ensure that all Americans have the opportunity to live close to their families and friends, to live more independently, to engage in productive employment, and to participate in community life.

Sec. 2. Swift Implementation of the Olmstead Decision: Agency Responsibilities. (a) The Attorney General, the Secretaries of Health and Human Services, Education, Labor, and Housing and Urban Development, and the Commissioner of the Social Security Administration shall work cooperatively to ensure that the Olmstead decision is implemented in a timely manner. Specifically, the designated agencies should work with States to

help them assess their compliance with the Olmstead decision and the ADA in providing services to qualified individuals with disabilities in community-based settings, as long as such services are appropriate to the needs of those individuals. These agencies should provide technical guidance and work cooperatively with States to achieve the goals of Title II of the ADA [42 U.S.C.A. § 12101 et seq.], particularly where States have chosen to develop comprehensive, effectively working plans to provide services to qualified individuals with disabilities in the most integrated settings. These agencies should also ensure that existing Federal resources are used in the most effective manner to support the goals of the ADA. The Secretary of Health and Human Services shall take the lead in coordinating these efforts.

(b) The Attorney General, the Secretaries of Health and Human Services, Education, Labor, and Housing and Urban Development, and the Commissioner of the Social Security Administration shall evaluate the policies, programs, statutes, and regulations of their respective agencies to determine whether any should be revised or modified to improve the availability of community-based services for qualified individuals with disabilities. The review shall focus on identifying affected populations, improving the flow of information about supports in the community, and removing barriers that impede opportunities for community placement. The review should ensure the involvement of consumers, advocacy organizations, providers, and relevant agency representatives. Each agency head should report to the President, through the Secretary of Health and Human Services, with the results of their evaluation within 120 days.

(c) The Attorney General and the Secretary of Health and Human Services shall fully enforce Title II of the ADA, including investigating and resolving complaints filed on behalf of individuals who allege that they have been the victims of unjustified institutionalization. Whenever possible, the Department of Justice and the Department of Health and Human Services should work cooperatively with States to resolve these complaints, and should use alternative dispute resolution to bring these complaints to a quick and constructive resolution.

(d) The agency actions directed by this order shall be done consistent with this Administration's budget.

Sec. 3. Judicial Review. Nothing in this order shall affect any otherwise available judicial review of agency action. This order is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

GEORGE W. BUSH

Notes of Decisions (129)

42 U.S.C.A. § 12131, 42 USCA § 12131
Current through P.L.118-7. Some statute sections may be more current, see credits for details.

End of Document

KeyCite Yellow Flag - Negative Treatment
Unconstitutional or PreemptedLimited on Constitutional Grounds by Reickenbacker v. Foster, 5th Cir.(La.), Dec. 03, 2001

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 126. Equal Opportunity for Individuals with Disabilities (Refs & Annos)
Subchapter II. Public Services (Refs & Annos)
Part A. Prohibition Against Discrimination and Other Generally Applicable Provisions

42 U.S.C.A. § 12132

§ 12132. Discrimination

Currentness

Subject to the provisions of this subchapter, 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.

CREDIT(S)

(Pub.L. 101-336, Title II, § 202, July 26, 1990, 104 Stat. 337.)

Notes of Decisions (1189)

42 U.S.C.A. § 12132, 42 USCA § 12132
Current through P.L.118-7. Some statute sections may be more current, see credits for details.

End of Document

42 U.S.C.A. § 12133

§ 12133. Enforcement

Currentness

The remedies, procedures, and rights set forth in section 794a of Title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

CREDIT(S)

(Pub.L. 101-336, Title II, § 203, July 26, 1990, 104 Stat. 337.)

Notes of Decisions (856)

42 U.S.C.A. § 12133, 42 USCA § 12133
Current through P.L.118-7. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 126. Equal Opportunity for Individuals with Disabilities (Refs & Annos)
Subchapter II. Public Services (Refs & Annos)
Part A. Prohibition Against Discrimination and Other Generally Applicable Provisions

42 U.S.C.A. § 12134

§ 12134. Regulations

Currentness

(a) In general

Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this part. Such regulations shall not include any matter within the scope of the authority of the Secretary of Transportation under section 12143, 12149, or 12164 of this title.

(b) Relationship to other regulations

Except for "program accessibility, existing facilities", and "communications", regulations under subsection (a) shall be consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 794 of Title 29. With respect to "program accessibility, existing facilities", and "communications", such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under section 794 of Title 29.

(c) Standards

Regulations under subsection (a) shall include standards applicable to facilities and vehicles covered by this part, other than facilities, stations, rail passenger cars, and vehicles covered by part B. Such standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204(a) of this title.

CREDIT(S)

(Pub.L. 101-336, Title II, § 204, July 26, 1990, 104 Stat. 337.)

Notes of Decisions (33)

42 U.S.C.A. § 12134, 42 USCA § 12134
Current through P.L.118-7. Some statute sections may be more current, see credits for details.

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Unaccommodated: How the ADA Fails Parents

Sarah H. Lorr

Unaccommodated: How the ADA Fails Parents

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In 1990, Congress passed the Americans with Disabilities Act (ADA) to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." Thirty years after this landmark law, discrimination and ingrained prejudices against individuals with intellectual disabilities—especially poor Black and brown parents with disabilities—continue. This ongoing discrimination is on stark display in family courts across the country, with devastating consequences for parents with intellectual disabilities and their families. Children who have parents with intellectual disabilities are eighty percent more likely to be removed from their homes and placed in foster care than other children, and, once in care, courts are three times as likely to permanently sever the parent-child relationship. Although technical assistance from the U.S. Departments of Justice and Health and Human Services in 2015 offered some hope of redress for these families, the disparities have not dissipated.

This Article makes a novel contribution to the literature by presenting a study of the treatment of ADA claims in both family and federal courts since the promulgation of the new technical assistance in 2015. It demonstrates that, despite promising federal intervention, both family and federal courts still fail to vindicate the rights of parents with disabilities, by sidestepping responsibility for parents' claims under the ADA. If family courts apply the ADA at all, they tend to offer a diluted application of the statute. Often, they disavow the applicability of the ADA to the family court proceedings or direct parents to federal courts or other ill-suited venues for relief. Families fair no better in federal courts, which often find that the ADA claims have already been decided in family court, sometimes even after the family court has specifically refused to consider an ADA-based claim. Placing these state and federal decisions side-by-side lays bare how ostensibly neutral principles of federalism have the effect of preventing any forum from applying federal anti-discrimination law to parents with disabilities, harming these parents in the family regulation system. This transforms the ADA into an empty vessel for parents with intellectual disabilities.

For the ADA to fulfill its promise, parents with intellectual disabilities must have a viable legal avenue to enforce it. This Article offers concrete avenues to vindicate this promise of the ADA. In federal courts, parents with intellectual disabilities should be able to bring ADA-based claims without running afoul of federal doctrines that prevent review of state court decisions. And, in state courts, advocates and judges should either apply the ADA directly or use the ADA as the benchmark of what services and supports the state must be offer to avoid discriminating against parents with disabilities. More broadly, this Article calls for an intersectional reimagining of the disability rights movement and is the first to apply the concept of DisCrit to family regulation.

INTRODUCTION

Between 2002 and 2006, Connecticut's Department of Children and Families (DCF) removed three children—Kristina, Joseph Jr., and Daniel—from the care of their parents Karin Hasemann and Joseph Watley.[1] DCF removed Kristina immediately after her birth when Karin insisted that Kristina was a boy, was having a heart attack, and should be fed in an "unusual and inappropriate pattern."[2] DCF removed Joseph Jr. and Daniel immediately following their births as well, this time based on a theory of "predictive neglect."[3] Ms.

1. *Watley v. Dept't of Child. & Families*, 991 F.3d 418, 421 (2021) ("*Watley II*") Ms. Hasemann is Kristina's biological mother. Ms. Hasemann and Mr. Watley are the biological parents of Joseph Jr. and Daniel. *Id.*

2. *Id.* at 422 (citing *Watley v. Department of Children and* Families, 2019 WL 7067043, at *3 (D. Conn. Dec. 23, 2019).

3. *Id.* ("Predictive neglect allows a court to terminate a parent's rights if it is 'more likely than not' that the child under their care will be 'denied proper care and attention physically, educationally, emotionally, or morally.'")

Hasemann reported a history of seizures and narcolepsy; she was diagnosed by a court evaluator as having "a schizotypal personality disorder," attention deficit disorder, and other disabilities.[4] Ultimately, the court terminated Ms. Hasemann and Mr. Watley's rights to all three children.

Throughout their appearance in state court, Ms. Hasemann and Mr. Watley attempted to raise discrimination and reasonable accommodation claims under the Americans with Disabilities Act of 1990 (ADA). The Connecticut court admonished the Watley-Hasemann family that claims under the ADA must be raised in "a separate lawsuit against the Department of Children and Families for not accommodating your disability with their services."[5] After the final termination of their rights, Ms. Hasemann and Mr. Watley followed the instructions of the Connecticut court and filed a claim of discrimination in the United States District Court for the District of Connecticut. The district court recognized the "profoundly serious nature of the harm" alleged by the Watley-Hasemann family and "the role and responsibility of the federal district court in ensuring access to a federal trial proceeding for persons whose federal rights have been violated by state officials."[6] Nonetheless, the district court ruled that

4. *In re. Joseph W., Jr.,* 79 A.3d 155, 170 (Conn. Super. Ct. Mar. 11, 2013).

5. Trial Transcript at 19:6-19:11, *In re Joseph J. W., Jr. and Daniel J. W.*, Nos. L15-CP05-008 039-A, L15-CP06-008 191-A (Conn. Super. Ct. Dec. 3, 2012).

6. *Watley*, 2019 WL 7067043, at *2 (D. Conn. Dec. 23, 2019).

proceeding under the ADA in federal court was not an option for the parents because the state court had already decided the issues presented in this case.[7]

The predicament faced by the Watley-Hasemann family is not unique. Despite Congress's intention that the ADA "eliminat[e]" discrimination against individuals with disabilities,[8] parents enmeshed in family court proceedings across the country have found scant recourse for disability-based discrimination. Discrimination against parents with disabilities is at its zenith in cases involving parents with intellectual disability (ID).[9] Parents with ID are more than three times as likely to have their parental rights terminated than parents without a disability[10] and their children are removed at rates as much as 80 percent higher

7. *Id.* ("I conclude that the amended complaint must be dismissed.. . . . The primary obstacle to adjudication of the claims in the amended complaint is . . . that federal district courts lack subject matter jurisdiction to review state court judgments.")

8. 42 U.S.C. § 12101[b][1].

9. Parents with any disability face disproportionately higher hurdles within the family system, but the extent to which discrimination of people with intellectual disabilities is implicitly accepted by court systems, lawyers, and broader society makes their treatment in the system an area of particular importance. *See* Robyn M. Powell, *Safeguarding the Rights of Parents in Child Welfare Cases: The Convergence of Social Science and Law*, 20 CUNY L. Rev. 127, 141 (2016) ("[C]hild welfare policies, practices, and adjudications are based—implicitly and at times, explicitly—on the postulation that parents with intellectual disabilit[y] are inherently unfit because of their disability.")

10. S. Singh et al., *Parental Disability and Termination of Parental Rights in Child Welfare*, Minn-Link Br. No. 12 (2012), http://www.cehd.umn.edu/ssw/cascw/research/minnlink/minnlinkpublications.asp [https://perma.cc/G64C-737L].

than are children of non-disabled parents.[11] The rights-based model[12] of disability has failed to penetrate family court, leaving parents with disabilities simultaneously more likely to be separated from their children and less likely to receive meaningful support to reunify with their families once they are involved in the family regulation system. [13]

The failure to provide a legal pathway for parents with disabilities to protect themselves and their children is part of the family regulation system's long history of removing children from parents deemed "undesirable." Removals have long been undertaken under the guise of "protecting" children from the

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11. Nat'l Council on Disability, *Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children* 15 (Sept. 27, 2015) (hereinafter "Rocking the Cradle"), https://www.ncd.gov/sites/default/files/Documents/NCD_Parenting_508_0.pdf [https://perma.cc/8GBM-5B94]

12. For discussion of the rights-based model and its shortcomings see Mark Tushnet*, The Critique of Rights*, 47 SMU L. Rev. 23 (1994); Mark Tushnet, *An Essay on Rights*, 62 Tex. L. Rev. 1363 (1984); Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 Tex. L. Rev. 1563 (1983-84).

13. In line with leading scholars in the field, this Article uses the term "family regulation system" to describe what is often described as the "child welfare system." *See* Dorothy Roberts, *Abolishing Policing Also Means Abolishing Family Regulation*, The Imprint, https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480 [https://perma.cc/C77K-PHY9] (describing "the misnamed 'child welfare system'" as "more accurately referred to as the "family regulation system."); Emma Williams*, 'Family Regulation,' Not 'Child Welfare': Abolition Starts with Changing our Language*, The Imprint, *https://imprintnews.org/opinion/family-regulation-not-child-welfare-abolition-starts-changing-language/45586* [https://perma.cc/Y7XY-XA8M].

families and communities that love and care for them. Frequently courts remove children and place them into institutional and private foster homes in the name of "safety," but history reveals that child removal often derives from different, darker goals.[14] For parents with ID, caseworkers' desire to "save" children has combined with society's deep distrust of, and discomfort with, disabled people to create the outcome we have today.[15]

For nearly twenty-five years after the passage of the ADA, most family courts found that the law did not apply to, and could not be raised in, family court proceedings.[16] In 2015, the U.S. Departments of Justice (DOJ) and Health and

14. *See, e.g.*, Laura Briggs, *Taking Children: A History of American Terror* (U. California Press 2020) (documenting the history of parent-child separation through U.S. history and tendency to invoke "child protection" as a means of social control targeting poor families of color); Dorothy Roberts, *Shattered Bonds: The Color of Child Welfare* (Basic *Civitas* Books 2002) (rigorously documenting the disproportionate representation of Black children in the family regulation system and the extent to which it has reinforced racial inequality).

15. Amanda Morris, *'You Just Feel Like Nothing': California to Pay Sterilization Victims*, N.Y. Times (Jul. 11, 2021), https://www.nytimes.com/2021/07/11/us/california-reparations-eugenics.html [https://perma.cc/G6E9-32NM] (describing history of eugenics and forced sterilization involving people with disabilities, people living in poverty as well as Black, Latino, Asian American or Native American people); Jasmine E. Harris, *Why* Buck v. Bell *Still Matters*, Bill of Health (Oct. 14, 2020), https://blog.petrieflom.law.harvard.edu/2020/10/14/why-buck-v-bell-still-matters/ [https://perma.cc/G6E9-32NM]; Adam Cohen, *Imbeciles: The Supreme Court, Eugenics, and the Sterilization of Carrie Buck* (2016).

16. *See*, *e.g.*, *In re Antony B.,* 735 A.2d 893, 899 (Conn. App. Ct. 1999); *In re B.S.*, 693 A.2d 716, 720-22 (Vt. 1997); *In re Torrance P.*, 522 N. W.2d 243, 245-46 (Wis.App. 1994); *In re Doe*, 60 P.3d 285, 290 (Haw. 2002).

Human Services (HHS) jointly issued technical assistance (TA) acknowledging ongoing discrimination against parents with disabilities within the family regulation system.[17] The guidance followed an investigation spurred by a specific complaint and recognized the the continued disproportionate separation of parents with disabilities from their children.[18] The resulting TA is clear, specific, and unequivocal: the ADA applies to the programs, services, and activities conducted by state family regulation agencies and proceedings in family court.[19] HHS has since entered voluntary agreements with Oregon and Washington following complaints that their family regulation agencies were removing children from parents with ID based on stereotypes and discriminatory assumptions about their ability to parent.[20]

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17. *See* U.S. Dep't of Health and Human Servs. & Dep't of Justice, *Protecting the Rights of Parents and Prospective Parents with Disabilities: Technical Assistance for State and Local Welfare Agencies and Courts under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act* (hereinafter "Technical Assistance") (August 10, 2015), at 9, https://www.hhs.gov/sites/default/files/disability.pdf [https://perma.cc/RW7V-CMAK].

18. *Id.* at 2.

19. *See id.* at 9.

20. Https://www.hhs.gov/about/news/2019/12/04/hhs-ocr-secures-voluntary-resolution-and-ensures-child-welfare-programs-in-the-odhs-protect-parents-with-disabilities-from-discrimination.html [https://perma.cc/735H-MQ4B]; https://www.justice.gov/usao-edwa/pr/department-justice-doj-and-washington-department-children-youth-and-family-services [https://perma.cc/74QH-KV8G]. In November 2020, HHS released technical assistance for the state of New Jersey, https://www.hhs.gov/about/news/2020/11/13/hhs-ocr-provides-technical-assistance-ensure-new-jersey-department-children-families-protect-parents-disabilities-from-discrimination.html

Nonetheless, disproportionate family separation continues, and many family courts across the country still refuse to consider meaningfully claims of discrimination under the ADA.[21] Caught in a catch-22, parents then face decisions by federal district courts refusing to hear family regulation-based ADA claims on the basis that they have already been litigated in family court, that statutes of limitations have been exhausted, and that other—largely procedural—bars preclude relief.[22] In practice, the application of a significantly diluted version of the ADA in family court and the bars on litigation in federal court mean that parents cannot rely on the ADA to seek protection from discrimination or as a means of preventing the agency from using their disability against them in removing their children.

There is a significant body of existing scholarship that challenges and critiques the constitutionality of termination of parental rights statutes based on a parent's diagnosis with intellectual or cognitive disabilities. This scholarship largely focuses on the statutes of states that allow courts to find a parent unfit

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[https://perma.cc/9WV4-7WBL], and a voluntary agreement with Massachusetts followed the 2015 investigation. *See* https://www.hhs.gov/about/news/2020/11/19/hhs-office-civil-rights-reaches-landmark-agreement-massachusetts-department-children-and-families.html [https://perma.cc/4WS8-8JYD].

21. *See, e.g.*, *In re Lacee L.*, 114 N.E.3d 123, 129-30 (N.Y. 2018); *In re Elijah C.*, 165 A.3d 1149, 1164-65 (Conn. 2017).

22. *See, e.g.*,, *Watley*, 2019 WL 7067043.

because of their disability.[23] Likewise, there have been substantial scholarly efforts to encourage more meaningful use of the ADA in family court proceedings. In particular, Professors Joshua B. Kay, Charissa Smith, and Robyn Powell have each assessed and explored the power and potential of the ADA in family court proceeding, generating ideas for use of the ADA and elevating the ADA as a tool for the meaningful generation of rights in family court. [24] Laying critical ground for this Article, Professor Kay has explored the growing use of the ADA in family court proceedings, identifying variations in application of the statute in family courts across the country, the use of the ADA as a defense in certain proceedings, and recent advances in state decisions and statutes.[25]

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23. *See, e.g.,* Charisa Smith, *Finding Solutions to the Termination of Parental Rights in Parents with Mental Challenges*, 39 Law & Psychol. Rev. 205 (2014); Alexis C. Collentine, *Respecting Intellectually Disabled Parents: A Call for Change in State Termination of Parental Rights Statutes*, 34 Hofstra L. Rev. 535 (2005); *see also* Rocking the Cradle, *supra* note 11, at 16.

24. *See, e.g.*, Joshua B. Kay, *The Americans with Disabilities Act: Legal and Practical Applications in Child Protection Proceedings*, 46 Cap. U. L. Rev. 783 (2018); Powell, *supra* note 9; Charisa Smith, *Making Good on Historic Federal Precedent: Americans with Disabilities Act (ADA) Claims and The Termination of Parental Rights of Parents with Disabilities*, 18 Quinnipiac Health Law 191 (2015) (hereinafter "Making Good on Historic Federal Precedent"); *see also* Dale Margolin Cecka, *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 (2007); Chris Watkins, *Beyond Status: The Americans With Disabilities Act and the Parental Rights of People Labeled Developmentally Disabled or Mentally Retarded*, 83 CAL. L. REV. 1415, 1418 (1995).

25. Kay, *supra* note 24, at 806-814.

This Article demonstrates that although the recent Federal TA usefully spotlights the specific needs of marginalized families, neither state nor federal court offers a venue for litigating claims under the ADA, and, as such, the ADA remains an ineffective tool to preserve and protect the rights of parents with ID. Diverging from prior articles in this field, this Article examines the application of the ADA in family and federal courts in light of the issuance of the DOJ/HHS TA. A close study of both family and federal court decisions since the 2015 TA reveals that both venues remain largely hostile to claims of disability discrimination from parents with ID. A growing number of family courts now acknowledge that the ADA technically applies to family regulation proceedings, and to the services provided by family regulation agencies. Still, the majority continue to hold that family court itself is not the proper venue to bring ADA-based claims or have determined that the ADA does not substantively change state agency burdens under relevant state law. And federal courts find that the substance of ADA claims have already been decided in state court, sometimes even after a family court has explicitly refused to consider an ADA-based claim.

After documenting this problem, this Article offers concrete avenues to vindicate the ADA in family and federal courts. Analyzing federal doctrine, this Article argues that federal courts can hear ADA-based claims without running afoul of federal doctrines that prevent review of state court decisions. Opinions to the contrary have resulted from misunderstandings of the legal meaning of certain family court findings and the reality of how services are provided in family court. In federal courts, judges and the advocates appearing before them must educate themselves about how the family regulation system operates. A

correct understanding of the workings of family court will create a pathway for federal courts to hear ADA claims based on discrimination occurring in the family regulation system. Intentional and strategic litigation in state courts will also advance the rights of parents with ID. Advocates should strive to replicate legal standards that directly apply the ADA to family court cases. Where the ADA is not directly applied, advocates should urge the duplication of family court decisions that effectively use the ADA as a benchmark for what services and supports must be offered to avoid discrimination against parents with disabilities.[26]

More broadly, this Article calls for an intersectional reimagining of approaches to disability rights in family court. One necessary response to the failure of the ADA to reach family courts is to look beyond the rights-based model of disability to the more expansive frameworks of disability justice and Dis/ability Critical Race Studies (DisCrit).[27] While scholars have explored the application of DisCrit and Disability Justice to immigration, criminal law, and

26. *See, e.g., In re Hicks/Brown*, 893 N.W.2d 637 (Mich. 2017); *In re Xavier Blade Lee Billy Joe S.*, 187 A.D.3d 659 (N.Y. App. Div. 2020).

27. Also called DisCrit, Dis/ability Critical Race Studies is a theory developed around the intersection of race and disability in education. *See generally DisCrit—Disability Studies and Critical Race Theory in Education*, 9 (David J. Connor, Beth A. Ferri, & Subini A. Annamma eds.) (New York: Teachers College Press, 2016) (hereinafter DisCrit).

other areas,[28] none have applied DisCrit to family regulation.[29] Given the stunning lack of opportunity for parents with ID to protect themselves from discrimination, the need to reimagine how our legal system will protect the rights of parents with disabilities is clear.

Part I of this Article describes the history of discrimination against parents with ID—and in particular those of color—alongside the battery of other challenges facing these parents in the family regulation system. Part II addresses the two primary federal regimes that shape the treatment of parents with disabilities in the family regulation system and introduces the Disability Justice movement, as well as the theoretical frame of DisCrit. Part III closely examines

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28. Natalie M. Chin, *ADA @ 30 — Dismantling the Master's House* (Aug. 24, 2020), https://medium.com/@professornmchin/ada-30-dismantling-the-masters-house-48e6cb1acdd1 [https://perma.cc/H65L-BD48] (critiquing the "porousness in access to the promises of the ADA for disabled people who live at the intersection of marginalized identities" and arguing that "Disability rights and racial justice must stand together in cross-movement solidarity to dismantle the master's house); Katherine Perez, *A Critical Race and Disability Legal Studies Approach to Immigration Law and Policy* (Feb. 2, 2019), https://www.uclalawreview.org/a-critical-race-and-disability-legal-studies-approach-to-immigration-law-and-policy/#_ftnref28 [https://perma.cc/W3PH-Q5X5]; Rabia Belt & Doron Dorfman, *Reweighing Medical Civil Rights* [https://perma.cc/2LZL-7CDY]; Jamelia N.https://perma.cc/2LZL-7CDY Morgan, *Reflections on Representing Incarcerated People with Disabilities: Ableism in Prison Reform Litigation*, 96 Denv. L. Rev. 973, 986 (2018).

29. In *Achieving Justice For Disabled Parents and Their Children: An Abolitionist Approach*, 33 Yale J. of Law and Feminism __ (2022), Robyn M. Powell applies an abolitionist approach to the family regulation system, using the lens of disability justice. Professor Powell offers a six-pronged agenda for advancing justice for parents with disabilities and their families. *Id.*

litigation in family and federal courts since the issuance of the 2015 DOJ/HHS TA, demonstrating that state and federal courts largely prevent parents with disabilities from using the ADA to vindicate their right to be free from discrimination and to seek accommodations. Part IV advances concrete avenues of advocacy in federal and state court. Part V suggests that even with the use of these litigation strategies, service providers, scholars and our society at large, must reimagine the family regulation system. Scholars, courts, parents, and advocates should adopt a DisCrit lens to disrupt and reconfigure the ordinary practice of the family regulation system and its treatment of parents with ID.

I.

PARENTS WITH INTELLECTUAL DISABILITIES

A. Notes on Language and Understanding Disability

Within the many and diverse communities of people with disabilities, language and the words that are used to describe people with disabilities make up a vital and ongoing conversation. Indeed, writing about ID inherently requires grappling with complicated—and often disputed—issues of definition.

As a starting point, the American Association on Intellectual and Developmental Disabilities (AAIDD) defines a diagnosis of ID by three criteria:

> (1) Significant intellectual limitations, typically an IQ score at least two standard deviations below the mean.

(2) Significant limitations in adaptive behavior.[30]

(3) Limitations begin before the age of 18.[31]

This definition is not offered as absolute but provides some idea of how the legal, psychiatric, and medical communities understand and define the diverse population of adults who might be identified as adults with ID. There is also a relatively straightforward definition of ID in the Fifth Edition of the Diagnostic and Statistics Manual,[32] and there are numerous other competing definitions provided by legal statutes that relate to public benefits,[33] guardianship laws[34] and other areas.

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30. Adaptive behavior encompasses three areas of "skills": "conceptual skills (*e.g.*, language, writing, reading, money concepts), social skills (*e.g.*, self-esteem, respect of rules, vulnerability), or practical skills (*e.g.*, daily living, vocational, safety)." The American Association on Intellectual and Developmental Disabilities, *Intellectual Disability: Definition, Classification, and Systems of Supports* 3-12, 44 (11th Ed. 2010) (hereinafter AAIDD Manual).

31. *Id.*

32. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 33–36 (5th ed. 2013), https://www.psychiatry.org/psychiatrists/practice/dsm [https://perma.cc/34EN-84A2].

33. *See, e.g.,* Gina A. Livermore, Maura Bardos & Karen Katz, *Supplemental Security Income and Social Security Insurance Beneficiaries with Intellectual Disability,* Office of Retirement and Disability Policy (2017) https://www.ssa.gov/policy/docs/ssb/v77n1/v77n1p17.html [https://perma.cc/5J88-KBR6] (offering extensive definition of ID).

34. *See, e.g.*, N.Y. Surr. Ct. Proc. Act Law § 1750 (McKinney) (defining a person who is intellectually disabled as a person who has been certified by one licensed physician and one licensed

Importantly, the diagnosis-driven understanding of disability, often described as the "medical model" of disability, has been rejected by many people with disabilities and their advocates. Instead, many within the disability community use the "social model" of disability. Whereas the medical model understands and explains disability by whether a person has certain characteristics and carries a specific diagnosis, the social model understands that disability exists within—and often because of—norms defined by broader society.[35]

The social model of disability asserts that disability is not explained by a specific diagnosis but rather as a failure of society to support specific people in specific ways. Under the social model, a person with an ID is understood not by

psychologist or by two licensed physicians at least one of whom is familiar with or has professional knowledge in the care and treatment of persons with an ID).

35. Michael Arehart has observed that under the social model, "disability is redefined as a social construct—a type of multi-faceted societal oppression—and distinguished from the physiological notion of impairment."). *See* Michael Arehart, *When Disability Isn't "Just Right": The Entrenchment of the Medical Model of Disability and the Goldilocks Dilemma*, 83 Indiana L. J. 181, 188 (2008) (defining the social model of disability and noting that "given the expanse of its supporters, no one restatement of the social model will cover every interpretation"); *see also* Shirley Lin, *The Law & Political Economy of Disability Accommodations*, https://lpeproject.org/blog/the-law-political-economy-of-disability-accommodations/ [https://perma.cc/4CHL-8APU] ("Under this 'social model,' whether a condition makes someone unable to perform a certain task is largely a matter of how society sets up the task.").

their diagnosis but by society's willingness, ability, or failure to support them.[36] When viewed through a social lens, the focus naturally expands beyond a set of physical, neurological, or physiological deficits and, instead, underscores the "relational, contingent, fluid, and subjective nature" of disability.[37] Notably, the social model does not discount the existence of difference—whether in body, hearing, mind, or otherwise—but shifts the emphasis to the consequences of the impairment and how such consequences are shaped by social and environmental norms.[38] This shift, in turn, can lead more readily to identifying what specific forms of support a person might need to thrive in our society.

In the context of ID, the pitfalls of relying on a medical definition go beyond merely the typical limits of the medical model, in that the broad diversity of who is included by the medical definition is not well expressed by rigid listings from a medical manual. The group is a heterogenous one with members having very different strengths and needs for supports. As the AAIDD has

36. Elizabeth F. Emens, *Framing Disability*, 2012 U. Ill. L. Rev. 1383, 1401 ("Even if one accepts some impairments as inherently undesirable, the social model shifts the focus from whatever physical or mental variation an individual might bear, to the ways that the environment renders that variation disabling.").

37. Jamelia N. Morgan, *Policing Under Disability Law*, 73 Stan. L. Rev. 1401, 1407 (2021) (citing Subini Ancy Annamma, David Connor & Beth Ferri*, Dis/ability Critical Race Studies (DisCrit): Theorizing at the Intersections of Race and Dis/ability*, 16 RACE ETHNICITY & EDUC. 1, 2-3 (2013)).

38. *Id.* at 1408 ("Though the social model of disability recognizes socially constructed categories of difference, it does not reject the obvious existence of corporeal differences among people.") (citation omitted).

explained, while IQ "might be appropriate for a research study in which measured intelligence is a relevant variable," it is not meaningful when assessing how and where a person will best live and learn.[39] This same observation may be applied to parenting skills and the building of family relationship.[40]

The medical model of disability is also fraught because of the extent to which dominant groups have, historically, used diagnosis or the naming of specific "conditions" as a means of pathologizing individuals and justifying societal norms. This extends beyond people with disabilities and has included people from marginalized communities, including Black, Indigenous, and other people of color. "The most common disability argument for slavery was simply that African Americans lacked sufficient intelligence to participate or compete on an equal basis in society with [W]hite Americans."[41] An additional line of argument held that "inherent physical and mental weaknesses" would make Black people more likely to become disabled under the conditions of freedom.[42]

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39. AAIDD Manual, *supra* note 30, at 22.

40. Maurice Feldman & Marjorie Aunos, *Comprehensive, Competence-Based Parenting Assessment for Parents with Learning Difficulties and Their Children* (2011).

41. Douglas C. Baynton, *Disability and the Justification of Inequality in American History*, The New Disability History: American Perspectives, 37 (Paul K. Longmore & Lauri Umansky eds.) (New York: New York University Press, 2001).

42. *Id.* at 37; *see also* Chris Chapman, *Five Centuries' Material Reforms and Ethical Reformulations of Social Elimination*, *in* Disability Incarcerated, 33 (Liat Ben-Moshe, Chris Chapman & Allison C. Carey eds.) (Palgrave Macmillan, 2014) (following emancipation from slavery, Black Americans "were first among those massively deemed 'in need' of incarceration and institutionalization").

Drapetomania was one such theoretical condition that caused slaves to run away because of a mistaken belief that they were equal to their masters.[43] Another condition was thought to "result[] in a desire to avoid work and generally cause mischief."[44] These examples illustrate the extent to which medical diagnosis has been used to pathologize individuals and their behaviors rather than laying blame on conditions or systems external to the individual.[45]

B. Disproportionality in the Family Regulation System

Numerous studies have established the disproportionate representation of parents with ID in the family regulation system. Parents with ID are more than three times as likely to have their parental rights terminated as compared to parents without a disability,[46] and their children are removed at rates as much as 80 percent higher than children of non-disabled parents.[47] One recent study also revealed disparities in the likelihood that authorities will substantiate a report of

43. *Id.* at 38.

44. *Id.*

45. Many prison abolitionists trace the pathology of Black people—and people with disabilities or those who are otherwise marginalized—to slavery through "the lineage of oppression and segregation based on race and color in the United States. . . ." Liat Ben-Moshe, *Decarcerating Disability: Deinstitutionalization and Prison Abolition*, University of Minnesota Press: Minneapolis, 18 (2020); *see also* Jennifer Pokempner & Dorothy Roberts, *Poverty, Welfare Reform and the Meaning of Disability*, 62 OHIO ST. L.J. 425-26 (2001) (stressing the salience of disability as the consequence of injuries and deprivations rooted in racial and class oppressions).

46. Singh et al., *supra* note 10.

47. Rocking the Cradle, *supra* note 11, at 15.

potential abuse or neglect: reports relating to caregivers with any disability are 70 percent more likely to be substantiated and parents with ID had 58 percent higher odds of substantiation.[48] 19 percent of children in foster care are placed there, at least in part, because of parental disability, and 5 percent are in foster care solely because of parental disability.[49]

The treatment of parents in the modern family regulation system cannot be understood in a vacuum. As scholar Robyn Powell has suggested, the family regulation system exists and functions in such close connection to the history of discriminatory and dehumanizing treatment of people with disabilities that it can be understood as a "backdoor" for the eugenics movement.[50]

The abhorrent treatment of adults and people with disabilities of all kinds, and especially ID, is well documented. The roots can be traced through the Supreme Court's 1927 decision *Buck v. Bell*. In *Buck*, the Supreme Court

48. Sharyn DeZelar & Elizabeth Lightfoot, *Who refers parents with intellectual disabilities to the child welfare system? An analysis of referral sources and substantiation*, Children and Youth Services Review 4 (2020). DeZelar & Lightfoot found that the likelihood of substantiation also increased depending upon the source of the report. *Id.* at 20 ("[F]or cases involving caregivers with ID, cases are more likely to be substantiated, indicated or otherwise determined if they entered the system based on a report from a social service worker rather than from any other type of professional reporter.").

49. 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, 23 (2016).

50. Powell, *supra* note 9, at 132; *see also* Nicole Porter, *Mothers with Disabilities*, 33 Berkeley J. Gender L. & Just. 75, 88-89 (describing recent history of disabled women being forcibly sterilized or "pressured or coerced by doctors to undergo sterilization").

approved of the involuntary sterilization of a woman with an ID based on the loathsome reasoning that "three generations of imbeciles are enough."[51] Forced sterilization continued through the 1990s.[52] This history is bound up inextricably with the history and tools of scientific racism and efforts to prove that Black people are subhuman and inherently less evolved than their White counterparts.[53]

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51. *Buck v. Bell*, 274 U.S. 200, 207 (1927). The story of Carrie Buck has been the subject of much historical inquiry. *See e.g.,* Adam Cohen, Imbeciles: The Supreme Court, American Eugenics, and the Sterilization of Carrie Buck, 2016; Paul Lombardo, Three Generations, No Imbeciles: Eugenics, the Supreme Court and Buck v. Bell, 2008; *see also* Robyn M. Powell, *From Carrie Buck to Britney Spears: Strategies for Disrupting the Ongoing Reproductive Oppression of Disabled People*, 107 Va. L. Rev. Online 246 (Oct. 18, 2021) (connecting *Buck v. Bell* to contemporary "reproductive oppression" of individuals with actual and perceived disabilities); Harris, *supra* note 15. Carrie Buck was living in foster care when she became pregnant. *See* Hidden Brain, Emma, Carrie, Vivian: How a Family Became a Test Case For Forced Sterilizations (NPR radio broadcast Apr. 23, 2018). In later interviews, Ms. Buck consistently maintained that her pregnancy was the result of rape by the nephew of her foster mother. *Id.* It appears likely that the rape and Ms. Buck's subsequent pregnancy—not her IQ or cognitive ability—were the reason that her foster mother sent her to the institution. *Id.*

52. Rocking the Cradle, *supra* note 11; *see also* Paul Lombardo, *Disability, Eugenics, and the Culture Wars*, 2 St. Louis U. J. of Health Law & Pol'y 57, 62 (2009) (describing *Buck* as applying "the theory that poverty, disease, and unruly sexuality could be wiped out by state mandated surgery"); Martha A. Field & Valerie A. Sanchez, *Equal Treatment for People with Mental Retardation: Having and Raising Children* (Harvard University Press 1999).

53. Lombardo, *supra* note 52, at 59; Cohen, *supra* note 15; Baynton, *supra* note 41, 33-57; Laura T. Kessler, *"A Sordid Case":* Stump v. Sparkman, *Judicial Immunity, and the Other Side of Reproductive Rights*, 74 Md. L. Rev. 833, 874 (2015) ("Beginning in the late 1960s, the medical

It is also bound up with the law: there is a history of statutes discouraging the reproduction of people of color and the poor on the belief that these groups are inferior and must be limited.[54]

Alongside the disproportionate representation of parents with disabilities, the disproportionality of parents and guardians of color in the family regulation system is well documented.[55] Understanding the causes and effects of these two

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profession and government systematically targeted poor women for 'family planning' services as part of an anti-poverty and population control agenda.").

54. As Paul Lombardo has written, "[t]he energies devoted to negative eugenics have often found an expression in the law," including immigration restrictions based on genetic superiority of some ethnic and racial groups, and "racial integrity" laws which prevented interracial marriage. Lombardo, *supra* note 52, 60-61; *see also* Kessler*, supra* note 53, at 840 (examining contemporary public law and public policy through the lens of eugenic ideology); DisCrit, *supra* note 27 at 22 (citing Menchaca, M., *Early Racist discourses: Roots of Deficit thinking*, *in* R. Valencia (Ed.), *The evolution of deficit thinking: Educational Thought and Practice*, (p. 113-131). London, Englange: Routledge, Falmer.)).

55. The issue of racial disproportionality in the family regulation and foster systems has received growing attention in recent years, and for good reason. *See,. e.g.,* Briggs, *supra* note 14; Roberts, *supra* note 14; *see also Disproportionality and Race Equity in Child Welfare, Nat'l Conference of State Legislatures* (Jan. 26, 2021), https://www.ncsl.org/research/human-services/disproportionality-and-race-equity-in-child-welfare.aspx [https://perma.cc/JY9T-T595]. Black children and families are disproportionately involved in the family regulation system: nearly 25% of children in foster care in 2019 were Black and 21% were Hispanic. U.S. Dep't of Health and Human Services, Administration for Children and Families, Administration on Children, Youth, and Families, Children's Bureau, The AFCARS Report No. 27, (June 23, 2020), *available at* https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport27.pdf [https://perma.cc/L7G5-E567]. 53% of Black children experience a child protective investigation by the age of 18.

phenomena require us to grapple with the forces of racism and ableism.[56] School disability labels—including which, and how, students are labeled—are a concrete example of how racism and ableism impact the family regulation system. How a child is labeled in school connects to the eventual treatment of parents in the family regulation system: parents who received special education in high school are at greater risk of termination and system involvement than other parents. One study estimated that parents who had a disability label in their school records are more than three times as likely to face termination of parental rights and more than twice as likely to become involved in the family regulation

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Hyunil Kim, Christopher Wildeman, Melissa Jonson-Reid, Brett Drake, "Lifetime Prevalence of Investigating Child Maltreatment Among US Children," 107 *American Journal of Public Health* 2, 274 (Feb. 1, 2017).

56. Lawyer, educator, and organizer Talila "TL" Lewis offers the following "working definition of ableism," developed "in community with Disabled Black & other negatively racialized people, especially Dustin Gibson":

> A system that places value on people's bodies and minds based on societally constructed ideas of normality, intelligence, excellence, desirability, and productivity. These constructed ideas are deeply rooted in anti-Blackness, eugenics, misogyny, colonialism, imperialism and capitalism.
>
> This form of systemic oppression leads to people and society determining who is valuable and worthy based on a person's language, appearance, religion and/or ability to satisfactorily [re]produce, excel and "behave."
>
> You do not have to be disabled to experience ableism.

Talila A. Lewis, January 2021 Working Definition of Ableism, https://www.talilalewis.com/blog/january-2021-working-definition-of-ableism [https://perma.cc/UCF4-4G6Y].

system than peers without a disability label.[57] This is significant because of documented disproportionality in education: compared to White peers, Black students are three times as likely to be labeled "mentally retarded," two times as likely to be identified as emotionally disturbed, and one and one half times as likely be labeled learning disabled.[58] Thus, the disproportionate inclusion of Black children in special education portends their eventual treatment in the family regulation system. In these numbers, there is evidence of the cocreation of race and disability and its relationship to family regulation: Black children who are more likely to be given a disability label, and therefore placed in special education, then grow up and are more likely to have their families forcibly separated.

C. Explanations for Disproportionality

Outside of the stigma-stained history, how can we account for the continued disproportionality of parents with ID in the family regulation system and the systemic failure to support these parents? One long-debunked but still pervasive explanation is that parents with ID are inherently unfit or unable to learn the

57. Rocking the Cradle, *supra* note 11, at 77-78.

58. DisCrit, *supra* note 27 at 11 (citation omitted) (pointing out that over-representation of students of color is much less likely in categories relating to physical or sensory disabilities and arguing that "this fact alone is evidence that race and perceived ability (or lack thereof) are still connected within educational structures and practices today albeit in much more subtle ways"); *see* Smith, *Making Good on Historic Federal Precedent*, *supra* note 24 at 18.

skills required to parent.[59] While these beliefs and stigmas still exist—and may help to explain overinclusion and bias in the family regulation system[60]—the social science is clear that parents with ID can and do parent successfully.[61] Ample evidence that there is no clear relationship between intelligence and parenting ability underscores this point.[62]

Other explanations for overrepresentation, many related to the failure to provide comprehensive support for adults with ID, also exist. Adults with ID are

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59. *See* Powell, *supra* note 9; *see also* Kate Eyer, *Claiming Disability*, 101 Boston Univ. L. Rev. 547, 559-61 (May 8, 2020) (listing contemporary examples of continued stigma, bias and discrimination faced by people with disabilities).

60. DeZelar & Lightfoot, *supra* note 48 at 4 (collecting studies and pointing to international studies which suggest parents with ID face different types of disparities than parents with other types of disability).

61. *See, e.g.*, David McConnell & Gwynnyth Llewellyn, Stereotypes, *Parents with Intellectual Disability, and Child Protection*, 24 J. Soc. Welfare & Fam. L. 297, 306-07 (2002) (describing research on the ability of parents with ID to learn parenting skills and the most effective interventions); Elizabeth Lightfoot & M. Zheng, *Promising Practices to Support Parents with Intellectual Disabilities*, Practice Notes, No. 34. (Fall 2019), https://cascw.umn.edu/wp-content/uploads/2019/11/PN34_WEB508.pdf [https://perma.cc/DVB3-F3CQ].

62. *See, e.g.,* Tim Booth & Wendy Booth, *Parenting with Learning Disabilitie*s, 23 Br. J. Soc. Work 459, 461-63 (1993) ("On this point, however, the research evidence is consistent and persuasive. There is no clear relationship between parental competency and intelligence."); Katie MacLean & Marjorie Aunos, *Addressing the Needs of Parents with Intellectual Disabilities: Exploring a Parenting Projec*t, 16 J. Develop. Disabilities 18, 18-19 (2010) (summarizing the initial group of studies that "discredited the idea that one's IQ was the sole predictor of child outcomes").

less likely to have appropriate social supports and more likely to be isolated.[63] Adults with ID are more likely to be victims of intimate partner violence and those who require mental health counseling or substance abuse treatment are considerably less likely to find appropriate, tailored supports in their communities.[64] Moreover, parents with ID are more likely to be in contact with the service providers who are very often mandatory reporters and, it is hypothesized, are more likely to be reported than those parents without ID.[65] Parents with disabilities are more likely to live in poverty than the general population,[66] a salient difference because "poverty itself is a prominent risk factor for involvement with the child protection system."[67] These factors, not the disability itself, place parents with ID at higher risk of system involvement.[68]

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63. *See, e.g.*, E.M. Slayter, J. Jensen, *Parents with Intellectual Disabilities in the Child Protection System*, 98 Children and Youth Services Review, 298 (Jan. 2019) (citations omitted). Note that in advancing arguments for specialized and individualized services for parents with ID, there is the problematic potential for reification of the able/disabled binary. *See* DisCrit, *supra* note 27. Indeed, to the extent that services specifically tailored for parents with ID are offered within the current child welfare system, reification of this false binary is the likely result.

64. *See, e.g.*, Slayter, *supra* note 57, at 298.

65. Lightfoot & DeZelar, *supra* note 4853, at 5-6; *see also* Field & Sanchez, *supra* note 52.

66. Kay, *supra* note 24, at 787-88 (parents with disabilities are twice as likely to be living in poverty); *see also* Slayter, *supra* note 63, at 298 (collecting case studies).

67. Kay, *supra* note 24, at 788.

68. The experiences of parents with ID "show more similarities than differences with other . . . families from the same social background, and the problems they encounter or present tend to mirror those of other 'at risk' groups." Booth & Booth, *supra* note 62, at 476.

The reasons that parents with ID are more likely to be caught in the family regulation system are only amplified once they actually enter the system. For example, a parent who was unable to take full advantage of existing forms of social support because of their learning style—such as pre-birth parenting classes—is unlikely to be able to take advantage of routine parenting services designed for neurotypical parents offered as part of a family regulation intervention.[69] Research supports the need for one-on-one training, offered in the environment in which it will be practiced, and tailored to the specific parent involved in the class.[70] Unfortunately, specific services designed to support parents with ID are largely unavailable.[71] This lack of meaningful support is exacerbated by the biased notion that parents with disabilities are themselves inherently dangerous to their children.[72] As Professor Charisa Smith has posited, "parents with [mental] disabilities . . . are often typecast as perpetrators of child

69. *See* Maurice A Feldman & Laurie Case, *Teaching Child-Care and Safety Skills to Parents with Intellectual Disabilities Through Self-Learning,* 24 J. Intell. & Develop. Disability 27, 28 (1999) (describing the specific teaching modalities best suited for teaching parents with ID).

70. *See, e.g.*, Lightfoot & Zheng, *supra* note 61 (best practice for working with parents with ID is to provide tailored services designed for the specific parent in question, to teach in the environment will skills will be used, and to offer teaching in one-on-one environment); *Parents with Intellectual Disabilities*, The Arc (Mar. 1, 2011), https://thearc.org/wp-content/uploads/forchapters/Parents%20with%20I_DD.pdf [https://perma.cc/6AKS-ADAK].

71. Kay, *supra* note 24, at 812.

72. Smith, *Making Good on Historic Federal Precedent*, *supra* note 24, at 200.

maltreatment and not offered the opportunity to find the root of the alleged maltreatment and reunify their famil[ies]."[73]

D. Problems of Identification and Definition

One fundamental barrier to serving parents with disabilities in the family regulation system is that it is unknown how many there are; this gap in data exists both because few are counting and because there is not strong agreement about who, exactly, counts. Indeed, disability itself can be difficult to define, and the definition varies depending on context.[74] The statistics cited above is largely based on extrapolations from small, often localized, data.[75] In fact, "a national-

73. *Id.*

74. *See* Samuel Bagenstos, *Rational Discrimination, Accommodation, and the Politics of (Disability) Civil Rights*, 89 Va. L. Rev. 825, 830 (2003); *see also* Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397, 399 (2000) (noting, in the employment context, that the "ambiguity of that definition has led to great controversy"); Arlene B. Mayerson, *Restoring Regard for the "Regarded As" Prong: Giving Effect to Congressional Intent*, 42 Vill. L. Rev. 587, 587 (1997) ("[N]o issue has generated more controversy and divergence in judicial interpretation than the definition of disability."); *see also* DisCrit, *supra* note 27 (pointing out that changing definitions of disability overtime reveals the subjective nature of the label).

75. "National estimates of the number of parents with disabilities are usually based on projections from much fewer data or estimated by complex extrapolations." Rocking the Cradle, *supra* note 11, at 43 (discussing the lack of data in this area and asserting that "[b]ecause of the scarcity of substantive data at the local and national levels, parents with disabilities remain mostly invisible").

level study on the prevalence and characteristics of [parents with ID] in the child protection system does not exist in the United States."[76]

The Adoption and Foster Care Analysis and Reporting System (AFCARS), a database maintained by HHS's Children's Bureau, includes case-level information from state family regulation agencies on all children in foster care. Though AFCARS collects information twice annually, and agencies are required to submit data, it does not track the disability status of parents.[77] While the National Child Abuse and Neglect Data System (NCANDS) does track this data, compliance with NCANDS reporting is voluntary and, for states who do report, there is no indication of how disability should be identified for reporting. Within NCANDS, there are variations in reporting across states that prevent accurate accounting and meaningful comparisons across states.[78] Importantly, NCANDS data is generated from the records maintained by caseworker and is therefore susceptible to variations in decision-making by caseworkers in individual cases.[79] There are many reasons that a caseworker may not report an existing ID: it may be perceived as opposed to diagnosed, the parent may seek to hide it from

76. Slayter, *supra* note 63, at 297; *see generally* Robyn Powell & Sasha M. Albert, *Barriers and Facilitators to Compliance with the Americans with Disabilities Act by the Child Welfare System: Insights from Interviews with Disabled Parents, Child Welfare Workers, and Attorneys*, 32 Stanford L. & Pol'y Rev. 119 (2020).

77. *See* Kay, *supra* note 24, at 208.

78. *See, e.g.*, Slayter, *supra* note 63, at 299.

79. *Id.* (hypothesizing various possible explanations for the underreporting of parents with disabilities in the family regulation system).

the caseworker, the parent may disagree with or resist the ID label outright, the disability may be so mild as to go undetected, or it may not be the primary issue in the case.[80]

Adding to the confusion about identification and reporting, parents themselves may not self-identify as having a disability for many reasons. As scholar Jasmine Harris has pointed out, to "avail yourself of protection from disability discrimination," you must first prove the legitimacy of your disability which requires "direct contention with social norms."[81] In the family regulation system this "direct contention with social norms" requires parents to choose between asking for greater and more specific forms of assistance but risking discrimination, and forgoing the potential for greater assistance. "[L]ong-standing conceptions of disability as . . . functional limitation and the inability to work" persist, making self-identification a significant risk in any social context.[82] This choice is only exacerbated by the adversarial system in which the legal battle for the right to raise their children is being fought. [83]

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80. *Id.*

81. Jasmine E. Harris, *The Frailty of Disability Rights*, 169 U. Pa. L. Rev. Online 29, 49-50 (2020).

82. Eyer, *supra*, note 59 (thoroughly exploring the challenges and choices involved in self-identification as a person with a disability).

83. Mandatory reporting "establishes an adversarial relationship between the State and the parent at the outset of the relationship." Vivek S. Sankaran, *Innovation Held Hostage: Has Federal Intervention Stifled Efforts to Reform the Child Welfare System?*, 41 U. Mich. L. Reform, 281, 295 (2007). For further discussion of the adversarial relationships that can develop, and one parent's account

For some, the decision to hide or avoid a diagnosis may come from perceived or actual stigma.[84] Others may have never been diagnosed or may have been misdiagnosed. Still others will be deterred by the laws in many states that list ID as a ground for termination of parental rights.[85] The combination of the fear of the legal threat of termination of parental rights based on ID, the stigma of identifying as having ID, and well-grounded fears of bias and discrimination, may prompt parents with ID to make the decision to avoid seeking assistance altogether.

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of how a disability label impacted her case see generally L. Frunel and Sarah Lorr, *Lived Experience and Disability Justice in the Foster System*, 11 Columbia J. of Race and the Law _ (forthcoming 2021); *see also* Erin Miles Cloud, *Unraveling Criminalizing Webs: Building Police Free Futures, Toward the Abolition of the Foster Care System*, 15 S&F Online 3 (2019), http://sfonline.barnard.edu/unraveling-criminalizing-webs-building-police-free-futures/toward-the-abolition-of-the-foster-system/#identifier_48_4262.

84. Parents with disabilities who rely on public assistance face an especially profound stigma as they may encounter both what Doron Dorfman has called "fear of the disability con" and the deep suspicion of women on welfare. Doron Dorfman, *Fear of the Disability Con: Perceptions of Fraud and Special Rights Discourse*, 53 Law & Soc'y Rev. 1051 (2019); Roberts, *supra* note 14, at 16-17 (describing history of suspicion and distrust of parents seeking welfare assistance, especially Black mothers).

85. Rocking the Cradle, *supra* note 11, at 15 (2/3 of states have laws allowing disability as a basis for TPR; nearly all allow disability to be considered as a factor in determining whether TPR is in the "best interest" of a child).

II.

FEDERAL LEGAL REGIMES AND THEORETICAL FRAMEWORKS

A. The ADA

The 1990 passage of the ADA involved years of organization and a broad coalition of congressional support, activists, and national nonprofits like The National Council on Disability, then called The National Council on the Handicapped.[86] Adults with disability across the nation played a pivotal role in educating others—and themselves—about the bill's potential.[87] Alongside this

86. For a history of the legislative and strategic efforts that led to the passage of the ADA see Arlene Mayerson, *The History of the Americans with Disabilities Act, Disability Rights Education and Defense Fund* (1992), https://dredf.org/about-us/publications/the-history-of-the-ada/ [https://perma.cc/GY8D-7YCF]; *see also* Joe Ability, A Brief History of Disability Rights & the Americans with Disabilities Act, LivAbility Magazine (Jul. 14, 2015), https://ability360.org/livability/advocacy-livability/history-disability-rights-ada/ https://perma.cc/TFE9-649E (describing the role of American Disabled for Attendant Programs Today); *ADA History – In Their Own Words: Part One,* Administration for Community Living (Jul. 27, 2020), https://acl.gov/ada/origins-of-the-ada [https://perma.cc/TL46-5ZEF] (describing the role of The National Council on Disability in drafting the first versions of the ADA).

87. People with disabilities were asked to create "diaries" highlighting instances of disability discrimination faced in their daily lives. Using these testimonials, Justin Dart, Chair of the Congressional Task Force on the Rights and Empowerment of People with Disabilities, held public hearings across the country, attended by thousands of people. *The ADA Diaries*, It's Our Story (last visited Jul. 21, 2021), http://www.itsourstory.com [https://perma.cc/UVJ5-LRE4]. This record was delivered to Congress and served as an evidentiary basis for the ADA.

nationwide effort, adults with disabilities led a fierce movement complete with sit-ins and demonstrations.[88]

Once passed, the ADA offered the unprecedented promise of protection from discrimination in the realms of private employment, public services, public accommodations offered by private entities, telecommunication, and transportation.[89] Within these broad realms, the ADA prohibits discrimination against any "qualified individual with a disability,"[90] including those with "physical or mental impairment[s] that substantially limit[] one or more major life activit[y]."[91] To be a qualified individual with a disability, one must have such an impairment, have a record of having such an impairment, or be regarded as having such an impairment.[92]

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88. When the ADA's progress stalled in Congress, ADAPT led a march to the Capitol, during which sixty disability advocates abandoned their assistive devices and crawled up the Capitol steps. This event, known as the Capitol Crawl, is credited with eventually pushing the ADA out of committee and to its signing by President Bush on July 26, 1990. *See* Joe Ability, *supra* note 86.

89. Americans with Disabilities Act of 1990, 42 U.S.C. § 12101; *see also* Philip Pauli, *29 Years Later, the Fight to Fulfill the Promise of the ADA Continues*, Respect Ability (Jul. 26, 2019), https://www.respectability.org/2019/07/ada-29-years-later/ [https://perma.cc/7A57-39MP]; *ADA at 30: The Unmet Promises*, CSH (Jul. 30, 2020), https://www.csh.org/2020/07/ada-at-30-the-unmet-promises/ [https://perma.cc/5R4X-KAPJ].

90. 42 U.S.C. §§ 12131(2) and 12132.

91. 42 U.S.C. § 12102(1)(A).

92. There are several defenses available to ADA-covered entities that seek to push back against a request for a reasonable accommodation or a claim of discrimination under the ADA. For example, public entities do not need to make modifications that would fundamentally alter the nature of the

Title II of the ADA forbids discrimination by state and local government, including in the provision of services, programs, or activities of the state.[93] The Supreme Court, in *Tennessee v. Lane*, acknowledged that Title II is meant to address the long history of "pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights."[94] In ruling that Title II applies to the "class of cases implicating the fundamental right of access to the courts," the Supreme Court focused on the "sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services."[95] Though "the Supreme Court has not . . . directly addressed whether the substance of state court proceedings . . . constitutes a state 'activity'

service, program, or activity. 42 U.S.C. § 12201(f). Likewise, ADA-covered entities are not required to include individuals with disabilities in their programs or services if doing so would be a "direct threat to the health and safety of others." 28 CFR 35.139(a). A direct threat is a significant risk to 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. *Id.*

93. 42 U.S.C. § 12134.

94. *Tennessee v. Lane*, 541 U.S. 509, 524-525 (2004) (describing categorical bars on voting, prohibitions on marriage, refusal to allow juror service, and the unwarranted commitment of individuals with disabilities, without regard to assessment of individual capacity).

95. *Id.* at 533-534, 528. In contrast, the Supreme Court's holding that the Eleventh Amendment bars private money damages actions for state violations of Title I, which prohibits employment discrimination against the disabled, was based on what the Court thought was thin Congressional record with respect to discrimination against people with disabilities in public employment. *See Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 368, 374 (2001).

or 'service,'"[96] the legislative history of the ADA suggests that Congress was aware of the plight of parents with disabilities.[97] For example, Justin Dart, Jr., an activist often described at the "Father of the ADA," testified before Congress, "We have clients whose children have been taken away from them and told to get parent information, but have no place to go because the services are not accessible. What chance do they ever have to get their children back?"[98] Moreover, in *Pennsylvania Department of Corrections v. Yeskey*, the Supreme Court made clear the breadth and reach of the ADA in deciding that "state prisons fall squarely within the statutory definition of 'public entity,' which includes 'any department, agency, special purpose district, or other instrumentality of a State or States or local government.'" [99]

The ADA provides a legal vehicle for those seeking freedom from discrimination and integration into the broader community but not without reservation. The structure of the statute puts the onus on individuals with a disability to identify themselves as such and to prove "qualification."[100] Thus, even given the broad goals of the ADA, individuals with disabilities—the class of individuals meant to be protected by the law—bear the burden of ensuring its

96. Margolin, *supra* note 24, at 117 & n.23 (citation omitted).

97. *See* Porter, *supra* note 50, at 99-100.

98. *Id.* at 100 & n. 205 (citing Rocking the Cradle, *supra* note 11, at 74).

99. 524 U.S. 206, 209 (1998) (quoting 42 U.S.C. § 12131(1)(B)); *see id.* ("Here, the ADA plainly covers state institutions *without* any exception that could cast the coverage of prisons into doubt.").

100. 42 U.S.C. § 12131(2).

enforcement.[101] The requirement that a government service provider or employer provide a "reasonable accommodation" or "reasonable modification" is another challenge for those seeking to enforce the ADA.[102] "Reasonable

101. The need for plaintiffs to prove disability causes accommodations claims to focus on "demonstrating deep dysfunction," a dynamic that scholars have observed leads to a "binary view" of whether one is capable of working or has a disability. *See* Michael Ashley Stein, Anita Silvers, Bradley A. Areheart, and Leslie Pickering Francis, *Accommodating Every Body*, 81 U. Chi. L. Rev. 690, 691–92, 744 (2014) (proposing that the ability to seek accommodations should be extended to "all work-capable" people as means of "integrating" determinations of disability and ability to perform essential job functions). While all beneficiaries of rights-granting legislation, for example those seeking vindication of rights under the Civil Rights Act of 1964, bear the burden of enforcing the law, those seeking protection for the ADA must prove—and courts must spend time deciding whether—they are within the class of people the ADA is supposed to protect. *Id.* Likewise, as Katherine A. Macfarlane has chronicled, the need to prove disability with medicatl documentation can be incredibly arduous. *See* Katherine A. Macfarlane, *Disability Without Documentation*, 90 Fordham L. Rev. 59, 70-81 (2021) (laying bare, through case analysis, the centrality of medical documentation to the process of obtaining accommodations in the context of employment and revealing the difficulty of the process).

The passage of the Americans with Disabilities Amendments Act of 2008 clarified that the ADA's definition of disability should be construed broadly, Pub L No 110-325, 122 Stat 3553, codified in various sections of Title 42, but litigation of this kind continues. Samuel Bagenstos and Christine Jolls, among others, have engaged in significant analysis on the overlap between the requirements of the ADA, even including the accommodation requirements, and other anti-discrimination legislation. *See* Christine Jolls, *Accommodation and Antidiscrimination*,115 Harv. L. Rev. 642, 645, 684-697 (2001) (citing Bagenstos, *supra* note 74, at 456-57 & n. 223).

102. 42 U.S.C. § 12111(9) (defining reasonable accommodation in the context of employment discrimination); 28 CFR 35.139(b)(7) (outlining the requirement that public entities make "reasonable modifications" to avoid discrimination on the basis of disability).

accommodation" is a diffuse term that does not present a clear, specific mandate.[103] What is "reasonable" depends on the facts and circumstances of each case and on the needs of each individual involved.[104] This leaves open the possibility of reaching ideal, individualized results for people seeking accommodations, but specific requests can easily be portrayed as so unique as to be unreasonable. Individuals requesting reasonable accommodations can also be seen as ungrateful, self-absorbed, or otherwise disconnected from reality. As Lennard Davis has described, when individuals seek specific accommodations "it almost seems that, in some cases, the claimant is biting the hand that feeds her, is unappreciative of what has been done for her, or is acting in a paranoid

103. People with disabilities and advocates are not the only groups concerned with the vagueness of the ADA's requirements. *See, e.g.*, Stephen B. Epstein, *In Search of a Bright Line: Determining When an Employer's Financial Hardship Becomes "Undue" Under the Americans with Disabilities Act*, 48 Vanderbilt L. Rev. 391 n.226 (1995) ("With insufficient guidelines as to how much accommodation is enough, there is the possibility that overall cost, both to employers and to the judicial system, may eventually outweigh the considerable social benefits of the ADA. The problem of quantifying reasonable accommodation-delineating the standard beyond the law's vague generalizations-persists."). For an assessment of the challenges in enforcing accommodations through the "interactive process" required by the EEOC in employment discrimination claims, and a critique of the extent to which the process disempowers employees, see Shirley Lin, *Bargaining for Integration*, 96 N.Y.U. L. Rev. __ (forthcoming 2022).

104. *See e.g.,* Lennard J. Davis, *Bending over Backwards: Disability, Dismodernism & Other Difficult Positions,* 126 (2002) ("To claim that an employer did not provide reasonable accommodation because it installed ramps and provided many other structural changes, but did not lower a sink, is to make a strident claim about a subtle thing.").

manner. In other words, the claimant is being self-centered and narcissistic."[105] The ADA also provides little clarity with respect to how it should apply when it seemingly conflicts with other, competing laws—an issue that is specifically difficult in the context of our nation's byzantine family regulation system described more completely below.

B. Federal Technical Assistance

In 2015, the U.S. Departments of Justice and Health and Human Services issued technical assistance clarifying that Title II applies to all aspects of the family regulation system.[106] The Technical Assistance—born out of the case of Sara Gordon—makes clear that discrimination against parents with disabilities is "long-standing and widespread" and "can result in long-term negative consequences to both parents and their children."[107]

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105. *Id.* Underpinning the view described by Davis is the belief accommodations benefit individuals while forcing government agencies, service providers, and employers to bear the cost associated with these benefits. In practice, however, there is a wide array of accommodations which benefit third parties. *See generally* Elizabeth F. Emens, *Integrating Accommodation*, 156 U. Penn. L. Rev. 839 (2008).

106. Technical Assistance, *supra* note 17, at 1 (stating that the ADA protects "parents and prospective parents with disabilities from unlawful discrimination in the administration of child welfare programs, activities, and services"). Though this article focuses principally on the ADA, the Technical Assistance issued by DOJ/HHS applies with equal force to Section 504 of the Rehabilitation Act (RA). *Id.* The RA, passed in 1973, provides essentially the same coverage as ADA but covers only federal agencies, contractors. actors who receive federal funding. 29 U.S.C. § 794.

107. *See* Technical Assistance, *supra* note 17, at 2 & n. 5.

Ms. Gordon is a mother from Massachusetts who, in November 2012, gave birth to a baby girl, Dana.[108] While Ms. Gordon was still in the hospital and recovering from child birth, Massachusetts Department of Children and Families (DCF) received a call alleging concerns that Ms. Gordon "was not able to comprehend how to handle or care for the child due to the mother's mental retardation."[109] DCF opened a case and observed Ms. Gordon at the hospital, documenting that she had difficulty feeding and holding Dana, and that she required reminders to burp Dana and clean spit out of Dana's mouth.[110] The investigators observed that Ms. Gordon appeared uncomfortable changing Dana's diaper and had trouble remembering when to feed her daughter because she could not read an analog clock.[111] Two days after Dana's birth, DCF removed Dana from her mother's care.[112] DCF removed Dana despite Ms. Gordon's intention to care for Dana in collaboration with her own mother.[113]

108. Both Sara and Dana are pseudonyms used in the DOJ-HHS investigation. U.S. Dep't of Justice, Civil Rights Div. & U.S. Dep't of Health and Human Serv., Office for Civil Rights, letter to Erin Deveney, Interim Comm'r, Mass. Dep't of Children & Families, 1-2 (Jan. 29, 2015) (hereinafter "Investigation of Massachusetts DCF).

109. *Id.* at 5.

110. *Id.*

111. *Id.*

112. *Id.* at 2.

113. *Id.*

The joint investigation found that DCF's removal of Dana violated the ADA and Section 504 of the Rehabilitation Act (RA).[114] DCF staff erred by assuming that Ms. Gordon was unable to learn how to safely care for her daughter because of her disability and denying her the opportunity to receive meaningful assistance from her mother and other service providers during visits.[115] The resulting Technical Assistance is unequivocal: the ADA applies to termination of parental rights proceedings, "investigations, assessments, provision of in-home services, removal of children from their homes, case planning and service planning, visitation, guardianship, adoption, foster care, and reunification services."[116]

The Technical Assistance identifies two principles of the ADA that are central to the administration of services for parents involved in the family regulation system: firstly, parents with disabilities have the right to individualized treatment; secondly, parents with disabilities are entitled to the full and equal opportunity to benefit from offered services.[117] The Technical Assistance advises that any assessment of capacity should be based specifically on the "strengths, needs, and capabilities of a particular person with disabilities based on objective evidence, personal circumstances, demonstrated

114. *Id.* at 1. The Rehabilitation Act of 1973 prohibits discrimination against disabled people by recipients of federal funding. Rehabilitation Act of 1973, § 504(a), 29 U.S.C.A. § 794(a).

115. *Id.* at 2.

116. Technical Assistance, *supra* note 17*, at* 3.

117. *Id.*at 4.

competencies, and other factors that are divorced from generalizations and stereotypes regarding people with disabilities."[118] Alongside individualization, the Technical Assistance explicitly recognizes that providing the same resources to an individual with a disability that are provided to individuals without disabilities will not necessarily be sufficient to provide an equal opportunity to an individual with a disability.[119]

When the Technical Assistance was promulgated, it was heralded as "groundbreaking," and scholars believed that the TA would transform the ADA into a more useful tool in family regulation proceedings.[120] And in many respects, the emphasis on the importance of individual assessments and equal opportunity can be regarded as a sea change—at least in terms of recognizing what is required. Unfortunately, as this Article explores in Part III, the TA has led to only limited change.

C. ASFA and the Role of Federal Statutes

Family regulation law and policy in the United States can be seen as a pendulum, swinging between an emphasis on family support and reunification

118. *Id.* at 14. Requirements for "individualized assessments appl[y] at the outset and throughout any involvement that an individual with a disability has with the child welfare system." *Id.* at 12-13.

119. *Id.* at 14. The requirement that parents have an equal opportunity to benefit from, and participate in, services "applies throughout the continuum of a child welfare case, including case planning activities." *Id.*

120. *See* Smith, *Making Good on an Historic Federal Precedent*, *supra* note 24, at 201; *see generally* Kay, *supra* note 24.

on one hand, and a push to move children to new, permanent homes on the other.[121] Until 1997, the Adoption Assistance and Child Welfare Act of 1980 ("AACWA") required agencies and states to make "reasonable efforts" to reunify a family before a child could be adopted.[122] The Adoption and Safe Families Act ("ASFA"), passed in 1997, shifted the focus from family reunification to achieving "permanency" for children.[123] Under ASFA, the overarching goal is to identify and establish a permanent home for children.[124] There are strict timelines for children separated from their parents to be either reunified or placed in new homes.[125] Parental rights can be terminated because of the length of time a child is in foster care, regardless of whether rights could

121. Roberts, *supra* note 14, at 104.

122. 42 U.S.C.A. § 670 et seq. Understanding ASFA—and the other federal statutes that govern public family law—is pivotal because while family law is largely determined by individual states, receipt of federal child welfare spending is conditioned upon adherence to federal law. By 1999, all states had passed laws that either mirrored ASFA's timelines for permanency or created timelines that were even shorter. Roberts, *supra* note 14, at 110.

123. 42 U.S.C. §§ 671 et seq.

124. Roberts, *supra* note 14, at 107-11; Morgan B. Ward Doran & Dorothy E. Roberts, *Welfare Reform and Families in the Child Welfare System*, 61 MD. L. REV. 386, 404 (2002) (explaining that "ASFA radically transformed the focus of federal child welfare policy," shifting away from the "emphasis on family reunification that characterized its predecessor [AACWA]" to a "legislatively mandated preference for adoption").

125. 42 U.S.C. §§ 671 et seq.; Roberts, *supra* note 14, at 106-07 (describing the time pressures of ASFA).

otherwise be terminated or the family otherwise could be supported.[126] Though the timelines in ASFA are not immutable, the statute "effectively shifts the presumption in favor of termination when children have spent a long time in state custody."[127]

While many advocates and scholars initially understood ASFA as "pro-child," or putting the value of a child's safety above the biological family, this mistakenly assumes that an interest in family integrity belongs to parents alone.[128] In fact, social science and the lived experience of individuals who have been separated from their parents tell a different story, one where family integrity is pivotal to both parents and children. A child's trauma of permanent and total separation from their birth parents can leave a long-lasting effect on children and parents alike.[129] Likewise, children placed in foster care are more likely to experience diminished physical and mental health, poor educational outcomes,

126. ASFA requires that where a child has been in foster care for 15 out of the last 22 months, an agency can file a TPR unless certain exceptions must be met. Roberts, *supra* note 14, at 109-10.

127. *Id*. at 150.

128. *See id.* at 108.

129. *See, e.g.*, *Children with Traumatic Separation: Information for Professionals*, The National Child Traumatic Stress Network (last visited Jul. 21, 2021) http://fsustress.org/pdfs/TraumaticSeparation_forProfessionals.pdf [https://perma.cc/H4XK-5G92]; Allison Eck, *Psychological Damage Inflicted by Parent-Child Separation is Deep, Long-Lasting*, NOVA Next (June 20, 2018), http://www.pbs.org/wgbh/nova/next/body/psychological-damage-inflicted-by-parent-child-separation-is-deep-long-lasting/ [https://perma.cc/LSC5-GUFY].

lower employment prospects, inconsistent housing arrangements, and unstable family relations.[130]

ASFA did not do away with the requirement that agencies make "reasonable efforts" to reunite families.[131] In fact, ASFA requires family courts to assess whether state agencies are making reasonable reunification efforts at various points throughout a child protective proceeding.[132] Individual states have followed suit by requiring these efforts as well.[133] While there are variations among courts as to what the "reasonable efforts" requirement actually entails, it has largely been interpreted to require individualized efforts to reunify families and many states have made clear that efforts cannot be "cookie cutter."[134]

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130. See *In the Matter of Jamie J.,* 30 N.Y.3d 275, 280 n.1 (2017) (citing Joseph J. Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 Am. Econ. Rev. 1583 (2007)); Vaidya Gullapelli, *The Damage Done by Foster Care Systems*, The Appeal (Dec. 18, 2019), https://theappeal.org/the-damage-done-by-foster-care-systems/ [https://perma.cc/PY8X-RK2V]; Eli Hager, *The Hidden Trauma of "Short Stays" in Foster Care*, The Marshall Project (Feb. 11, 2020), https://www.themarshallproject.org/2020/02/11/the-hidden-trauma-of-short-stays-in-foster-care [https://perma.cc/C9E2-5KP9].

131. 42 U.S.C. § 671(a)(15)(B)(i)-(ii).

132. *Id.* (requiring "reasonable efforts . . . to preserve and reunify families . . . prior to the placement of a child in foster care . . . [and] to make it possible for a child to safely return to the child's home); 42 U.S.C. § 675(5)© (requiring family courts to hold permanency hearings every 12 months).

133. *See e.g.*, N.Y. Fam. Ct. Act §§ 1027, 1028, 1055(c), 1089; NMRA § 10-345 (2009); V.T.C.A. Family Code § 263.305.

134. *See, e.g.*, *In re Sheila G.*, 462 N.E.2d 1139, 1148 (N.Y. 1984) (the "agency must always determine the particular problems facing a parent with respect to the return of [the] child and make

Both AACWA and AFSA mandate reasonable efforts to reunify families except in three specific situations, including if the parent's rights to another child have been involuntarily terminated.[135] Parents with ID are more likely to have had a prior child removed, and hence those who bear subsequent children are more likely to be among those for whom reasonable efforts are not required. Likewise, ASFA's emphasis on "quickly moving children through temporary (usually foster) care to a permanent home"[136] can have a disproportionate impact on parents with ID who may require additional time to learn and process information, or additional services that take additional time and attention to procure.[137]

D. Theoretical Frames: Disability Justice and DisCrit

The Disability Rights Movement was pivotal to the passage of the ADA.[138] Relying primarily on the passage of legislation and litigation to advance the

affirmative, repeated, and meaningful efforts to assist the parent in overcoming these handicaps."); *In re C.F.*, 862 N.E.2d 816, 820 (2007); *In re C.P.*, 71 A.3d 1142, 1153 (Vt. 2012).

135. 42 U.S.C. § 671(a)(15)(D).

136. Porter, *supra* note 50, at 93.

137. *See* Rocking the Cradle, *supra* note 11. Additional time to put services in place can result from slowness on the part of caseworkers to identify the needs of a parent or, more generally, the lack of services for parents with disabilities. *See* Charisa Smith, *"The Conundrum of Family Reunification: A Theoretical, Legal, and Practical Approach to Reunification Services for Parents with Mental Disabilities*," 26 Stanford Law & Policy Review 307, 327 (2015) (stating "[r]eunification plans often call for fast and decisive action by parents, which can be difficult with a mental disability").

138. *See supra* notes 81-83 and accompanying text.

rights of individuals, the movement spurred the creation of civil rights for people with disabilities. Activists and people with disabilities played a significant role in the passage of the ADA, but scholars Rabia Belt and Doron Dorfman have observed that older models of disability rights activism were nonetheless led primarily by individuals without disabilities on behalf of those with disabilities.[139] Moreover, many of the actors in the movement tended to focus on rehabilitating disabled individuals with the intent that they might function more similarly to the nondisabled.[140] As Belt & Dorfman note, this model provides resources and social infrastructure for the movement, but organizations and advocacy groups doing this work can inadvertently promote the view that people with disabilities are dependent on others or require charity.[141]

The Disability Justice Movement understands itself as the "next stage in movement evolution."[142] Whereas Disability Rights can be said to have focused on disability "at the expense of other intersections," centering White individuals

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139. Belt & Dorfman, *supra* note 28, at 177-78 & nn. 7 & 8.

140. *Id.*

141. *Id.* at 178 (citing Thomas P. Dirth & Michelle R. Nario-Redmond, *Disability Advocacy for a New Era: Leveraging Social Psychology and a Sociopolitical Approach to Change*, *in* UNDERSTANDING THE EXPERIENCE OF DISABILITY: PERSPECTIVES FROM SOCIAL AND REHABILITATION PSYCHOLOGY 349, 350-51 (Dana S. Dunn ed., 2019)).

142. Sins Invalid, *Skin, Tooth, and Bone: The Basis of Movement is Our People: A Disability Justice Primer* 11 (2d. ed. 2019); Powell, *supra* note 29, at __ ("Disability justice . . .was developed in reaction to the disability rights movement and underscores that addressing problems of disability-based discrimination requires attending to disparities created by race, immigration status, gender identity sexual orientation, class, and other systems of oppression.").

with physical disabilities,[143] Disability Justice recognizes that "all bodies are confined by ability, race, gender, sexuality, class, nation state, religion, and more, and we cannot separate them."[144] A Disability Justice lens demands an inherently intersectional analysis, urging that individuals with disabilities "are not only disabled, but also each come "from a specific experience of race, class, sexuality, age, religious background, geographical location, immigration status, and more."[145] This view recognizes that whether and how a person may be privileged or oppressed depends upon context,[146] and that intersectional identities shape both how a person perceives, and is perceived by, others.[147] Rather than looking to academics and experts to guide the movement, Disability

143. Sins Invalid, *supra* note 142, at 13; *see also* Jamelia N. Morgan, *Toward a DisCrit Approach to American Law*, *in*, DisCrit Expanded: Inquiries, Reverberations & Ruptures 3 (Annamma, Connor, Ferri, et al. 2021) ("An intersectional approach to, and examination of, disability law reveals how the ADA, despite its broad protections, leaves disabled people of color, in particular, under-protected.").

144. Sins Invalid, *supra* note 142, at 19.

145. *Id.* at 23.

146. *Id.*

147. *See id.* This is connected to Lennard J. Davis's idea of the "dismodern" body, which begins from the premise that we are all disabled and need assistance and interdependence in order to survive—ranging from legislation to technology. *See* Davis, *supra* note 104 at 30. Under this framework, it is not unnecessary or unusual to require assistance or support from the state, and notions like independence are exposed as being artificial. *Id.*

Justice looks to "those who are most impacted by the systems we fight against."[148]

DisCrit is a theoretical approach combining Disability Studies and Critical Race Theory, originally in the field of education.[149] Subini Ancy Annamma, David J. Connor, and Beth A. Ferri first proposed DisCrit as a framework that "incorporates a dual analysis of race and ability."[150] Annamma, Connor and Ferri offer seven primary tenets of DisCrit that, they suggest, can be used to "operationalize" the framework.[151] Though this framework has not yet been applied to family law, there is an emerging understanding of the power that it

148. Sins Invalid, *supra* note 142, at 23. Ben-Moshe, like other scholars and activists in this field, also acknowledges the value of centering the experience of the most disabled and shaping law and policy accordingly. *See* Ben-Moshe, *supra* note 45.

149. DisCrit, *supra* note 27, at 1 (describing the origin of DisCrit as "traced through an academic lineage of boundary pushing" and listing James Baldwin, Bayard Rustin and others as "academic ancestors" to the framework).

150. *Id.* at 9

151. *See id.* at 19. The seven tenets: (1) focus on the ways racism and ableism "circulate interdependently . . . to uphold notions of normalcy"; (2) "value[] multidimensional identities"; (3) "emphasize[] the social constructions of race and ability", while acknowledging the "material and psychological impacts" of being labeled by race or dis/ability; (4) "privilege[] voices of marginalized populations"; (5) consider "legal and historical aspects of dis/ability and race and how both have been used . . . to deny the rights of some citizens"; (6) recognize "Whiteness and Ability as Property"; and (7) "require[] activism and support[] all forms of resistance." DisCrit, *supra* note 27,, at 19.

might play in the legal context more generally.[152] Indeed, as Jamelia Morgan has urged, "A DisCrit intervention into American law can explain why over thirty years after the passage of the ADA, with clear exceptions for those with privilege, disabled people remain a subordinated group within society."[153]

Three tenets of DisCrit have particularly strong relevance to the practice, study, and application of family law and the family regulation system.[154] First, DisCrit "focuses on ways that the forces of racism and ableism circulate interdependently, often in neutralized and invisible ways, to uphold notions of normalcy."[155] This tenet urges examination of the standards and structures within the law that purport to be neutral. Second, "DisCrit values multidimensional identities and troubles singular notions of identity such as race or dis/ability or class or gender or sexuality, and so on."[156] Like Disability Justice, this tenet of DisCrit calls upon scholars and practitioners to "embrace the nuance" of lived experience and to surface areas of the family regulation system where such nuance is excluded or made invisible. Third, "DisCrit emphasizes social

152. *See, e.g.*, Morgan, *supra* note 143, at 7 (exploring how "some of DisCrit's central tenets offer a basis for critical and intersectional approaches to American law" and calling for subsequent engagements); Kathleen M. Collins, *A DisCrit Perspective on the* The State of Florida v. George Zimmerman: *Racism, Ableism, and Youth Out of Place in Community and School*, *in* DisCrit: Disability Studies and Critical Race Theory in Education.

153. *See, e.g.*, Morgan, *supra* note 143 , at 20-21.

154.DisCrit, *supra* note 27, at 19 (listing tenets). 155. *Id.*

155. *Id.*

156. *Id*. (emphasis omitted).

constructions of race and ability and yet recognizes the material and psychological impacts of being labeled as raced or dis/abled, which sets one outside of the western cultural norms."[157] With this tenet, DisCrit invites scholars and advocates to unearth the impacts of labeling a person by their race or inability and to envision new paradigms with which to understand and support people with disabilities.

In Part V, this Article will explore more fully how a Disability Justice lens and the DisCrit framework can be applied to family court.

III.

APPLICATION OF THE ADA IN FAMILY REGULATION CASES

This study is the first to review family court decisions from all fifty states issued since the 2015 Technical Assistance, alongside decisions from federal courts during the same period. A review of these decisions shows where and how the Federal TA has made an impact, and the limitations of Federal TA as a tool to change outcomes for parents in the family regulation system. The results reveal how, if at all, the federal clarity about the ADA's application to the family regulation system has changed the way courts handle ADA-based claims. Looking at decisions from both family and federal courts allows a complete picture of how courts treat parents' claims of disability discrimination and requests for accommodation. The study itself involved a review of all fifty states and an extensive review of federal court cases issued since 2015. This Section

157. *Id.*

will briefly discuss prominent, pre-TA trends and then present the results of the study. Rather than presenting case information from each of the fifty states, some of whom do not appear to have addressed the application of the ADA at all, this Part presents cases and trends that are representative of how courts handle these claims.

A. Historic Failure to Apply the ADA

Prior to the DOJ/HHS TA in 2015, family courts across the country held that ADA violations may only be remedied in separate proceedings brought under the ADA and could not be pursued in family court.[158] These courts endeavored to make clear that 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."[159]

For example, in 1999, Connecticut courts ruled that parents with disabilities may not litigate ADA issues in termination of parental rights proceedings, because such proceedings purportedly are not a "service, program or activity"

158. Kay, *supra* note 24, at 807 & n. 175 (citing Ann Haralambie, Handling Child Custody, Abuse and Adoption Cases § 8.16 (3d ed. 2009) and cases in Wisconsin, Vermont, Louisiana, Connecticut, California, Indiana, Ohio, New York, Hawaii).

159. *Id.*

under the ADA.[160] Instead, Connecticut courts required that such claims be pursued as a separate cause of action under the ADA in a separate proceeding.[161]

Other courts found that accommodating parental disability—or even discrimination against a parent—was not the proper subject of a family court proceeding.[162] For example, the Vermont Supreme Court held that a termination of parental rights proceeding must focus on the "welfare of the child" rather than question whether the parents' treatment was "consistent with the requirements of the ADA.".[163]

B. Emerging State Court Consensus: Limited Application of the ADA

There is no overarching rule for how state family courts have handled allegations of disability discrimination or application of the ADA following the promulgation of the DOJ/HHS TA. Still, state courts are moving towards acknowledgment—if not actual application of—the ADA. At least nine state courts that have addressed the ADA since the issuance of the DOJ/HHS TA have

160. *In re Antony B.,* 735 A.2d 893, 899 (Conn. App. Ct. 1999); ("[T]he ADA neither provides a defense to nor creates special obligations in a termination proceeding.").

161. *Id.* at n.9 (a failure to provide adequate services because of the parent's mental condition "would give rise to a separate cause of action under the ADA"); *In re B.S.*, 693 A.2d 716, 721 (Vt. 1997) ("The ADA provides for a private right of action for Title II violations. . . . Pursuant to these provisions, the mother could have filed a complaint or brought a civil action to obtain relief.").

162. For a fifty-state survey of state court decisions regarding the applicability of the ADA to termination of parental rights cases and the use of the ADA as a defense to TPRs published in 2007—8 years before the issuance of the HHS/DOJ TA, see Margolin, *supra* note 24, at 178.

163. *In re B.S.*, 693 A.2d at 720–22.

cited the TA[164] and many more appear to have become more sensitive to the law's requirement that service providers and state agencies comply with the ADA.[165] Three state courts have articulated clear and robust application of the ADA.[166]

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164. *See In re Hicks*, 893 N.W.2d 637 (Mich. 2017); *In re H.C.*, 187 A.3d 1254, 1265 (D.C. 2018); *Commonwealth v. K.S.,* 585 S.W.3d 202, 228 (Ky. 2019); *State ex rel. K.C. v. State*, 362 P.3d 1248, 1252 (Utah 2015); *In re Adoption of Beatrix*, No. 15-P-933, 2016 WL 3912083, at 5 (Mass. App. Ct. July 20, 2016); *New Jersey Div. of Child Protection & Permanency v. L.M.W. In re Guardianship of J.R.*, 2017 N.J. Super. Unpub. LEXIS 2679 (Super Ct App Div Oct. 25, 2017, No. A-2850-15T4); *In re. Children's Aid Society for Guardianship of Xavier Blade Lee Billy Joe S.*, 62 Misc.3d 1212(A)113 (NY Bronx Fam. Ct., Jan. 9, 2019), *aff'd In re Xavier Blade Lee,* 187 A.D.3d 659; *In re A.L.*, 2018 WL 722521, *3 (Vt. 2018); *N.C. v. Indiana Dep't of Child Servs.*, 56 N.E.3d 65, 70 (Ind. Ct. App. 2016).

165. *See, e.g., Jessica P. v. Dep't of Child Safety*, 471 P.3d 672, 679-680 (Ariz. Ct. App. 2020); *In Re Elijah C.*, 165 A.3d 1149, 1166 (Conn. 2017); *In re K.L.N.*, 482 P.3d 650, 658-60 (Mont. 2021); *In re S.K.*, 440 P.3d 1240, 1247-50 (Colo. App. 2019), *cert. denied sub nom. C.K. v. People*, 19SC287, 2019 WL 2266493 (Colo. May 28, 2019); *In the Termination of Parental Rights to M.A.*, 2016 Wash. App. LEXIS 1208, *9-10 (Ct App May 24, 2016, Nos. 32948-8-III, 32949-6-III, 32950-0-III, 32951-8-III).

Other courts that already applied the ADA before the TA continue to do so. *See, e.g., Ronald H. v. Department of Health & Social Services, Office of Children's Services*, 490 P.3d 357, 369 (Alaska 2021); *In the Interest of J.L.,* 868 N.W.2d 462, 467-68 (Iowa Ct. App. 2015); *In re Child of Rebecca R.*, 221 A.3d 540, 548 (Me. 2019); *In re. S.A.*, 256 N.C. App. 398 (2017). Still other states that initially applied the ADA have not had an occasion to address the issue since the TA. *See*, e.g., *S.C. Dep't of Soc. Servs. V. Mother*, 651 S.E.2d 622, 627-29 (S.C. Ct. App. 2007); *Welfare of K.D.W.,* No. C5-93-2262, 1994 WL 149450 (Minn. Ct. App. 1994).

166. *See In re Hicks*, 893 N.W.2d 637, 640 (Mich. 2017); *State ex rel. K.C.*, 362 P.3d 1248 (Utah 2015); *In re S.K.*, 440 P.3d 1240, 1249 (Colo. App. 2019).

State court decisions about the applicability of the ADA can vary even within individual states, making generalizations on a state-by-state basis difficult. Nonetheless, the decisions themselves can be grouped in four general categories: (1) decisions that actually apply the ADA; (2) decisions that "encourage" consultation with the ADA but do not require strict application of the statute; (3) decisions that find actual application of the ADA unnecessary because the requirements of the ADA are already incorporated in state anti-discrimination statutes or state laws requiring reasonable efforts; and (4) decisions that find the ADA is not a defense to a termination of parental rights (TPR) or that otherwise fail to apply the ADA to family regulation proceedings. The last category is the largest, containing decisions from at least seventeen states.[167]

167. Note that, as with many of the decisions about the applicability of the ADA, decisions refusing to apply the ADA are not necessarily controlling state law. Nonetheless, the following decisions reveal a refusal to apply the ADA to family court proceedings. *See In re A.E.*, No. A149302, 2017 WL 2537236, at 8 (Court of Appeal, First District, Division 4, California) (unpublished); *In re Jeanette L.*, 69 N.E.3d. 918, 922 (Ill. App. Ct. 2017); *In re Guardianship of J.R.*, 2017 N.J. Super. Unpub. LEXIS 2679, at *22; *In re A.L.*, 2018 WL 722521, at *4; *N.C.*, 56 N.E.3d at 69-70; *Adoption of Yolane*, 95 NE3d 298,*4 (Mass. App. Ct. 2017); *In re D.A.B.*, 570 S.W.3d 606, 610-22 (Mo. Ct. App. 2019); *In re B.A.*, 73 N.E.3d 1156, 1159 (Ct. App. Ohio 2016) (reiterating that the ADA is not a valid defense to TPR and referencing numerous decisions from other states reaching the "same conclusion."); *In the Interest of J.J.L.*, 150 A.3d 475, 481-82 (Pa. Super. 2016); *In re Hailey S.*, No. M2016-00387-COA-R3-JV, 2016 Tenn. App. LEXIS 930, 2016 WL 7048840, at *11 (Tenn. Ct. App. Dec. 5, 2016); *see also In re D.M.S.,* 2016 WL 5853263 at *1 (Tex Ct App Oct. 5, 2016, No. 11-16-00101-CV) (reasoning that,

Together, these decisions reflect an important pattern. Although an increasing number of courts accept the ADA's general application to family regulation proceedings, very few have adopted rigorous, clear standards by which the ADA is applied. A scant but significant minority of cases find that the ADA applies, and that state service providers must at minimum meet the standards of the ADA. The majority of courts find that a state's proffered services are adequate regardless of whether or how the ADA is applied. Even among the decisions that at least engage with a surface application of the ADA—explored in detail in Parts 2 and 3 of this Section—many courts appear to conclude that the ADA is satisfied by the application of existing state law. One can argue that this surface engagement with the ADA is an improvement upon the historical refusal to recognize the basic application of the ADA. Undercutting this vision of progress, however, is the difference between two sets of decisions. Cases that require application of the ADA as a threshold matter demand courts, attorneys, and caseworkers use, consider, and comply with federal anti-discrimination law. Cases that find state law itself to satisfy the ADA allow

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to the extent noncompliance was a defense at all, "it would be an affirmative defense for which the parent has the burden to plead, prove, and secure findings.").

The number cited in the text includes states that appear not to have had the occasion to revisit the issue since 2015 TA. *See, e.g., S.G. v. Barbour Cnty. Dep't of Human Res*., 148 So. 3d 439, 446-448 (Ala. Civ. App. 2013); *M.C. v. Department of Children and Families*, 750 So.2d 705, 706 (Fla. Dist. Ct. App. 3d Dist. 2000); *In re Doe*, 60 P.3d at 290-91; *Curry v. McDaniel*, 37 So. 3d 1225, 1233 (Miss. Ct. App. 2010); *In re Kayla N.*, 900 A.2d 1202, 1208 (R.I. 2006); *In re Torrance P.,* 522 N.W.2d at 244-46.

federal anti-discrimination law to be subsumed within state law standards and, as a consequence, arguably permit courts, attorneys, and caseworkers to avoid genuine engagement with federal standards. An analysis of these decisions makes a strong argument for the idea that parents with ID (and other disabilities) are still largely unprotected by the ADA and, therefore, still risk facing unchecked discrimination in state family courts.

1. ADA is Actually Applied

Three state courts have engaged in robust and clear application of the ADA.[168] This Article identifies these cases as those that "actually apply" the ADA. This category includes those cases that have made it clear that an agency's efforts to reunify a family cannot be considered "reasonable" under state law if parents were not provided appropriate accommodations pursuant to the ADA. In other words, these few decisions consider compliance with the ADA as a threshold question for a finding that the state has complied with its legal duty under ASFA to make efforts to reunify a family.

Perhaps the most robust application of the ADA following this logic comes out of Michigan's Supreme Court.[169] The court, in *Hicks/Brown*, reversed a termination decision due to ADA violations in a case where a mother with intellectual and psychiatric disabilities had repeatedly requested specific

168. *See In re Hicks/Brown*, 893 N.W.2d at 637; *K.C.*, 362 P.3d 1248; *In re S.K.*, 440 P.3d at 1249.

169. *In re Hicks/Brown*, 893 N.W.2d at 637-39.

services, which the State never provided.[170] The trial court eventually ordered the agency to refer the mother to another agency focused on serving individuals with disabilities but the originally assigned foster care agency failed to do so and her rights were terminated.[171] The *Hicks/Brown* court reversed the termination and remanded the case to the family court with the instruction that it "consider whether the Department reasonably accommodated Brown's disability as part of its reunification efforts" given that she never received court-ordered, disability-specific services.[172] In making this ruling, the court made clear that "efforts at reunification cannot be reasonable . . . if the Department has failed to modify its standard procedures in ways that are reasonably necessary to accommodate a disability under the ADA."[173]

A close reading of the *Hicks/Brown* decision makes clear that Michigan's highest court has gone further than most other courts in its application of the ADA. The court's decision that reasonable efforts "dovetail" with obligations under Title II of the ADA may initially appear comparable to those decisions that have found the ADA either incorporated into, or coextensive with, state law. The standard announced by Michigan's Supreme Court goes further, however: under Michigan's analysis, if reasonable accommodations are not made, the

170. Prior to the termination proceeding, the mother made requests for specific services to accommodate her disability. *Id.* at 639.

171. *Id.*

172. *Id.* at 642.

173. *Id.* at 640.

State's obligation to make reasonable efforts cannot have been met and the termination was improper.[174] By applying the ADA as a threshold matter, *Hicks/Brown* requires courts, attorneys, and caseworkers to consider and comply with federal anti-discrimination law in the first instance.

A court in Colorado, citing *Hicks/Brown*, articulated a similar standard in a 2018 case. Like *Hicks/Brown*, the Colorado court made clear that efforts to reunify cannot be reasonable unless they accommodate a parent's disability under the ADA.[175] The *S.K.* court is also clear that lower family courts should make a specific finding as to whether an accommodation was made.[176] The *S.K.* court reiterated the reasoning of prior Colorado court decisions in finding that the ADA is not a "defense" to a termination petition but clarified that the ADA "applies to the provision of assessments, treatment, and other services that the

174. "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 under the Probate Code to offer services designed to facilitate the child's return to his or her home." *Id.*; *see also* Kay, *supra* note 24, at 812-14 (describing that *Hicks/Brown* goes further than decisions that find reasonable efforts inherently include compliance with the ADA).

175. *In re S.K.*, 440 P.3d at 1249. "[A]bsent reasonable modifications to the treatment plan and rehabilitative services offered to a disabled parent, a department has failed to perform its duty under the ADA to reasonably accommodate a disability and, in turn, its obligation to make reasonable efforts to rehabilitate the parent." *Id.*

176. *Id.* at 1250 & n. 4; *see also id*. at 1248.

Department makes available to parents through a dependency and neglect proceeding before termination."[177]

2. The ADA Generally Applies

The second set of family court cases are those that acknowledge the application of the ADA to family court proceedings and the services provided by the family regulation system but do not strictly apply the ADA. Cases from twelve states fit into this category.[178] These decisions focus on the question of whether or not the state has made reasonable efforts to reunify the family, as required by ASFA.[179] The most robust among them encourage courts to consult with the requirements of the ADA as part of assessing whether an agency has made the required efforts.

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177. *Id.* at 1248. *See In re B.A.*, 407 P.3d 1053, 1056 (Utah App. Ct. 2017) (stating "[t]here is no doubt that the ADA applies to the government's provision of reunification services.").

178. *See e.g., In re Lacee L.*, 114 N.E.3d 123, 129-30 (N.Y. 2018); *Ronald H. v. Department of Health & Social Services, Office of Children's Services*, 490 P.3d 357, 369 (Alaska 2021); *Jessica P. v. Dep't of Child Safety*, 471 P.3d 672, 679-680 (Ariz. Ct. App. 2020); *In Re Elijah C.*, 165 A.3d 1149, 1166 (Conn. 2017); *In the Interest of J.L.,* 868 N.W.2d 462, 467-68 (Iowa Ct. App. 2015); *In re K.L.N.*, 482 P.3d 650, 658-60 (Mont. 2021); *In the Termination of Parental Rights to M.A.*, 2016 Wash. App. LEXIS 1208, *9-10 (Ct App May 24, 2016, Nos. 32948-8-III, 32949-6-III, 32950-0-III, 32951-8-III); *S.C. Dep't of Soc. Servs. v. Mother*, 651 S.E.2d 622, 627-29 (S.C. Ct. App. 2007); *Welfare of K.D.W.,* No. C5-93-2262, 1994 WL 149450 (Minn. Ct. App. 1994); *In re Child of Rebecca R.*, 221 A.3d 540, 548 (Me. 2019); *In re. S.A.*, 256 N.C. App. 398 (2017); *Commonwealth v. K.S.,* 585 S.W.3d 202, 228 (Ky. 2019).

179. *See supra* note 122-125.

In 2018, in *Lacee L.*, the New York Court of Appeals ruled unambiguously that the New York City Administration for Children's Services (ACS) must comply with the ADA.[180] Prior to the Federal TA, numerous family courts in New York had previously ruled that the ADA did not apply to family court proceedings.[181] Despite the court's clarity on the question of ACS's obligation, the court declined to require application of the ADA within the family regulation proceeding.[182] The court reasoned that "[t]he ADA's 'reasonable accommodations' test is often a time- and fact-intensive process with multiple layers of inquiry" that "is best left to separate administrative or judicial proceedings, if required."[183]

In lieu of the actual application of the ADA, the New York Court of Appeals advised that "Family Court should not blind itself to the ADA's

180. *In re Lacee L.*, 114 N.E.3d at 129-130 ("To be sure, ACS must comply with the ADA.")

181. *In the Matter of La'Asia Lanae*, 803 N.Y.S.2d 568, *1 (N.Y. App. Div. 2005); *In the Matter of Chance Jahmel B.,* 723 N.Y.S.2d 634 (N.Y. Fam. Ct. 2001).

182. *Lacee L., 114 N.E. 3d* at 129-130. Other courts continue to reach a similar conclusion, reasoning that violations of the ADA should be litigated in alternative settings. *See, e.g., Adoption of Vicky,* 93 Mass App Ct 1120 (2018); *see also In re Doe*, 60 P.3d 285 at 290-93 (rejecting the ADA as a defense in termination proceedings but considering a parent's disabilities in evaluating reunification efforts); *In the Matter of Moore*, No. CA99-09-153, 2000 WL 1252028, at *8-9 (Ohio Ct. App. Sept. 5, 2000) (holding that ADA violations "by a public entity" do not provide "a defense against a legal action by the public entity."); *In re Torrance P.,*522 N.W.2d at 245-46 (finding that ADA violations do not provide grounds to set aside TPR proceedings but holding that evaluation of efforts to provide court-ordered services to a parent must consider that parent's disabilities).

183. *Lacee L.*, 114 N.E.3d at 130.

requirements placed on ACS and like agencies" and that "courts may look at the accommodations that have been ordered in ADA cases to provide guidance as to what courts have determined in other contexts to be feasible or appropriate with respect to a given disability."[184]

In *Elijah C.*, the Supreme Court of Connecticut decided a case involving a mother with ID who placed in the bottom one percentile of the population for IQ. A psychologist also concluded that her social skills, adaptive behavior, and ability to perform daily living skills were in the one percent range.[185] The family court rejected the department's claim that the ADA does not apply to child protection cases,[186] but nonetheless concluded that the department had provided services that amounted to reasonable efforts toward reunification in this case.[187] After a full evidentiary hearing, the court concluded that despite providing services appropriate under both the ADA and reasonable efforts standards, the mother was unable to benefit from such services and reunification efforts were found to be in compliance with the ADA.[188]

In its ruling affirming the outcome, the Connecticut Supreme Court noted that there was "nothing in the record before us to suggest that the trial court deviated in any way from ADA principles, which, as we have explained, are

184. *Id.* at 129.

185. *In re Elijah C.*, 165 A.3d at 1154-55.

186. *Id.* at 1164.

187. *Id*. at 1149, 1153-56.

188. *Id.* at 1153-56.

incorporated by reference into our state's own stringent antidiscrimination statutes, in adjudicating the neglect and termination petitions in the present case."[189] The court also advised that it "continue[s] to encourage trial courts to look to the ADA for guidance in fashioning appropriate services for parents with disabilities."[190] In this decision, the Connecticut Supreme Court appears to have applied the ADA not as a law but as a set of "principles" that are "incorporated by reference" into the State's antidiscrimination laws. Like New York, Connecticut clarified the general application of the ADA but failed to articulate a standard by which to apply it.

Some lower courts have made use of the general applicability of the ADA to hold state agencies to higher standards. For example, in *Xavier Blade Lee Billy Joe S.*, the Bronx Family Court reasoned that by the time of a TPR, the agency "should be able to demonstrate that appropriate, adapted services consistent with the reasonable accommodation requirements of the ADA were offered and that the parent refused or was unable to plan in spite of them."[191] In reaching the conclusion that the State had not offered appropriate services, the court looked not only to the ADA but also to guidance from EEOC.[192] In affirming this

189. *Id.* at 1167.

190. *Id.*

191. *Source #082: In re Children's Aid Soc'y.*, at *14.

192. After the passage of the ADA, the EEOC created the interactive process through which an accommodation can be identified and implemented in the employment setting. *See* Lin, *supra* note103, at 10. In this case, the Family Court apparently looked to EEOC for possible accommodations. *See Source #082: In re Children's Aid Soc'y.*, at *14.

decision, New York's Appellate Division makes no mention of the ADA but does make clear that the efforts of the State were inadequate because of a failure to make reasonable accommodations and provide tailored services in light of the mother's disability.[193] Cases in Washington State and Massachusetts, though not relying specifically on the ADA, have also explicitly held agencies to a higher standard when cases involved parents with ID.[194]

3. The ADA is Already Incorporated in Existing State Law

The third set of family court cases are those that acknowledge the application of the ADA but find explicitly that it is already incorporated into existing state law. Connecticut is an example both of a state that "encourages" family courts to look to the ADA for guidance and one which has determined that the ADA is "incorporated by reference" into its antidiscrimination statutes. Similarly, the highest courts of Montana and Alaska have determined that their states' respective reasonable efforts requirements generally encompass "the ADA's reasonable accommodation requirement."[195] As Alaska's Supreme Court

193. *In re Xavier Blade Lee Billy Joe S.*, 187 A.D. at 660 (stating specifically that "people with intellectual disabilities possess the ability to be successful parents and should receive services and support appropriately tailored to their needs.").

194. *In re M.A.S.C.,* 486 P.3d 886, 893-94 (Wash., 2021); *In re Adoption of Beatrix*, 2016 WL 3912083, at *5 ("Where, as here, a parent has cognitive limitations, the department's duty includes a requirement that it provide services that accommodate the special needs of a parent.") (quotation marks and citation omitted).

195. *In re K.L.N.*, 482 P.3d at 659-60 (holding that "ADA requirements [. . .] are consistent

articulated, "[T]he question whether reunification services reasonably accommodated a parent's disability is . . . included within the question whether active or reasonable efforts were made to reunite the family."[196] Courts in Montana, Iowa, North Carolina, and California have reached similar conclusions.[197] Courts that follow this approach elide stringent application of the ADA requirements in favor of a wholistic finding that, as a legal matter, the ADA's reasonable accommodations requirement has been met. This approach rests on the equation of the individualized treatment plans and reasonable efforts often required by state law with the reasonable accommodations requirement of the ADA. This analysis avoids grappling with case law interpreting the ADA's

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with —and generally subsumed within" the state's "reasonable efforts" requirement); *Lucy J. v. State, Dept. of Health & Soc. Servs., Off. Of Children's Servs.*, 244 P.3d 1099, 1116 (Alaska 2010) (reiterating that the state's "reasonable efforts" requirement is "essentially identical to the ADA's reasonable accommodation requirement.").

196. *Lucy J.*, 244 P.3d at 1116. Alaska was one of a few states that settled on the applicability of the ADA before the 2015 TA was issued. It continues to be cited by other states with approval.

197. *In re K.L.N.*, 482 P.3d at 660; *In the Interest of J.L.,* 868 N.W.2d at 467; *In re S.A.*, 256 N.C. App. 398 at *2; *In re L.W.*, No. H043712, 2017 WL 1318453 at *12 (Cal. Ct. App. Apr. 10, 2017). In West Virginia, a court found no violation of the ADA where the state engaged in "reasonable efforts . . . as well as any expectations that would be added for a person with a mental health diagnosis under the [ADA]." *In re N.H.,* No. 19-1127, 2020 WL 3447580 at *2 (W. Va. June 24, 2020). Though this decision leaves open the possibility that the ADA goes beyond reasonable efforts, the decision fails to grapple with what application of the ADA would mean or how it would differ from the application of reasonable efforts.

reasonable modifications requirement and related inquiries.[198] While it offers family courts the benefit of efficiency, it appears to flout congressional intent to provide specific protections for people with disabilities.[199]

4. The ADA is Not a Defense or Does Not Otherwise Apply

The largest set of decisions come from family courts that remain completely hostile to parents raising discrimination-based claims under the ADA.[200] Among these states exist different rationales for finding the general inapplicability of the ADA to family court proceedings: (1) the ADA is not a defense to a termination of parental rights proceeding; (2) termination proceedings are held for the benefit of children and should focus on their best interests, not services for parents; (3) termination proceedings are not a state-provided "service"; and (4) ADA claims can and should be brought in separate, federal or administrative, proceedings. This section will explore these rationales in turn.

198. *See, e.g., Mershon v. St. Louis Univ.*, 442 F.3d 1069 (8th Cir. 2006) (placing the initial burden of requesting accommodations on the individual seeking accommodation and holding that the university did not fail to reasonably accommodate the student absent a showing that he was denied specific, requested reasonable accommodations); *see generally* 42 U.S.C.A. § 42 U.S.C. § 12131(2) (prohibiting discrimination by public entities).

199. 42 U.S.C. § 12101.

200. *See supra* text accompanying note 167 (collecting cases).

Numerous family courts across the country have held that the ADA is not a "defense" to a TPR.[201] On February 2, 2018, the Vermont Supreme Court decided *The Matter of A.L.* There, the mother's cognitive, intellectual, or learning deficits were the motivating factor in the termination of rights with all of her children. The court found that the department complied with the ADA by offering the extra assistance that could have provided the parenting skills needed by the parents, though it did not comport exactly with what was recommended by an expert retained by the parents. Even while finding general compliance with the ADA, the court noted that "ADA noncompliance is not a defense" to a petition to terminate parental rights.[202]

The court's reasoning in *A.L.* is also an example of those decisions that assert termination proceedings are held for the benefit of children and should not, therefore, focus too much attention on the needs of the parent. According to *A.L.*, in a TPR, "the court must focus on the best interests of a child, including whether the parents will be able to resume parental duties within a reasonable period of

201. *See, e.g.*, *L.M.W.*, 2017 N.J. Super. Unpub. LEXIS 2679 at 22; *In re A.L.,* 2018 WL 722521 at *4; *Adoption of Yolane*, 92 Mass App Ct 1116 at *4; *Interest of D.A.B.*, 570 S.W.3d at 622; *In re B.A.*, 73 N.E.3d at 1159. Still other states have held that even if it is a defense or viable claim, it must be raised in the first instance or it is waived. *State ex rel. Children v Jacqueline P., 2020 N.M.* App. Unpub. LEXIS 42, at *3 (Ct App Jan. 29, 2020, No. A-1-CA-38068); *In re L.M.*, 111 N.E.3d 1242, 1252-53 (Ohio 2018)*; In re A.E.*, 2017 WL 2537236, at *8; *In re Jeanette L.*, 69 N.E.3d 918, 921 (Ill. App. 2017); *Adoption of Yolane*, 92 Mass App Ct at *4; *In re A.A.*, 340 P.3d 1235, 2014 WL 7575375**,** at *7 (Kan. Ct. App. 2014).

202. *In re. A.L.*, 2018 WL 722521, at *4 (citing *In re B.S.*, 166 Vt. At 351).

time."[203] The court framed the question of assessing the parents' needs under the ADA as one that "ignores the needs of the child and diverts the attention of the court" to disagreements between the agency and the parents.[204] Courts in several other states have expressed similar views.[205]

A different, but often overlapping, strain of decisions has held that TPRs are not a service so the ADA does not apply.[206] This finding is in direct

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203. *Id.*

204. *Id.* (quoting *In re B.S.*, 166 Vt. at 351).

205. *See, e.g.*, *L.M.W.*, 2017 N.J. Super. Unpub. LEXIS 2679, at 22 (reiterating a prior holding that "to allow the provisions of the ADA to constitute a defense to a termination proceeding would improperly elevate the rights of the parent above those of the child"); *In the Interest of J.J.L.*, 150 A.3d 475, 481 (Pa. Super. 2016) (emphasizing the centrality of "the child's best interests" in rejecting the ADA as a defense to TPR proceedings); *M.C.*, 750 So.2d at 705 (rejecting ADA defenses in TPR proceedings on the grounds that "dependency proceedings are for the benefit of the child, not the parent."); *In re Kayla N.*, 900 A.2d at 1208 (quoting and adopting the reasoning of the *M.C.* court in rejecting ADA defenses); *In the Matter of John D.*, 1997 NMCA 019, P 21, 934 P.2d 308, 314-15 (Ct. App. 1997) (holding that "the best interests of Child must take precedence over Mother's interest in parenting" and rejecting ADA defenses); *In re L.W.*, 2017 WL 1318453, at *17-18 (holding that family courts had authority to bypass typical reunification requirements where such bypass is in "the child's best interests"); *see also In re B.A.*, 73 N.E.3d at 1159, 1160 (determining that the ADA is not a defense to TPR and noting that "the best interests of the child are of paramount concern" in the case).

206. *See, e.g.*, *Adoption of Yolane*, 92 Mass App Ct 1116 at *4 ("[T]he Supreme Judicial Court has held 'that proceedings to terminate parental rights do not constitute 'services, programs, or activities' for the purposes of' the ADA, and that any claimed violations could not be used as a defense."); *In re Jeanette L.*, 69 N.E.3d at 922 ("Parental rights termination proceedings are not 'services, programs, or activities' that would subject them to the requirements of the ADA.") (internal quotation marks omitted);

contravention to the DOJ/HHS TA, which articulated specifically that termination of parental rights proceedings are covered by the ADA.[207] These decisions point to the frailty of Federal TA as a mechanism for legal change.

Finally, there are those decisions that refuse to hear ADA claims in family court because of a view that these claims can and should be raised in a federal court or a different forum.[208] For example, a California court reasoned that Congress's intent in adopting the ADA was not to change obligations imposed by unrelated statutes. Therefore, even where a parent may have a separate cause of action under the ADA, such a claim should be brought elsewhere and is not a basis to attack a state order.[209] As explored in Part III.C., reliance on federal

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S.G., 148 So. 3d at 447 ("[W]e hold that a termination-of parental-rights proceeding is not a service, program, or activity within the meaning of the ADA and that, therefore, the ADA does not apply to such a proceeding.").

207. Technical Assistance, *supra* note 19, at 3.

208. *Lacee L.*, 114 N.E.3d at 130; *Adoption of Vicky,* 93 Mass App Ct 1121 at *2; *see also In re Doe*, 60 P.3d at 290-91 ("[A]ny purported violation may be remedied only in a separate proceeding brought under the provisions of the ADA."); *In the Matter of Moore*, 2000 WL 1252028, at *7 (All of the remedies and procedures provided by the ADA contemplate affirmative action on the part of the injured party); *In re Torrance P.,* 522 N.W.2d at 246 ("[The parent] may have a separate cause of action under the ADA . . . such a claim, however, is not a basis to attack the TPR order."); *In re Diamond H.*, 82 Cal.App.4th 1127, 1139 (Cal. App. 4th Dist. 2000) ("Although a parent may have a separate cause of action under the ADA based on a public entity's action or inaction, such a claim is not a basis to attack a state court order.").

209. *In re Diamond H.*,82 Cal.App.4th at 1139; *In re Ivan M.*, No. E039029, 2006 WL 1487173, at *6 (Cal. Ct. App. May 30, 2006).

courts to seek vindication of rights under the ADA offers parents only a marginal path forward.

C. Use of Federal Courts to Vindicate ADA Rights

A study of federal decisions issued since the 2015 Technical Assistance reveals many barriers facing parents who file ADA claims in federal courts. These barriers persist despite the many states that have encouraged parents to file ADA claims outside of family court, and despite the strong Federal TA addressing the application of the ADA to family regulation proceedings.[210]

1. Rooker-Feldman Doctrine

Often, federal courts find ADA-based discrimination claims foreclosed by the *Rooker-Feldman* doctrine. A doctrine of subject matter jurisdiction, *Rooker-Feldman* bars federal review of cases (1) brought by the party that lost in state court; (2) complaining of injuries caused by state court judgments; (3) rendered before the district court proceedings commenced; and (4) inviting district court review and rejection of those judgments.[211] In deciding that *Rooker-Feldman* bars ADA claims based on discrimination experienced in family courts, federal courts reason that a ruling against the defendants would require the court to reject

210. Federal lawsuits in this area are relatively new. *See* Watkins, *supra* note 24, at 1473, n.346 (1995) (stating that, at the time, no parent had yet sought to apply the ADA to child welfare proceedings in federal court).

211. *See, e.g.*, *Exxon Mobil Corp. v. Saudi Basic Indus. Corp*., 544 U.S. 280, 291–92 (2005).

a previous state court judgment.[212] The failure of federal courts to move past *Rooker-Feldman*—even when there may have been manifest failures to apply the ADA in the process of terminating a person's fundamental right to parent—creates a disturbing vacuum for families seeking to vindicate their rights under the ADA. At least some parents have tried in vain to raise claims of disability discrimination or requests for accommodations in family court, only to be told that family court is not the proper venue for such a claim. When a federal court subsequently bars these same parents from pursuing a claim under the ADA, the parents and their children are left without recourse. This lacuna is especially notable given the long and continuing history of family courts directing parents and families to pursue such claims in other fora.[213]

In *Watley v. Hasemann*, parents whose rights were terminated sued under the ADA in federal court alleging that their caseworkers discriminated against them.[214] Despite the family court's affirmative statement that claims under the

212. *See, e.g., Skipp v. Brigham*, No. 3:17-CV-01224 (MPS), 2017 WL 4870907 at *5 (D. Conn. Oct. 26, 2017) (applying *Rooker-Feldman* to dismiss ADA claims arising out of state court custody proceedings, reasoning that "in requesting redress against defendants for accepting the dictates of the state court, [plaintiff] invites the Court to reject those judgments"); *Watley*, 2019 WL 7067043 at *19-20 (applying *Rooker-Feldman* to dismiss ADA claims arising from state court child welfare proceeding).

213. *See supra* text accompanying note and note 208 (citing cases that foreclose raising the ADA in family court but suggest raising the claim in federal court or another separate proceeding).

214. *Watley*, 2019 WL 7067043. Initially, the District of Connecticut dismissed for failure to state a claim but the Second Circuit reversed and reinstated the case. Plaintiffs—two parents, one with ID—filed an amended complaint that was dismissed again in December of 2019. *Id.* at *1

ADA must be brought in a separate, distinct proceeding, the U.S. District Court for the District of Connecticut ruled that the court lacked jurisdiction to hear the claims.[215] The court found that a claim of discrimination under the ADA was, inherently, a challenge to a state court judgment and therefore barred by *Rooker-Feldman*.[216] In finding that *Rooker-Feldman* barred discrimination claims brought under the ADA, the *Watley* court determined that because the state law reasonable efforts requirement mandated DCF to consider a parent's disabilities, a federal proceeding under the ADA would be an inappropriate review of the state court judgement.[217] The consequences of this decision are manifold for parents seeking to protect their rights.

Perhaps most glaringly, *Watley* demonstrates the extent to which parents who seek to raise claims under the ADA may face a Catch-22. The family court specifically told the *Watley* parents that they could not raise the ADA in family court. Likewise, the *Watley* parents were careful not to seek the return of their children in federal court. Instead, the parents sought damages and injunctive relief.[218] Nonetheless, the District Court of Connecticut ruled that their claims could not be heard in federal court because they had already been heard and decided in the family court.[219]

215. *Id.* at *10

216. *Id.*

217. *Id.* at *2, *10

218. *Watley*, 2019 WL 7067043, at *19-23.

219. *Id.* at *19-25

A more technical set of issues also arises from the *Watley* court's interpretation that a claim of discrimination under the ADA in federal court inherently requires the inappropriate review of a state court finding that reasonable efforts were made. By making such a finding, the court implicitly rejected the argument that the harm inflicted on the parents began before any order of the court or could be understood as stemming from nonjudicial action, such as behavior of the caseworkers. Caseworkers are charged with providing services to parents and families, often outside of court or before a court case has even been initiated. Caseworkers and their counsel are charged with informing the court about their efforts but such reports are often minimal, sparse, or based on form documents. The details of their efforts—or lack thereof—are often entirely unknown to the court. The District of Connecticut's ruling misconstrues the role that family regulation agencies and caseworkers play in the lives of parents and families—though their work is meant to be reviewed by courts, it often begins months and sometimes years before a case comes to court.[220]

The case *Johnson v. Missouri* illustrates this second set of issues presented by *Watley*. In *Johnson*, a state agency asked the hospital to delay the release of a newborn baby. Both baby and mother were healthy, and the mother had been

220. *See* Josh Gupta-Kagan, *America's Hidden Foster Care System*, 72 Stanford Law Review 841, 843 (2020); Roxanna Asgarian, *Hidden Foster Care: All of the Responsibility, None of the Resources* (Dec. 21, 2020), https://theappeal.org/hidden-foster-care/ [https://perma.cc/WE34-UTKXhttps://perma.cc/WE34-UTKX] (describing the phenomenon of "shadow foster care" where children are removed from their parents without the opportunity to speak with a lawyer or go before a court).

discharged from the hospital. This intervention effected a separation that began before court intervention and arguably influenced the judge who later oversaw the case.[221] When the state finally approached the family court, they came to make an official request for separation that had already occurred. By interpreting this removal as one "stem[ming] from" a court order, the *Johnson* decision insulates the state agencies from any claims of ADA-based discrimination. As the facts of *Johnson* show, however, discriminatory harms often occur before court orders are issued and subsequent court orders often flow from those harms.

In cases where harm occurs before a family arrives in state court, the harm often influences the proceeding itself. When federal courts nonetheless dismiss these harms under *Rooker-Feldman* because the family court judge ratified the decision to remove, any claim of disability discrimination—or any related harm—goes unaddressed in both courts. The result of applying *Rooker-Feldman* to these claims is that discrimination outside of the court proceeding is not redressable where a family court judge ultimately determines that the children should have been removed.

The *Watley* decision also presents a third problem with federal court handling of ADA claims. While *Watley* finds the claims technically precluded or subject to abstention, the family court never made a thorough assessment of a claim of discrimination or the wrongful denial of accommodations. Indeed, because both the federal and family courts refused to hear the claim, *no court*

221. *Johnson v. Missouri Department of Soc. Servs.*, No. 15-CV-00391-DGK, 2016 WL 6542722, *2-3 (W.D. Mo. Nov. 2, 2016).

will ever review the ADA-based claim for discrimination. This problem will likely also arise for parents seeking federal redress in the many states where courts have found reasonable efforts and the ADA to be coextensive.

The *Watley* court reasoned that "the requirements of state and federal antidiscrimination law are substantially the same" and therefore a federal ADA claim will generally be precluded when reasonable efforts are found.[222] This holding both flies in the face of findings by state courts that hold reasonable efforts are affirmatively not meant to gauge or assess discrimination under the ADA,[223] and fails to reckon with the reality that family courts are not meaningfully assessing these claims.

At least one court initially interpreted *Rooker-Feldman* as a less than absolute bar. In *Wilson v. The New Jersey Division of Child Protection and Permanency* ("*Wilson I"*), the court reasoned that a suit under the ADA based on a child protective matter that led to a TPR "does not complain explicitly about injuries caused by the state court judgment or ask this Court to overturn that judgment."[224] The court recognized that Ms. Wilson's "claims, if granted, might

222. *Watley*, 2019 WL 7067043, at *12.

223. *See, e.g., Lacee L.*, 114 N.E.3d at 129-30 (holding that the "time- and fact-intensive process" of fully applying ADA standards would be inappropriate for family court permanency proceedings); *In re Elijah C.*, 165 A.3d. at 1164-65 (explaining that ADA defenses are improper in termination and neglect proceedings in which "the parties and the court should not allow themselves to be distracted by arguments regarding the parent's rights under the ADA").

224. *Wilson v. N.J. Div. of Child Prot. & Permanency*, No. 13-cv-3346, 2016 WL 316800, at *4 (D.N.J. Jan. 25, 2016).

tend to undermine the state court's conclusions, but would not require that they be overruled."[225]

2. Abstention Doctrines

Federal courts have relied on doctrines of abstention to avoid review of ADA claims based on discrimination that occurred during a family court proceeding. "The *Younger* doctrine applies where: (1) there is an ongoing state proceeding; (2) an important state interest is involved; and (3) the plaintiff has an adequate opportunity for judicial review of his or her constitutional claims during or after the proceeding."[226] In cases where parents with disabilities face loss of parental rights due to discrimination, *Younger* has been found to prevent federal courts from interfering in state court proceedings absent "extraordinary circumstances."[227] *O'Shea v. Littleton* expanded the kind of abstention

225. *Id.* at *4. Ultimately, however, the District of New Jersey dismissed Ms. Wilson's claims on summary judgment. *See Wilson v. N.J. Div. of Child Prot. & Permanency*, 2019 U.S. Dist. LEXIS 144839 at *2 (D.N.J. Aug. 23, 2019).

226. *See Thurston v. Cotton,* No. 5:15-cv-138, 2015 US Dist. LEXIS 92195, at *4 (D. Vt. July 10, 2015) (citation omitted) (barring the plaintiffs' claims for injunctive relief under the *Younger* Doctrine); *Younger v. Harris*, 401 U.S. 37 (1971).

227. *Watley, 2019 WL 7067043, at *25* (noting that "the federal court will have to abstain from interfering in what will then be an ongoing state proceeding" and that "the plaintiff's allegations do not support a finding that he or she faces an 'imminent' injury"); *Rosenbaum v. Kissee,* No. 1:16-cv-00056 KGB, 2018 US Dist. LEXIS 28609 2018 WL 10399000, at *4-6 (E.D. Ark. Feb. 22, 2018); *Amato v. McGinty,* 2017 U.S. Dist. LEXIS 150198, 2017 WL 4083575, at *6 (N.D.N.Y. Sept. 15, 2017) (holding

conceived in *Younger*, prohibiting federal courts from deciding claims that seek review of ongoing state court proceedings.[228]

The District Court of New Jersey's decision to dismiss the claims brought in *Wilson I* at a later stage of review exemplifies how the abstention doctrine acts as a barrier for parents seeking federal intervention. The court reasoned that the entry of injunctive relief in this case "would almost certainly result in a flurry of federal suits that the rulings in state court family law matters ignored or circumvented the federal order."[229] Expanding upon that, the court observed that "a federal district court is not to appoint itself a de facto supervisor of state court proceedings . . . a scenario which would inevitably ensue given the frequent interplay between the New Jersey state courts and the [Department of Child

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that "to the extent that any issues in this litigation are still pending in family court, this Court is barred from exercising such jurisdiction pursuant to *Younger*"); *Duke v. Or. DOJ*, No. 6:16-cv-01038-TC, 2016 U.S. Dist. LEXIS 144132, at *1 (D. Or., July 19, 2016); *Thurston v. Cotton,* 2015 U.S. Dist. LEXIS 92195 2015 WL 4251191, at *4 (barring the plaintiffs' claims for injunctive relief under the *Younger* Doctrine) (citing *Moore v. Sims*, 442 U.S. 415, 430 (1979) (holding that the district court should have abstained while state-court proceedings, regarding welfare of children, took place).

228. *O'Shea v. Littleton*, 414 U.S. 488, 499 (1974) (characterizing Respondents' effort to seek an injunction "aimed at controlling or preventing the occurrence of specific events that might take place in the course of future state criminal trials" as "nothing less than an ongoing federal audit of state criminal proceedings which would indirectly accomplish the kind of interference that *Younger v. Harris* and related cases sought to prevent") (citation omitted).

229. *Wilson*, 2019 U.S. Dist. LEXIS 144839, at *29.

Protection and Permanency] regarding family law matters."[230] Unlike *Rooker-Feldman*, these barriers do not forbid federal courts from hearing claims after the conclusion of a family court case but are likely to prohibit litigation during a proceeding.

3. Collateral Estoppel and Preclusion

Federal courts have found collateral estoppel, also referred to as issue preclusion, to be a barrier to the handling of ADA claims arising from a parent's treatment in family court. Issue preclusion forbids courts from reassessing issues and facts that a party already litigated and another court actually decided.[231] When a court considers whether issue preclusion will bar relitigation of a particular issue, the court assesses whether (1) the underlying factual issues were already addressed by a state court decision and (2) plaintiffs had a "fair

230. *Id.*; *see also Karkanen v. California*, No. 17-cv-06967-YGR, 2018 U.S. Dist. LEXIS 135536 2018 WL 3820916, at *5 (N.D. Cal. Aug. 10, 2018) (addressing an alleged failure to provide reasonable accommodations and representation in a private custody case and reasoning that the court lacked "the authority to provide federal oversight over state courts' appointment of legal representation in custody cases").

231. *Watley*, 2019 WL 7067043 at *10 (stating "[c]ollateral estoppel precludes re-litigation of the issue at the heart of plaintiffs' complaint . . ."). Under the full faith and credit statute, 28 U.S.C. § 1738, federal courts are generally required "to treat a state-court judgment with the same respect that it would receive in the courts of the rendering State," and must look to a state's preclusion laws when evaluating state judgements. *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 373-375 (1995); *see also* 28 U.S.C. § 1738.

opportunity" to litigate as defined by state law.[232] Even when plaintiffs allege a variety of claims in federal court, issue preclusion can take effect when the "theme" of the claims briefed to each court overlap.[233]

In *Miller v. Nichols*, Janine Miller and James Mahood sought injunctive and declaratory relief to prevent the adoption of their daughter, as well as damages under the ADA.[234] Ms. Miller alleged that her caseworker made no effort to accommodate her possible mental illness and was consistently biased in favor of the foster parents.[235] The First Circuit determined that "the failure to accommodate the parents' needs in the context of the reunification obligation" was an overlapping "theme" between the federal ADA and the family court case. The First Circuit also held that the ADA claims depend on an "identical factual issue" litigated in the family court case.[236]

In *Watley,* the Second Circuit affirmed the District of Connecticut's dismissal of the ADA claims, finding them barred by collateral estoppel.[237] The *Watley* parents argued that the issues of whether DCF complied with the ADA and RA and whether DCF made reasonable efforts to reunify them with their

232. The preclusive effect of an issue raised in a state proceeding is determined by the law of the state in question. *Miller v. Nichols*, 586 F.3d 53 at 60-63 (1st Cir. 2009). Note that issue preclusion depends on an interpretation of state law and therefore varies somewhat across the nation.

233. *Id.* at 61.

234. *Id.* at 56

235. *Id.* at 58.

236. *Id.* at 61.

237. *Watley II*, 991 F.3d 418, 421.

children were not identical to the issues litigated in state court. They further argued that DCF's compliance with the ADA and RA was not actually litigated.[238] The Court of Appeals disagreed, reasoning that under both federal and Connecticut law, the core issue in the parties' dispute was whether DCF reasonably accommodated the parents actual or perceived disabilities in providing services and programs to assist their reunification with their children.[239] The court ruled that this issue was actually litigated and necessarily determined by the Connecticut state courts.[240]

4. Statutes of Limitations

State statutes of limitations can create time-bars to otherwise valid claims under the ADA. For example, in *Chitester v. Department of Child Protection and Permanency*, the district court found that Congress had validly abrogated Eleventh Amendment immunity under the ADA and RA but, nonetheless, found the claims barred by statutes of limitation.[241] One potential reaction to these cases, and indeed to those that are dismissed under *Rooker-Feldman*, is to

238. *Id* at. 421.

239. *Id.* at 426-27.

240. *Id.*.

241. *Chitester v. Dep't of Child Prot. Permanency*, CV No. 17-12650 (FLW), 2018 WL 6600099, at *6 (D.N.J. Dec. 17, 2018). The *Chitester* court looked to state tort law and found that the statute of limitations began running at the time of initial removal. *Id*; *see also Wilson*, 2019 U.S. Dist. LEXIS 144839 at *65 ("Section 1983 does not contain its own statute of limitations and instead borrows the limitations period from the law of the forum state.").

suggest bringing a claim at the outset of a child protective matter. Such claims, however, are likely barred under *Younger/O'Shea* abstention doctrines, which prevent federal courts from overseeing ongoing state litigation or the state administration of their courts.[242] Alternatively, courts could stay the federal proceedings pending the outcome of the underlying state suit.[243]

5. Immunity

Eleventh Amendment immunity is another hurdle for claimants raising ADA claims against family regulation actors in federal court.[244] The Eleventh Amendment protects nonconsenting states from suits in federal court brought by citizens of other states. The Supreme Court has interpreted it to also bar suits brought by a state's own citizens. The Eleventh Amendment can be overcome

242. *See supra* notes 226-228 and accompanying text.

243. Courts do this occasionally in the context of civil rights suits raised pursuant to 42 U.S.C. § 1983 where there is an underlying, related, and ongoing suit in criminal court. *See, e.g., Stoddard-Nunez v. City of Hayward*, No. 3:13-cv-4490 KAW, 2013 U.S. Dist. LEXIS 179969 (N.D. Cal. Dec. 23, 2013) (staying plaintiff's § 1983 claims and allowing limited discovery, in lieu of dismissal, where all the elements of *Younger* abstention had been me); Gresham v. Carson, No. 3:12-cv-00008-SLG, 2012 U.S. Dist. LEXIS 127781 (D. Alaska Sept. 7, 2012) (staying plaintiff's § 1983 claims based on allegations of *Miranda v. Arizona* until the conclusion of pending criminal proceedings).

244. Ruth Colker's seminal work on the issues presented by the ADA and its interaction with Eleventh Amendment immunity describes this hurdle, and potential solutions, in a broader context. *See* The Section Five Quagmire, 47 UCLA L. Rev. 653, 701 (2000) (arguing that Congress's abrogation of Eleventh Amendment immunity under Title II of the ADA was valid and constitutional).

by Congressional abrogation.[245] Eleventh Amendment immunity "encompasses not just actions in which the state is actually named as a defendant, but also certain actions against state agents and instrumentalities," including actions "for the recovery of money from the state."[246] The Eleventh Amendment prevents state officials from being liable in federal court for damages regarding actions done within their "official capacity,"[247] essentially barring recovery that would be paid out of state coffers.

In one case, the District Court for the District of New Jersey dismissed pending ADA claims against individuals in their official capacity as well as those sued under their individual capacity.[248] The court applied a three-part test to determine whether Eleventh Amendment immunity would bar the ADA claim: "(1) whether the payment of the judgment would come from the state; (2) what status the entity has under state law; and (3) what degree of autonomy the entity has."[249] The court determined that child welfare agencies are "an arm of the state

245. *Kimel v. Florida Board of Regents*, 528 US 62, 73 (2000), *Seminole Tribe of Fla. V. Florida*, 517 U.S. 44, 54-55 (1996); *see also* U.S. CONST. amend. XI. ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

246. *Regents of the Univ. of Cal. V. Doe*, 519 U.S. 425, 429 (1997); *accord Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 101, (1984)); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979).

247. *Wilson*, 2019 U.S. Dist. LEXIS 144839 at *41.

248. *Id.*

249. *Id.*

for purposes of the sovereign immunity analysis" and, from there, determined that those defendants sued in their official capacity were covered by Eleventh Amendment immunity.[250] As to defendants sued in their individual capacity only, the court determined that Title II extends to public entities only.[251]

Still, Eleventh Amendment immunity is not absolute. *Ex parte Young* created an exception allowing pursuit of injunctive relief against state officials so long as the suit is not for damages.[252] In addition, a state can waive its immunity. Congress can also abrogate Eleventh Amendment immunity when it "(1) unequivocally express[es] its intent to abrogate that immunity; and (2) act[s] pursuant to a valid grant of constitutional authority."[253] To satisfy the second factor, Congress must act pursuant to its Fourteenth Amendment section 5 power. In accordance with the Court's decision in *City of Boerne v. Flores*, any law Congress passes pursuant to its authority under section 5 must prevent or remedy Fourteenth Amendment violations already recognized by the courts, and the law must be proportional and congruent to those violations.[254] In the context of disability, the Fourteenth Amendment prohibits only irrational

250.*Id.* at *42.

251. *Wilson*, 2019 U.S. Dist. LEXIS 144839 at *40-*41.

252. Ex Parte *Young*, 209 U.S. 123 (1908)

253. *Bowers v. NCAA*, 475 F.3d 524, 550 (3d Cir. 2007) (quoting *Kimel v. Fla. Bd. Of Regents*, 528 U.S. 62, 73 (2000).

254. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

discrimination.[255] Laws prohibiting discrimination that would survive a rational basis review cannot abrogate Eleventh Amendment immunity.

In the context of the ADA, the Court's willingness to find abrogation of the Eleventh Amendment has depended much upon the congressional record documenting a history of discrimination. In *Board of Trustees of University of Alabama v. Garrett*, the Court held that Title I of the ADA, which permitted suits for damages against state employers, was not a valid exercise of Congress's section 5 power.[256] The Court found insufficient evidence of a history of public employment discrimination in the congressional record, noting that the "overwhelming majority" of that evidence of discrimination related to "the provision of public services and public accommodations." [257]

In *Tennessee v. Lane*, however, the Court reached a different conclusion with respect to Title II. In *Lane*, the Court faced the question of whether the ADA properly allowed suit against a state where two adults with paraplegia were denied access to the court system by reason of their disability.[258] George Lane—a defendant who used a wheelchair for mobility—was unable to access the courtroom where his case was being heard.[259] The courthouse lacked an elevator and, though Mr. Lane crawled up two flights of stairs for his first appearance, he

255. *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

256. 531 U.S. 356, 368, 374 (2001); *see supra* note 94

257. *Id.*

258. 541 U.S. at 513.

259. *Id.* at 513-514.

refused to do so on a future occasion.[260] The question before the Court was whether Title II exceeded Congress's power under section 5 of the Fourteenth Amendment.[261] Bolstered by Lane's novel presentation of a Title II claim intertwined with a claim alleging a violation of his fundamental right to access the courts, and by the long history of state discrimination against people with disabilities resulting in deprivations of fundamental rights, the Court concluded that Congress was within its authority to abrogate Eleventh Amendment immunity pursuant to Title II.[262]

In the context of family regulation, at least one court has found that Congress validly abrogated immunity under the ADA.[263] In assessing the question of valid abrogation in the context of family regulation proceedings, *Lane* offers a compelling basis to argue that Congress acted well within its authority.[264] As the *Lane* Court found, "Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services

260. *Id.*

261. *Id.*

262. *Id.* at 524-528. (concluding that Congress was within its authority to abrogate Eleventh Amendment immunity pursuant to Title II "as it applies to the class of cases implicating the fundamental right of access to the courts").

263. *Chitester*, 2018 WL 6600099, at *3-5 (finding "clear intent" to abrogate Eleventh Amendment immunity in both the ADA and the RA).

264. Margolin, *supra* note 24, at 144 (citing *Tennessee v. Lane*, 541 U.S. at 432); *see also Santosky v. Kramer*, 455 U.S. 745 (1982).

and programs, including systematic deprivations of fundamental rights."[265] The *Lane* Court specifically considered the Congressional record on barriers to marriage for people with disabilities, among denials of fundamental rights.[266] Given this precedent, there are strong arguments to be made that Title II is a valid abrogation of Eleventh Amendment immunity in the context of family regulation cases, which impede directly on the fundamental right to parent. Nonetheless, many courts avoid the constitutional morass completely by determining that Congress's abrogation of immunity under the RA was valid and, because rights and remedies of the RA are coextensive with the ADA, they need not decide at the early stages of a case.[267]

The Eleventh Amendment does not bar suits for damages brought against state officials acting in their individual capacity on the grounds that any judgment against them is not a judgment against the state that should be paid by

265. 541 U.S. at 524.

266. *Id.* at 524-25 (finding in court decisions a "pattern of unequal treatment in the administration of a wide range of public services, programs, and activities, including the penal system, public education, and voting. Notably, these decisions also demonstrate a pattern of unconstitutional treatment in the administration of justice.").

267. *See, e.g.*, *Watley*, 2019 WL 7067043 at *18; *T.W. v. New York State Bd. of L. Examiners, No. 16CV3029RJDRLM, 2019 WL 4468081 (E.D.N.Y. Sept. 18, 2019), reconsideration denied,* No. 16CV3029RJDRLM, 2019 WL 6034987 (E.D.N.Y. Nov. 14, 2019); *see also Marble v. Tennessee*, 767 F. App'x 647, 655 (6th Cir. 2019) (finding that if there were a genuine question of fact as to whether DCS's conduct violated Title II, the district court would need to determine whether their conduct violated the Fourteenth Amendment or, if it did not, whether Congress validly, "prophylactically abrogated sovereign immunity for that class of conduct").

the state. However, officials sued in their individual capacity can raise individual immunity defenses, and at least one court has determined that they are not subject to Title II when sued in their individual capacity.[268]

Courts have also granted qualified immunity to the individual-capacity state defendants in these cases.[269] The doctrine of qualified immunity insulates government officials who are performing discretionary functions "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[270] As the *Watley* court reasoned, "[q]ualified immunity applies because it was not 'clearly established at the time of the alleged misdeeds that a state officer violated a parent's substantive due process rights by failing to direct the implementation of ADA policies and programs in child custody, neglect, and TPR proceedings.'"[271]

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268. *See supra* note 251 **Error! Bookmark not defined.** and accompanying text.

269. *Watley II,* 991 F.3d 418; *Wilson*, 2019 U.S. Dist. LEXIS 144839; *Mazzetti v. N. J. Div. of Child Prot. and Permanency*, No. CV14-8134KMMAH, 2017 WL 1159726 at *28-30 (D.N.J. Mar. 27, 2017).

270. *James v. City of Wilkes-Barre,* 700 F.3d 675, 679 (3d Cir. 2012) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). The U.S. Supreme Court has established a two-part analysis that governs whether an official is entitled to qualified immunity. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001). That two-part analysis inquires as to (1) whether the facts put forward by the plaintiff show a violation of a constitutional right; and (2) whether the right at issue was clearly established at the time of the alleged misconduct. *Id*.

271. *Watley*, 2019 WL 7067043 at *15.

Watley reveals how parents in these cases are hamstrung by the lack of controlling precedent or persuasive authority suggesting that failure to implement the ADA is a violation of substantive due process. Because courts rely on controlling authority or a significant volume of persuasive authority to determine whether an act was a "clearly established" violation of law,[272] and because claims involving ADA violations in the public family regulation system are overwhelmingly dismissed, rulings on qualified immunity can become a recurring block to ADA claims against state employees.

6. The Need to Embrace Disability

Federal decisions dismissing ADA claims stemming from family court cases also reveal the unique challenges facing parents in the family regulation system: parents must "claim" disability even where it can be harmful to their pursuit of parenthood and lead to greater discrimination. While this is inherent to making use of the ADA in many contexts,[273] it can be particularly fraught for parents with disabilities facing the punitive removal of their children.

In *Marble v. Tennessee,* the Sixth Circuit affirmed the dismissal of ADA claims where it was undisputed that Mr. Marble had a disability, and he had made

272. *See, e.g.*, *id.* at *50-51 (D. Conn. Dec. 23, 2019) ("Plaintiffs need not point to 'a case directly on point,' but must nonetheless find either 'cases of controlling authority in their jurisdiction at the time of the incident' or 'a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful.'").

273. Eyer, *supra* note 59; Bagenstos, *supra* note 74.

a specific request for a deviation from policy.[274] The problem for Mr. Marble was that he had not specifically connected his disability with his request for accommodation: "Marble's testimony shows that he never told DCS his disabilities kept him from meeting the requirements of the permanency plan."[275] The Sixth Circuit looked to cases arising from the employment context to support their reasoning that, without Mr. Marble's identification and "claim" of disability, the case worker would not have known about disability.[276]

In making this ruling, the court focused on the fact that Mr. Marble lived far from the child welfare agency and that the caseworkers would not have known about his disability.[277] Even though Mr. Marble requested an accommodation, the agency could not have connected it to his disability unless he told them. While compelling, this logic ignores the very real differences between employers and caseworkers; caseworkers, unlike employers, have federal obligation to engage in tailored, reasonable efforts to reunite an individual with their children. Arguably, this relationship contemplates a much higher degree of knowledge and awareness about a parent's particularized needs and individualized disability than an employer would have about an employee.

274. *Marble v. Tennessee*, 767 F. App'x 647,650 (6th Cir. 2019).

275. *Id.* Mr. Marble's claim specifically was that he had been wrongly denied a reasonable accommodation, *i.e.*, that his children be placed with a willing and available relative. *Id*. In denying the claim, the court cited to the DOJ/HHS TA and acknowledged specifically that placement with a family resource can be an accommodation under the ADA. Nonetheless, the court found that it was not clear enough that Plaintiff's request for placement with a relative was an accommodation.

276. *Id.* at 651-52.

277. *Id.* at 653.

IV.

THE WAY FORWARD

This Section offers potential solutions to the current crisis facing parents with disabilities, focusing on both local and federal reforms. In both state and federal venues, parents face a tremendous power imbalance when compared to the state: they are, by-and-large, poor, working with court-appointed counsel, and radically disempowered following the removal of their children.[278] In this sense, the ADA offers a potential means to shift power from courts and the state to parents with disabilities and their advocates. The time-sensitive nature of family court cases, especially family regulation cases that proceed according to the federal timelines identified in the ASFA, means that parties must invoke the ADA early and immediately at the local level. Families and their advocates require mechanisms to raise claims of disability-related discrimination and seek disability-related supports in a timely fashion before the local family court. Nonetheless, given that the ADA is a federal statute which purports to protect an entire group from discrimination, some active form of federal judicial oversight

278. *See infra* Part I.b-d and accompanying notes; *see also* S. Lisa Washington, *Survived & Coerced: Epistemic Injustice in the Family Regulation System*, _ Colum. L. Rev. at 1 (forthcoming 2022) (describing the family regulation system as an "intrusive, disempowering surveillance system"); L. Frunel and Sarah Lorr, *Lived Experience and Disability Justice in the Foster System*, 11 Columbia J. of Race and the Law _ (forthcoming 2022) ("In the family regulation system, the label of disability is used to strip parents of rights and credibility, and the system itself—along with the actors within it—fails to understand the nature of disability while simultaneously espousing and adopting harmful stereotypes of disability to conclude that disabled parents cannot parent.").

of state actors is appropriate. The jurisdictional, and often haphazard, way that family law develops across the country, with differences emerging at a state- and even county-wide level, underscores the need for a federal avenue of enforcement. Indeed, as the current state of ADA application in state court suggests, state and local family courts are destined to disagree about their interpretation of what the ADA requires and how it should be enforced. The below section suggests federal and local approaches to alleviate the current barriers facing parents, offered as tools for parents and their advocates to shift power in the courtroom and the family regulation system more broadly.

A. Correcting Federal Doctrine

Federal enforcement of the ADA is necessary to address the very real predicament facing parents who might seek intervention from federal courts—as family courts have directed them to do for decades, and that many courts continue to do today.[279] As a first step toward federal-level enforcement, federal courts must contend with the actual practice of the family courts. Federal decisions that find discrimination claims are barred by *Rooker-Feldman* or are precluded because of prior findings of reasonable efforts or a termination of parental rights appear to have only a superficial understanding of how services and supports are provided in the family regulation system. These decisions conflate interventions that take place outside of court, which are distinct acts by

279. *See supra* note 193 (collecting cases which continue to direct parents to file claims in federal court).

a social services agency and therefore covered by the ADA, with actual court proceedings and findings, which might be more easily subject to the doctrines of *Rooker-Feldman*, abstention, and preclusion.

As the review of state court decisions reveals, a thorough assessment of whether and how a case worker might have discriminated against a given set of parents while conducting a removal often does not regularly take place in family court. This is especially likely to be true given the high volume of cases before a judge and the particular issues—the immediate safety of a newborn in the situation presented to the court, the fear that the result of their decision will end up in a newspaper—on which family courts are focused. As the New York Court of Appeals observed, the question of whether accommodations are reasonable under the ADA requires "a time- and fact-intensive process with multiple layers of inquiry."[280] With the notable exception of Michigan, Colorado, and Utah, state court laws do not require that courts engage in deep, careful assessments of whether or not reasonable accommodations or modifications to policies exist for parents with ID.

Federal courts should look to the logic employed by the District of New Jersey in *Wilson*, which correctly comprehends that a claim under the ADA "asserts claims for damages based on alleged abuses by state officials" or injunctive relief seeking policy changes.[281] As the court reflected, such claims "might tend to undermine the state court's conclusions" but do not require that

280. *Lacee L.*, 114 N.E.3d at 130.

281. *Wilson*, 2016 WL 316800.

they be overruled.[282] Moreover, federal courts should take heed of *Rooker-Feldman*'s diminishing power in recent years.[283] Cases in other areas of law have made clear that *Rooker-Feldman* is not a bar when the injury complained of is caused by the defendant's actions, rather than the state court judgment.[284]

Federal courts must grapple with the watered-down approach utilized in family courts. Where a family court has refused to hear arguments about violations under the ADA, it is disingenuous for federal courts to allow states to invoke issue preclusion as a defense. The argument that issue preclusion should block litigation of ADA claims in such cases fails to meaningfully contend with the requirement that for a claim to be precluded, the issues must have been "actually litigated" in the underlying proceeding.[285] In service of these goals, federal courts and the advocates who appear before them must educate themselves about the mechanisms of service provision. Specifically, courts and advocates must contend with the extent to which services are provided outside

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282. *Id.*

283. *See, e.g.*, *Exxon Mobil*, 125 S. Ct. 1517, 1521 (observing that *Rooker-Feldman* "has sometimes been construed to extend far beyond the contours" of the initial cases creating the doctrine, "overriding Congress' conferral of federal-court jurisdiction concurrent with jurisdiction exercised by state courts, and superseding the ordinary application of preclusion"). For an entertaining and informative history of how *Rooker-Feldman* has weakened over the years, see Samuel Bray, *Rooker Feldman (1923-2006)*, 9 Green Bag 2D, 317 (2006).

284. *See, e.g.*, *In re Razzi*, 533 B.R. 469, 478 (Bankr. E.D. Pa. 2015); *Centres, Inc. v. Town of Brookfield*, Wis., 148 F.3d 699, 702 (7th Cir. 1998)

285. *See supra* notes 229-236.

of family court proceedings and beyond the watchful eyes of the family court judges. Advocates and scholars should train federal practitioners and judges, many of whom have very limited familiarity with the details of family court practice or service provision to parents and families.

Finally, parents and their advocates should take seriously DOJ and HHS's joint interest in these issues and file federal civil rights complaints. DOJ has a division of civil rights and HHS has an office of civil rights, and both have staff dedicated to investigation and enforcement of ADA claims.[286] Recent settlements with Oregon and Washington,[287] plus technical assistance directed to New Jersey,[288] suggest that the Sara Gordon case in Massachusetts is more than a passing interest to the departments.[289] Even better, these claims can be filed without access to an attorney and require no prescribed form of complaint.[290] Both agencies offer online forms as well as physical addresses

286. *How to File a Civil Rights Complaint*, https://www.hhs.gov/civil-rights/filing-a-complaint/complaint-process/index.html [https://perma.cc/R42P-HDW2] (Accessed Jul. 19, 2021); *Submit a Complaint*, https://www.justice.gov/actioncenter/submit-complaint (Accessed Jul. 19, 2021). Both the HHS and DOJ websites provide methods for filing a federal civil rights complaint, which includes the option to submit a complaint directly online through the portals linked in this footnote.

287. *See supra* text accompanying note 20.

288. *Id.*

289. *Id.*

290. *See supra* note 255.

where complaints can be sent by mail.[291] Institutional providers in state family courts should begin filing these complaints whenever appropriate.

B. Family Court-Based Solutions

Family courts and advocates appearing in them must insist that state agencies make "reasonable efforts" meaningful. Both the Michigan Court of Appeals decision in *Hicks/Brown* and the Bronx County Court decision in *Xavier Blade* provide a strong and replicable path forward for both judges and advocates.

The legal standard articulated in *Hicks/Brown*, which identifies compliance with the ADA as a threshold issue for a finding of reasonable efforts, is significantly different from the legal standard in almost every other state. The *Hicks/Brown* decision is unique among family court decisions in that it requires family courts to make an ADA finding, separate from the state law determination about compliance with family law standards of "reasonable efforts" and any existing state anti-discrimination laws. In contrast, decisions that have determined that reasonable efforts automatically presume compliance with the ADA allow courts to skip a detailed application of the ADA and instead simply assume compliance with the finding of reasonable efforts. The difference for parents can be significant in that the *Hicks/Brown* standard creates an

291. *In re Hicks/Brown,* 893 N.W.2d at 637.

"affirmative duty" to make reasonable accommodations.[292] In states that have not recently addressed the ADA or have not adopted the *Hicks/Brown* standard, advocates should pursue this standard.

An effort to secure clear legal standards applying the ADA should include advocacy that emphasizes the tension between ASFA and the ADA. ASFA, with its bright line rules surrounding termination of parental rights and permanency, can appear fundamentally at odds with individuation required by the ADA.[293] And it is ASFA, not the ADA, that family courts most often look to for guidance. After all, it is ASFA that pins federal funding to compliance, and ASFA that speaks directly to the state's obligation to both children and families in the family regulation system. Advocates in family court must insist on the primacy of federal antidiscrimination law and seek extensions on timelines under ASFA as reasonable accommodations where appropriate.

Trial and appellate lawyers working in family courts who seek replication of this standard should be mindful of the possibility that this standard may make litigation in federal court even less plausible. Parents with claims heard by courts that deem the requirements of the ADA and controlling state law to deal with nearly identical core factual issues can expect to face a particularly high hurdle

292. *Kay*, *supra* note 24, at 813 (describing that *Hicks/Brown* goes further than decisions that find reasonable efforts presumes compliance with the ADA because it clarified that "once the agency is aware of the disability, it has an 'affirmative duty to make reasonable efforts at reunification.'").

293. *See supra* notes 107-126 and accompanying text.

in federal court on *Rooker-Feldman* and preclusion grounds.[294] The great overlap in standards will require parents to decide early on whether they want to file in federal court under the ADA or raise the issue in family court. Though increased attention in family courts may lower the chances of federal engagement in these cases, it will significantly raise the possibility of vindication in family courts. In this way, federal engagement in these cases may become less critical. Moreover, the relatively high number of cases in family courts attempting to resolve issues under the ADA reveals that for many parents, family court is the sole and primary place of legal advocacy for the vast majority of parents.[295]

Xavier Blade, the decision of a Bronx County Family Court Judge and affirmed by New York Appellate Division of the First Judicial Department of the Supreme Court of New York also offers a path forward for judges and advocates. The family court's decision made significant use of the existing local resources for adults with ID and, while acknowledging the work that the foster care agency had done for this family, demanded that more be done based on the specific needs of parent before the court.[296] In addition, the court looked directly to ADA accommodations recognized by the EEOC in the employment law

294. *See supra* III.C.1-3.

295. Professor Joshua Kay has also discussed the downsides of pursuing ADA-based claims outside of family courts. Kay, *supra* note 24, at 808 (describing that such claims require parents to "suffer discrimination, lose their children, and seek a remedy under the ADA in a separate action," in that order). As this Article's review of federal decisions reveals, however, even under the less-than-ideal circumstances imagined by Kay, a parent is unlikely to prevail.

296. *In re Xavier Blade Lee Billy Joe S.*, 187 A.D. 659.

context.[297] A decision like *Xavier Blade* makes clear that even in those courts that have not adopted the standards outlined in *Hicks/Brown*, there is a route forward involving actual accommodation for parents with disabilities.

In addition to advocating for the application of more robust legal standards, lawyers must regularly raise the growing social science evidence that confirms parents with ID can effectively and safely parent with appropriate supports.[298] There is also specific evidence about what kinds of support will help these parents.[299] At the same time, lawyers, activists, and parents must push for increased support services for parents with disabilities. This cohort must also forge stronger connections between those service providers who regularly work with adults with ID and the parents in the family regulation system who are not often provided with specialized services.[300] As other scholars have also

297. *Id.*

298. *See, e.g.*, Powell, *supra* note 9; Rocking the Cradle, *supra* note 11; *see also* Elizabeth Lightfoot, Katharine Hill, & Traci LaLiberte, *The Inclusion of Disability as a Condition for Termination of Parental Rights*, 34 Child Abuse and Neglect 928 (2010); Smith, *supra*, note 24.

299. Astraea Augsberger, Wendy Zeitlin, & Trupti Rao, *Examining a Child Welfare Parenting Intervention for Parents with Intellectual Disabilities*, 31 Research on Social Work Practice 65 (2020); Trupti Rao, *Implementation of an Intensive, Home-Based Program for Parents with Intellectual Disabilities*, 7:5 Journal of Public Child Welfare 691 (2013).

300. *See* Sandra T. Azar, et al., *Practice Changes in the Child Protection System to Address the Needs of Parents with Cognitive Disabilities*, 7 J. Public Child Welfare 610, 612 (2013) (describing that for parents with ID "involved in multiple, complicated systems," collaboration between caseworkers involved in their child protective matter and the other, disability-specific service providers and programs

demonstrated, there is a great need for disability-specific training for lawyers, social workers, and other stakeholders in family regulation.[301]

V.

REIMAGINING DISABILITY RIGHTS IN FAMILY COURT

While the ability to pursue ADA-based claims in federal and family courts is critical both in terms of advancing substantive rights and shifting power, the current legal regime is plainly not sufficient to protect and support parents with disabilities. The near universal failure of federal and family courts to reckon with the rights of parents with disabilities suggests that a broader reimagining of disability rights in the family regulation system must take place. The challenges inherent to robust application of the ADA are on vivid display in the opinions and decisions discussed above. These decisions, which variously water down the ADA to a rough estimate of state antidiscrimination law or "reasonable efforts" required in every single case, regardless of whether the ADA bears relevance, show how unlikely family courts are to begin strenuously applying the ADA. With a growing number of scholars and activists recognizing the power and

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are pivotal); Sandra T. Azar and Kristin N. Read, *Parental Cognitive Disabilities and Child Protection Services: The Need for Human Capacity Building*, 36 J. of Sociology and Social Welfare 127 (2009).

301. *See, e.g.,* Robyn Powell, et al., *Terminating the Parental Rights of Mothers with Disabilities: An Empirical Legal Analysis*, 85 Missouri L. Rev. 1069 (2021).; Powell, *supra* note 9 (discussing the ethical responsibility of lawyers to be zealous advocates for clients and contending that part of this includes social science research to advance the rights of parents with ID and their children); Lightfoot et al., *supra* note 267.

promise of a Disability Justice Movement and DisCrit in other areas of law,[302] this Article concludes it is time for Disability Justice and DisCrit to come to the family regulation system.[303]

Here, this Article seeks to take seriously Amna Akbar's recent invitation to study social movements that seek change beyond the law.[304] Akbar posits that scholars reaching for meaningful change often "lack alternative frameworks" and are thus hamstrung in our efforts to truly revision or imagine change outside of the status quo.[305] Disability Justice provides a potential framework for thinking through and assessing the problems within the family regulation system and a foundation from which to imagine new solutions to these problems outside of the existing legal framework. As observed by Professor Robyn M. Powell, Disability Justice is "complimentary to child welfare system abolition."[306] The

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302. *See, e.g.*, Chin, *supra* note 27; Perez, *supra* note 26; Sins Invalid, *supra* note 130; Morgan, *supra* note 131; *supra* note 152 and accompanying text.

303. Further work by this author will explore the possibilities for reimagining or abolishing family regulation that emerge from the application of Disability Justice and DisCrit to this field. For now, this Article serves to make the case that such a radical reimaging is necessary, and to offer the beginnings of a path towards one such reimagining framed in the movement of Disability Justice and the tenets of DisCrit

304. *Amna A. Akbar*, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. Rev. 405, 473 (2018) (considering the creative potential of studying radical social movements through a comparison of the Vision for Black Lives with the DOJ's reports on Ferguson and Baltimore).

305. *Id.* at 412.

306. Powell, *supra* note 29, at __ ("Fundamental to disability justice is the recognition that universalist-individualist approaches to disparities are inevitably limited and inadequate.").

novel application of DisCrit to family regulation opens up similar potential. As abolitionist and scholar Liat Ben-Moshe urges, considering abolition pushes us to go "to the root cause of issues, in both content and form."[307]

The practical legal solutions proposed in Section IV aim to provide a path for parents and their advocates to use the existing legal framework to shift power towards parents.[308] Still, many of these solutions and other scholarship on the ADA's role in family regulation[309] are arguably fundamentally "inward facing," focusing more on allowing the system to continue to function than on creating fundamental change.[310] The project of Disability Justice, like other abolitionist

307. Ben-Moshe, *supra* note 41, at 133.

308. Indeed, these interventions are offered as a form of "harm reduction" and, though largely focused on in-court or system-based advocacy, could well be used within a broader framework of "non-reformist reforms" to the family regulation system. As Akbar has explained, "[t]he non-reformist reform does not aim to create policy solutions to discrete problems; rather it aims to unleash people power against the prevailing political, economic, and social arrangements and toward new possibilities." Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 Harv. L. Rev. F. 90, 102 (2020) (offering a history of the term "non-reformist reform"). Akbar has identified three "hallmarks" of such reform: "non-reformist reforms advance a radical critique and radical imagination," "advance a critique about how capitalism and the carceral state structure society for the benefit of the few, rather than the many, and "posit a radical imagination for a state or society oriented toward meeting those needs." *Id.* at 103.

309. *See e.g.*, *Kay*, *supra* note 24 (suggesting training, increased service provision, and various litigation strategies); Powell et al., *supra* note 271, at 1100 (discussing the need for accessible parenting evaluations, recommendations for policy and practice changes, and areas of further research).

310. Akbar, *supra* note 304,275 at 467 (describing reforms offered by the DOJ in its reports on policing in Ferguson, MI and Baltimore, MD).

movements, is an "agenda for demolishing but also building."[311] While the proposed avenues of relief have the potential to address symptoms—and are critical to helping individual litigants and to shifting the balance of control among a class of routinely disempowered litigants—they are neither deconstructive nor reconstitutive. Moreover, though they are pivotal parts of a law reform project focused on family court, they are limited in important, structural ways. Some place the burden for vindication of rights squarely on individuals with disabilities and their often-overwhelmed and underpaid advocates. Likewise, they further entrench the rights-based framework enshrined by the ADA.[312] This framework can be problematic not least because it requires that a person only receive certain benefits and rights if, in fact, they can prove they are worthy.[313]

Together, the application of DisCrit and Disability Justice principles call for a structure of family support that is non-adversarial, support-based, and led

311. Ben-Moshe, *supra* note 4541, at 132; *see* Patty Berne, *Disability Justice – a working draft,* Sins Invalid (June 9, 2015) [https://perma.cc/6AKS-ADAK] ("We are in a global system that is incompatible with life. There is no way stop a single gear in motion — we must dismantle this machine.").

312. *See* Akbar, *supra* note 304, at 445-446 (discussing the limits of rights and the extent to which scholars of Critical Legal Studies and Critical Race Theory have disagreed about the role and importance of rights).

313. Morgan, *supra* note 131, at 21 (noting, among other limitations, that the ADA requires individuals to prove "qualification" in order to benefit from its protections).

by the most impacted.[314] This call for a supportive, rather than punitive, system borrows not only from the Disability Justice movement's recognition of our interdependence[315] but also from the Movement for Black Lives' call to "invest-divest."[316]

On a more basic level, application of the tenets of DisCrit and Disability Justice encourages changes among attorneys and their relationship to their client, and new approaches to advocacy in family courts. These same tenets can provide courts themselves with new and more active approaches to maintaining family integrity. Scholars who apply these principals will further expose the flawed premise of the family regulation system, shed light on structural problems facing parents with disabilities in family court, and begin to imagine alternatives.

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314. While all of the tenets of DisCrit theory offer meaningful and substantive framing for lawyering in family court, this paper will interrogate and apply three tenets with the goal of assessing how they can be used to disrupt the ordinary practice of the family regulation system, creating space for the human beings ensnared in the system.

315. "We work to meet each other's needs as we build toward liberation, without always reaching for state solutions which inevitably extend control further into our lives." Sins Invalid, *supra* note 130, at 25.

316. "We demand investments in the education, health and safety of Black people, instead of investments in the criminalizing, caging, and harming of Black people. We want investments in Black communities, determined by Black communities, and divestment from exploitative forces including prisons, fossil fuels, police, surveillance and exploitative corporations." M4BL, *Invest-Divest*, https://m4bl.org/policy-platforms/invest-divest/ [https://perma.cc/GD3B-6QUA]; *see also* Roberts, *supra* note 13 ("Rather than divesting one oppressive system to invest in another, we should work toward abolishing all carceral institutions and creating radically different ways of meeting families' needs.").

The first tenet of DisCrit "focuses on ways that the forces of racism and ableism circulate interdependently, often in neutralized and invisible ways, to uphold notions of normalcy."[317] As applied to family court, this tenet demands—among other requirements—that scholars, practitioners, and participants in the family regulation system examine the substantial impact that racist and ableist ideas have had on the law's interpretation of theoretically objective standards like "reasonable efforts," "best interest," and "unfitness." DisCrit requires examination of the standards and structures within family law that purport to be neutral. Scholars, judges, and advocates must interrogate the extent to which these standards actually perpetuate racism and ableism. Attorneys especially must wrestle with how advocacy on behalf of a parent in family court can render parents with disability invisible or otherwise reinforce notions of ableism.[318]

For example, a parent or an attorney who makes the strategic decision to hide a parent's disability to avoid triggering greater concerns by a visiting caseworker is responding to the pressure to "uphold notions of normalcy" within the system. The decision may have the impact of masking how a particular family functions as an interdependent web, and instead focusing on the strengths and weaknesses of a specific and particular individual. As another example, when a judge or case worker demands that a parent care for children entirely on their own, and not rely on natural supports such as grandparents or cousins, as in

317. DisCrit, *supra* note 26, at 19.

318. For a sophisticated analysis of how the forces of race and ableism influence prison litigation, see Morgan *supra* note 27.

the case of Sara Gordon, the system may appear to be neutrally ensuring that the parent can act in an emergency. This standard works to reinforce the vision of a parent as one who can and should act independently and without the community from which they come or other supports.

By examining current laws, standards, and practices in light of the ableism and racism that operates within the system, the various actors within the system will be challenged to reevaluate those standards that have been understood as neutral or objective. Within the system, attorneys will be pushed to offer deeper and more nuanced narratives about their client's lives, contextualizing not only their circumstances and choices, but also their strengths and abilities as parents. This will naturally expose the structural inequality at play in the family regulation system and create a path for counsel to change the vision of parents with disabilities from that of "unworthy" or "inappropriate" parents to a more complicated vision of parents who, with support and opportunity, have the capacity and humanity to parent their children. These same narratives will shift the focus on structural inequality that contributes to the outcomes we see in the system. Moreover, applying a DisCrit lens to the current system will lead scholars and activists to consider alternatives to the system that do not reproduce current harms.

Tied closely to this first tenet is the second: "DisCrit values multidimensional identities and troubles singular notions of identity such as race *or* dis/ability *or* class *or* gender *or* sexuality, and so on."[319] In this way, DisCrit

319. DisCrit, *supra* note 26, at 19.

requires that we see individual parents and their families in their full and entire context. As with the first tenet explored here, this challenges actors in the system—including parents themselves—to see and understand the full context of those individuals who are threatened with permanent separation from their children. DisCrit demands that this becomes a central tenet of family court in general, not merely the province of particularly "woke," client-centered, or disability-focused lawyers.

Current family regulation-focused scholarship does engage with the concept of multidimensional and intersectional identities. For example, Professor Matthew I. Fraidin has observed that "[w]hen the government alleges that [a] client is "unfit," it is an explicit, unabashed attack on her viability as a human being." [320] He urges that, in response, attorneys must tell the stories of clients' lives "as contextualized and connected" and "situate the charges against [a] client realistically, which is to say, as merely one jewel in that infinite net, knowable only by its relation to the entire net of our client's life and the lives around her."[321] Scholar S. Lisa Washington urges moving beyond the creation of attorney-led "counter-narrative," wherein attorneys and the state often dictate solutions, towards "a movement that centers directly impacted parents" and their

320. Matthew I. Fraidin, *The Importance of Family Defense*, N.Y.U. Review of Law & Social Change 41, 219-220 (2016).

321. *Id*. at 221 ("It is the attorney's job to place that parent in context and to tell their entire story.").

families.[322] DisCrit asks that all actors in the family regulation system access the multiple identities of the human beings before them. To the extent the family regulation system zeroes in, instead, on one particular aspect of a person's identity, scholars and practitioners must interrogate this tendency and begin to imagine alternative ways of supporting parents in their full complexity. Creating a system of support that center the needs of multidimensional families will allow parents with disabilities to be understood as individuals surviving and striving to raise a family in a society that has failed to support them, as opposed to individuals trapped by their own personal failings.[323]

Finally, the third tenet of DisCrit "emphasizes social constructions of race and ability and yet recognizes the material and psychological impacts of being labeled as raced or dis/abled, which sets one outside of the western cultural norms."[324] This tenet is of particular importance to family courts. As a norm-

322. *See* Washington, *supra* note 260, at 62 (arguing for an "epistemic injustice informed approach" to fight against the state's narrative of "individual blame, rather than abusive power structures" in the family regulation system). Washington points to the June 2021 symposium, "Strengthened Bonds: Abolishing the Child Welfare System and Re-Envisioning Child Well-Being," hosted by the Columbia Journal of Race and the Law as an example of a scholarly conference which centered many parent activists alongside scholars and lawyers. *Id.* at 62.

323. As Amna Akbar has observed, shifting money to social programs defined and directed by impacted people would very likely require a "process through which power is built by and shifted into [impacted] communities." Akbar, *supra* note 304, at 472.

324. DisCrit, *supra* note 26, at 19.

based area of law, one focused on the subjective standards of "best interest"[325] and "risk," family courts must quite regularly confront the "material and psychological impacts" of labeling race and inability. Yet, despite this familiarity, family courts again and again decline to grapple with the extent to which these markers (race and ability) are socially constructed and, instead, blame those who struggle with the impact of their pervasive marginalization and see those parents and families as failures, labeling them "unfit."

The thorough study of the decisions and policies that have resulted from attempts to apply the ADA in family court reveal the dysfunction of the current system. It is apparent that justice for parents with disabilities and their families has not come by bringing rights-based advocacy through the ADA. Instead of looking within the legal framework to the ADA and attempting to bring the ADA to bear on the heavily racialized and poverty-focused family regulation system, we must radically alter the family regulation system itself, changing its focus from that of a corrective, judgmental force brought upon Black, Brown, poor, and disabled parents to that of a support system led by the very community it seeks to regulate. We must develop systems of support that allow families to seek assistance without fear of repercussions, and which seek input and direction from the families themselves, rather than from outside forces of judgment who have the power to punish and remove.

325. *See* Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J.L. & Fam. Stud. 337, 346 (2008); Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. Chi. L. Rev. 1, 11 (1987).

CONCLUSION

The failure of family and federal courts to protect parents from discrimination based on disability is untenable. Jurists and advocates alike must take heed of this vacuum in rights recognition and how it perpetuates discrimination against parents with ID. At the same time, the near universal failure of federal and family courts to reckon with the rights of parents with disabilities suggests that a broader reimagining of disability rights in the family regulation system must take place. Scholars, activists, and advocates should apply the tenets of DisCrit and the Disability Justice Movement in looking beyond the scope of the ADA and creating a system that works for parents with disabilities.

U.S. Department of Justice
Civil Rights Division

U.S. Department of Health and Human Services
Office for Civil Rights

Via Email and Overnight Mail

January 29, 2015

Erin Deveney
Interim Commissioner
Department of Children and Families
Executive Office of Health and Human Services
Commonwealth of Massachusetts
600 Washington Street
Boston, Massachusetts 02111

Re: Investigation of the Massachusetts Department of Children and Families by the United States Departments of Justice and Health and Human Services Pursuant to the Americans with Disabilities Act and the Rehabilitation Act (DJ No. 204-36-216 and HHS No. 14-182176)

Dear Commissioner Deveney:

We write concerning the investigation of the Massachusetts Department of Children and Families (DCF) by the United States Departments of Justice and Health and Human Services (collectively, Departments) pursuant to Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12131-12134, and Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794.

Title II and Section 504 prohibit disability-based discrimination by DCF, including the denial of opportunities to benefit from services, the failure to reasonably modify policies and procedures, and imposing methods of administration that have the effect of discriminating on the basis of disability.[1] The Departments' investigation has revealed that DCF has committed extensive, ongoing violations of Title II and Section 504 by discriminating against Sara Gordon[2]

[1] Title II applies to public entities, which include state and local governments, and their departments and agencies, such as DCF. 42 U.S.C. § 12131(1). Section 504 applies to the programs and activities of recipients of federal financial assistance. 29 U.S.C. § 794(b)(1)(A), (B). DCF operates child welfare programs and activities and receives financial assistance from the Administration for Children and Families, U.S. Department of Health and Human Services.

[2] We use pseudonyms throughout this letter for family members.

on the basis of her disability, and denying her opportunities to benefit from supports and services numerous times over the past two years, including her existing family supports.

Sara Gordon is a 21-year-old woman who has a developmental disability. In November 2012, Ms. Gordon gave birth to Dana Gordon. Two days later, DCF removed the baby from Ms. Gordon's custody while she was recovering from childbirth in the hospital. Ms. Gordon lives with her parents, who do not have developmental disabilities. Her parents have continually intended to provide her support in parenting her child. Ms. Gordon's mother quit her job to provide full-time support for Ms. Gordon and her baby.

In this letter, pursuant to 28 C.F.R. § 35.172(c) and 45 C.F.R. § 80.7(d) (incorporated by reference in the Section 504 implementing regulation at 45 C.F.R. § 84.61), we identify our findings of fact, conclusions of law, and minimum steps DCF needs to take to remedy the violations.[3]

The Departments find that DCF acted based on Ms. Gordon's disability as well as on DCF's discriminatory assumptions and stereotypes about her disability, without consideration of implementing appropriate family-based support services. DCF has continued to deny Ms. Gordon access to appropriate family-based support services it makes available to parents to successfully achieve reunification and has failed to reasonably modify its policies, practices, and procedures to accommodate Ms. Gordon's disability. DCF staff assumed that Ms. Gordon was unable to learn how to safely care for her daughter because of her disability, and, therefore, denied her the opportunity to receive meaningful assistance from her mother and other service providers during visits. Finally, DCF changed the permanency goal to adoption and has sought to terminate Ms. Gordon's parental rights on the basis of her disability.

During the past two years, multiple community-based service providers, two experts who have completed parenting assessments, Dana's court-appointed attorney, and even a majority of DCF's most recent Foster Care Review panel all have agreed that a family-supported parenting plan would be appropriate. In this matter, a family-supported parenting plan means that Dana would be placed with Ms. Gordon and her parents in their home and Ms. Gordon's mother (Dana's grandmother) would maintain guardianship of Dana. In particular, Dr. Nicole Brisson, Ph.D., LCMHC, a nationally-recognized expert in assessing parents with developmental and intellectual disabilities to ascertain appropriate parenting supports, evaluated Ms. Gordon in October 2014 and found Ms. Gordon "is a loving, caring, and conscientious mother who is willing to do whatever it takes to have her daughter in her life." Dr. Brisson also found there was "no discernible reason revealed [by her] assessment that [Ms. Gordon] and her parents do not have the ability to care for [Dana] safely." Brisson, Competence-Based Family Assessment at 23-24 (Oct. 24, 2014).

In this letter of findings, the Departments do not seek a remedy under Title II and Section 504 that requires DCF to immediately transfer custody of Dana to Ms. Gordon and her family. Instead, the Departments identify as a remedial measure that DCF immediately implement

[3] The U.S. Department of Justice makes findings under Title II. The U.S. Department of Health and Human Services makes findings under Title II and Section 504.

services and supports for an appropriate amount of time to provide Ms. Gordon a full and equal opportunity to pursue reunification with Dana, in consideration of the denials over the past two years and the evaluations of the professionals that have opined on this case.

The Departments recognize and respect the important responsibility placed on DCF and its social workers to investigate, protect, and care for infants and children involved with the child welfare system. However, the violations in this letter highlight systemic failures by DCF to ensure social workers follow appropriate policies and procedures and have necessary training to perform their duties without discriminating on the basis of disability.

Background

The child welfare system is a group of services designed to promote the well-being of children by ensuring safety, strengthening families, and achieving permanency. Pursuant to Title IV-E of the Social Security Act, DCF is required to make reasonable efforts to preserve and reunify families prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child's home; and to make it possible for a child to safely return to the child's home. *See* 42 U.S.C. § 671(a)(15). To that end, families with children in custody typically participate in developing a permanency plan for the child and a service plan for the family, which guide the child welfare agency's work. Family reunification, except in unusual and extreme circumstances, is the permanency plan for most children. If efforts toward reunification are not successful, the plan may be changed to another permanent living arrangement, such as adoption or transfer of custody to a relative.

DCF, through its more than two dozen offices across the Commonwealth of Massachusetts, is the State agency responsible for receiving and responding to reports of child abuse and neglect; providing and administering programs to strengthen families; making reasonable efforts to encourage and assist families to use all available resources to maintain the family unit intact and to reduce the risk of a child's placement into substitute care; and providing substitute care only when child safety and risk factors cannot be reasonably reduced or eliminated through services to the child's family.[4]

The Departments recognize and respect the important responsibility placed on DCF and its social workers to investigate, protect, and care for infants and children involved with the child welfare system. The Departments' investigation in this matter has revealed, however, that DCF has discriminated against Ms. Gordon in violation of Title II and Section 504 since November 2012.

[4] Although the Federal Government plays a major role in supporting States in the delivery of services by funding of programs and legislative initiatives under Titles IV-B and IV-E of the Social Security Act, the primary responsibility for child welfare services rests with the States. Child Welfare Information Gateway, *How the child welfare system works*. Washington, DC: U.S. Department of Health and Human Services, Children's Bureau (2013) (available at: https://www.childwelfare.gov/pubs/factsheets/cpswork/).

The Departments' Investigation

On June 30, 2014, the Office for Civil Rights, U.S. Department of Health and Human Services (OCR) notified DCF that it had opened an investigation of a complaint filed by Ms. Gordon under Title II and Section 504. OCR's letter also requested data from DCF concerning the allegations of the complaint, including copies of all Juvenile Court orders, petitions, and reports prepared for the Court and DCF child protection policies, procedures, and practices. On August 20, 2014, the Disability Rights Section, Civil Rights Division, U.S. Department of Justice (DRS) notified DCF that it, too, had opened an investigation of the services DCF provides to individuals with disabilities and the removal and subsequent placement of Dana Gordon. DRS also requested data from DCF concerning its policies, practices, and procedures and administrative and court files related to Dana, Ms. Gordon, and Ms. Gordon's parents. DRS explained that the Departments of Justice and Health and Human Services may conduct a joint investigation of DCF.

When DCF failed to provide all of the requested material five months after the OCR request and three months after the DRS request, the Departments again requested information responsive to their initial inquiries as well as additional information on November 25, 2014. To date, DCF has failed to fully comply in providing materials, such as email, and failed to timely seek to secure access to court records.

During the course of our investigations, the Departments interviewed:

- Ms. Gordon and her parents, Kim and Sam Gordon, on multiple occasions;
- DCF social workers providing direct services to Ms. Gordon, Dana, and the foster parents, the adoption social worker, the investigators who responded to and recommended the initial removal, their respective supervisors, and an Area Program Manager;
- DCF-funded service providers who have provided services to Ms. Gordon and Dana, including representatives from Valuing Our Children (VOC) and The United Arc; and
- Dr. Nicole Brisson from Sage Haven Associates, located in Fairfax, Vermont.

The Departments also reviewed extensive records, including:

- Hospital and family practice medical records dating back nearly two decades;
- Educational records;
- DCF records concerning Ms. Gordon, Dana, Kim and Sam Gordon, and the foster parents; and
- DCF's policies, practices, procedures, regulations, and training materials.

The Departments have also regularly requested that DCF submit any materials that DCF believes would be important for the Departments to consider in their investigation.

Summary of the Facts

Ms. Gordon lives with her parents in rural Massachusetts. Ms. Gordon volunteers for an organization in her community matching families with donated clothing and household items. She is finishing a few courses in a special education program in her high school in order to obtain her diploma. Ms. Gordon is interested in pursuing education beyond high school and finding a part-time job, perhaps in construction or in teaching art or preschool. Mostly, Ms. Gordon aspires to parent Dana. If reunified, Ms. Gordon hopes to do the things that most parents take for granted, such as taking Dana to the park, sharing a quiet moment with her daughter at bedtime, and teaching her to fish and ride a bike. According to Dr. Brisson, Ms. Gordon has realistic expectations and acknowledges that it would be difficult to care for Dana on her own, and fully recognizes that she needs the assistance of her parents.

Ms. Gordon has a developmental disability that manifests in several ways. Among other things, she requires repetition, hands-on instruction, and frequency in order to learn new things. She has difficulty reading and following oral instructions, and explains that she learns best visually and through practice. Dr. Brisson evaluated her and found that she displays characteristics of a mild intellectual disability that affects some conceptual areas of her learning.

In November 2012, while Ms. Gordon was in the hospital, recovering from giving birth to Dana two days earlier, DCF received a report containing allegations of neglect regarding Ms. Gordon and Dana.[5] According to DCF's Intake Report, DCF reviewed the report and decided to conduct an emergency response investigation, noting concerns that Ms. Gordon "was not able to comprehend how to handle or care for the child due to the mother's mental retardation." DCF's November 26, 2012 Emergency Investigation report documented the investigators' observations that 19-year-old Ms. Gordon had difficulties holding and feeding Dana, and that she had to be reminded by an investigator to burp the baby and clean spit out of the baby's mouth. The investigators also observed that Ms. Gordon was uncomfortable at changing the baby's diaper. DCF's Intake Report also alleged that Ms. Gordon forgot to feed Dana during one night shift.[6] Ms. Gordon explained to the investigators that she could not read an analog clock, which is why she had trouble remembering when she last fed her daughter. Ms. Gordon also reported that she started keeping a journal to track feedings.

During the investigation, DCF personnel also learned that Ms. Gordon's mother, Kim Gordon, intended to assist Ms. Gordon with parenting Dana. DCF also learned of the Gordons' involvement with the agency in the 1990s. However, DCF had closed all services to the family based on the Gordons' cooperation and successful completion of DCF's service plan.[7] DCF did

[5] Such reports are called "51A reports" under Massachusetts child welfare law. *See* M.G.L. c. 119, § 51A.

[6] Notably, during the course of the Departments' investigation, it confirmed that hospital staff did not permit Ms. Gordon's parents, Kim and Sam Gordon, to stay with Ms. Gordon and their grandchild, Dana, at the hospital pursuant to its policy that permitted only a spouse or significant other to remain after visiting hours. The Gordon grandparents explained that they were asked to leave the hospital when they stayed an hour-and-a-half past visiting hours the first night after the baby was born.

[7] DCF investigators reported that Sam Gordon did not want to meet with them during the emergency investigation. The investigative report reflects that Mr. Gordon said he did not want to meet with DCF, but that he "wanted to do

not identify any current or recent safety concerns with Kim and Sam Gordon. The investigators also visited the Gordons' home, finding ample baby supplies and noting no concerns.

Nonetheless, on November 25, 2012, at the conclusion of DCF's investigation, the agency removed Dana from Ms. Gordon's custody and placed her in foster care. According to DCF's Emergency Investigation report, DCF decided to conduct an "emergency removal," because Ms. Gordon was "unable to recognize, comprehend and react to the demands of an infant. . . . The concerns are there are no services in place..... [Dana] needs to come into foster care at this time. There are concerns with [Ms. Gordon's] ability to meet the basic needs of a newborn child." DCF also noted that Ms. Gordon and her parents had a previous history with DCF and that she has "serious developmental delays."

Over the next two years, DCF provided minimal supports and opportunities to Ms. Gordon while she sought to reunify with Dana. DCF set visitation at once per week for one hour, despite Ms. Gordon's request for more frequent visits. Visits were supervised by DCF and took place at DCF offices and at a community organization. DCF would not permit Kim Gordon and staff from VOC to assist Ms. Gordon for most of the visits. The frequency of visits was reduced to once every other week after seven months, when DCF changed Dana's permanency planning goal from reunification to adoption.

In addition, to the extent that DCF has continued to reference unspecified concerns regarding the Gordon's past DCF case history, DCF has not identified any current or recent safety concerns with Kim and Sam Gordon. On the contrary, Dr. Brisson and the psychologist that conducted the family's parenting assessment both reported that they identified no recent or current concerns.

As a part of Ms. Gordon's DCF service plan, Ms. Gordon agreed with DCF's requirement for her to work with a parent aide during her visitation with Dana to learn and utilize effective parenting skills. A parent aide is a trained individual who provides support and strengthens parenting skills. However, DCF failed to provide Ms. Gordon parent aide services for more than eight months and only provided these services after it already decided that Ms. Gordon would not be fit to parent Dana and changed the goal to adoption.[8] Even after the parent

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what is best for his daughter and grandchild." Mr. Gordon explained to the Departments during the interviews that he was angry with DCF's involvement. It was not until November 7, 2013, that the social worker contacted Mr. Gordon by letter and explained that she wanted to meet with him following a DCF Foster Care Review panel which recommended that such a meeting be added to the service plan. There is no record that DCF sought to explain to any of the Gordons until this time the consequences of Mr. Gordon not meeting with the agency. Since that time, Mr. Gordon made himself available to DCF to address any concerns, and DCF has identified no current or recent concerns.

[8] DCF personnel suggested that this was because Ms. Gordon refused to sign a consent to release her information to The United Arc, the service provider DCF chose to provide parent aide services. On the advice of her attorney, Ms. Gordon did not sign the consent because, in the attorney's opinion, the consent presented by DCF was overly broad. However, DCF did not express willingness or propose to modify the standard form to limit the scope of information that DCF could discuss, did not suggest that Ms. Gordon contact the parent aide agency herself directly, as she had initiated services from VOC on her own behalf, or permit Kim Gordon or staff from VOC to fill in to provide hands-on parenting support to Ms. Gordon during weekly visitations in the interim while the breadth of the release was being worked out.

aide was secured, DCF limited the parent aide's participation to the last thirty minutes of Ms. Gordon's visits with Dana. The parent aide was otherwise tasked by the agency with training Ms. Gordon on parenting skills using a "life-like" doll.

During the early visits with Dana, DCF noted that Ms. Gordon had some difficulty with feedings, diaper changes, and transitioning Dana between people. DCF also noted that Ms. Gordon walked away from the changing table on a couple of occasions, during supervised visits. Since that time, Ms. Gordon has participated in numerous parenting classes and her parenting skills have improved significantly. On the other hand, DCF has repeatedly overlooked numerous safety concerns in Dana's pre-adoptive foster care placement. Specifically, over the past two years in the foster home, Dana received a black eye, bumps, bruises, scrapes, burnt hands on two occasions, and was left unattended on a kitchen table when she was only a few weeks old.

As described below, several professionals have reviewed this case and found that a family-supported parenting plan with Ms. Gordon's parents would be appropriate. The Gordons' family-supported parenting plan involves Kim and Sam Gordon obtaining guardianship and responsibility for making educational, medical, and other significant decisions, while Ms. Gordon would live in the home and learn how to care for her daughter with Ms. Gordon's assistance. Among the professionals are service providers from VOC and The United Arc, the psychologist that conducted the Parenting Assessment, Dr. Brisson, the majority of DCF's most recent Foster Care Review panel, and Dana's court-appointed attorney.

VOC: VOC is a community-based organization that provides supports to, among others, families involved with DCF. VOC is also a contractor of DCF. VOC personnel have attended most, if not all, visits between Ms. Gordon and Dana (though not permitted to provide hands-on assistance). Ms. Gordon has participated in multiple parenting courses through VOC. VOC personnel work with the Gordons on a regular basis and are intimately aware of the family's current functioning. Multiple VOC staff have repeatedly advocated for DCF to increase services, visitation, and to reconsider its decision-making. VOC has supported the Gordons and their family-supported parenting plan since the organization became involved on November 26, 2012, when Ms. Gordon contacted the agency on her own the day after Dana's removal.

The United Arc: The United Arc is also a community-based organization that provides a number of services to, among others, parents with developmental and intellectual disabilities. The United Arc is also a contractor of DCF. Beginning in 2013, The United Arc was retained by DCF to provide parent aide services for Ms. Gordon. The United Arc staff believe that Ms. Gordon has an "amazing support system" through her parents and staff at VOC and any of DCF's concerns about Ms. Gordon parenting alone are sufficiently resolved through a family-supported parenting plan.

Psychologist's Parenting Assessment: In October 2013, a psychologist retained by Ms. Gordon's court-appointed counsel conducted an assessment of the parenting abilities of both Ms. Gordon and Kim Gordon. The evaluation included review of Ms. Gordon's school records, interviews with Ms. Gordon and her parents, and observation of Ms. Gordon, Dana, and Kim Gordon during a supervised visit. The psychologist noted that Dana had been teething during the visit, which impacted her mood, but that "[Ms. Gordon] appeared interested and involved with

her daughter and acted appropriately at all times exhibiting patience and tolerance with her daughter's upset." The psychologist found that "[b]oth [Ms. Gordon and Kim Gordon] provided praise and encouragement and set some limits and redirected [Dana's] behavior when the situation dictated the need for this. They appeared to have a very good sense of how to interact and respond to this young child." The psychologist found no concerns with emotional maltreatment or physical touching, and explained that the participation of both Ms. Gordon and Kim Gordon "was defined by an entirely positive, nurturing, enthusiastic and patient presentation." Ultimately, the psychologist concluded that DCF should reconsider its adoption goal, and instead develop a plan involving greater visitation among Ms. Gordon, Kim Gordon, and Dana to help transition to the ultimate goal of reunification, where Kim and Sam Gordon would assume guardianship over Dana in a family-supported parenting plan.

Dr. Brisson's Competence-Based Family Assessment: In September 2014, DCF agreed to permit a Competence-Based Family Assessment by Dr. Nicole Brisson with Sage Haven Associates, a licensed clinical mental health counselor and a nationally recognized expert on parenting with a mental disability. Dr. Brisson conducted an in-home assessment of Ms. Gordon, Kim Gordon, and Dana, reviewed records, interviewed numerous collaterals including her social worker and supervisors, and conducted interviews of Ms. Gordon and Kim Gordon.[9]

Dr. Brisson provided the following conclusion in her assessment:

> Clearly, [Ms. Gordon] is a loving, caring, and conscientious mother who is willing to do whatever it takes to have her daughter in her life. She is capable of learning new skills and has done so through her visits with [Dana], despite them being infrequent .....With continued dedication by support providers and [the] willingness [of Ms. Gordon and Kim Gordon] to continue to work with them, it is likely that [Dana] can return home and will be well cared for by her mother and grandparents. It is important to remember that all parents receive help at some time, and [Ms. Gordon] should be no exception. There is no discernible reason revealed by this assessment that [Ms. Gordon] and her parents do not have the ability to care for her child safely.

[9] Dr. Brisson utilized numerous instruments to complete her thorough assessment, including:

- A social history questionnaire;
- A drug and alcohol screening tool;
- Medical emergency questions to determine responses to serious cuts, choking, and medication administration;
- The Community Life Skills Scale, intended to measure an individual parent's ability to negotiate in the community, including transportation, budgeting, support services, support-involvement, interests, hobbies, and routines of daily live;
- The Parenting Awareness Skills Survey, designed to illuminate strengths and needs in awareness skills a parent accesses in reaction to typical childcare situations;
- The Impediments-Supports Checklist, which evaluates effective parenting and family outcomes;
- The Infant/Toddler HOME Inventory, designed to measure the quality and extent of stimulation available to a child in the home environment;
- The Mental Health Screening Form III; and
- Parent Education Program Checklists, which evaluate basic child-care, health, safety, and interactional skills.

Brisson Assessment of Oct. 24, 2014 at 24. Dr. Brisson recommended that Dana be reunified with the Gordons, that the Gordons and the foster parents should exchange information to ensure a smooth transition, and that Ms. Gordon and Kim Gordon should continue to participate in services to further enhance their parenting skills.

DCF Foster Care Review: In November 2014, a majority of a DCF Foster Care Review panel also found that "the goal of permanency through Adoption is no longer the most appropriate permanency plan..... This Foster Care Review panel supports the goal of Permanency through Guardianship on behalf of [Dana] with her maternal grandparents with her mother residing with them and them co-parenting." The DCF Review Panel majority recommended that this goal should be achieved by May 2015, and that the Service Plan should be updated for DCF to increase visits among Ms. Gordon, Dana, and the grandparents and provide them in their home for extended time frames. A majority of the DCF Review panel further recommended that DCF provide the Gordons with the dates of Dana's medical appointments, network them with Dana's early intervention providers, and if distance is a barrier, at minimum, explore phone communication. DCF Foster Care Review panels also include a community volunteer. The Community Volunteer on the November 2014 Panel disagreed with the goal change, citing only the longevity of Dana's placement, and not any concern of the Gordons.

While the Foster Care Review panel can make a recommendation, DCF must make a goal change at a Permanency Planning Conference meeting. DCF subsequently held an internal Permanency Planning Conference but has not changed the goal.

Dana's Court-Appointed Attorney: For the past two years, Dana's court-appointed attorney has supported reunification with appropriate supports. Dana's attorney has also repeatedly advised DCF that she believed the agency was violating Ms. Gordon's rights under the ADA and Section 504 by denying Ms. Gordon the opportunity to benefit from supports and services. For virtually all of Dana's life, DCF has flatly refused such a plan and failed to provide a full and equal opportunity for her to participate in and benefit from DCF's program to pursue reunification with Dana.

Statutory and Regulatory Background

Congress enacted the ADA nearly 25 years ago "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Congress found that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, [and] independent living" and that "the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to . . . pursue those opportunities for which our free society is justifiably famous." 42 U.S.C. § 12101(a)(7), (8). Title II provides:

> [N]o 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.

42 U.S.C. § 12132. Congress enacted the ADA to broaden the coverage of the Rehabilitation Act of 1973, which similarly prohibits discrimination against individuals with disabilities by recipients of federal financial assistance. 29 U.S.C. § 794. Section 504 similarly provides:

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .

29 U.S.C. § 794(a).

Title II covers essentially everything state and local governments and their agencies do. *See Pa. Dept. of Corrs. v. Yeskey*, 524 U.S. 206, 209-12 (1998) (discussing the breadth of Title II's coverage). Section 504 also applies to all of the activities of agencies that are federally funded and as a general rule violations of Section 504 also constitute violations of Title II.[10] As such, Title II and Section 504 apply to everything DCF does, including its investigations, assessments, removals, family preservation, provision of services, determining goals and permanency plans, setting service plan tasks, reunification, guardianship, adoption, and assisting clients in meeting such tasks.[11]

Pursuant to congressional directive, *see, e.g.*, 42 U.S.C. § 12134; 28 C.F.R. § 41.4, the Departments of Justice and Health and Human Services have promulgated regulations implementing Title II and Section 504. *See* 28 C.F.R. pt. 35 (Title II); 45 C.F.R. pt. 84 (HHS Section 504); 28 C.F.R. pt. 42, subpt. G (DOJ Section 504). Both agencies are responsible for investigating complaints and conducting compliance reviews under Title II. *See* 28 C.F.R. pt. 35, subpt. F, G. Because DCF receives financial assistance from the U.S. Department of Health and Human Services, it has jurisdiction under Section 504. 45 C.F.R. § 84.61.

Under these regulations, covered entities may not directly, contractually, or through other arrangements "deny a qualified individual with a disability the opportunity to participate in or

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[10] A "program or activity" is defined under Section 504 to include "all of the operations of a department, agency, . . . or other instrumentality of a State or of a local government" and "the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government." 29 U.S.C. § 794(b)(1)(A), (B). As such, all operations of a state government agency are covered by Section 504 if any part of it receives federal financial assistance. Title IV-B and Title IV-E of the Social Security Act are the primary sources of federal child welfare funding, and DCF accepts such funding.

[11] During the Departments' investigation, DCF suggested, based on *Adoption of Gregory*, 434 Mass. 117, 121 (2001), that the ADA may not be raised as a defense to proceedings to terminate parental rights because such proceedings do not constitute a "service" under the ADA. The Justice Department has long taken the position in its regulatory guidance, technical assistance, and enforcement actions that Title II applies to everything a public entity does—all of the child welfare services it provides, including recommendations and petitions related to child welfare matters and proceedings to terminate parental rights. The legal conclusion that termination proceedings are not covered by the ADA similarly cannot be squared with the U.S. Supreme Court's unanimous pronouncement in *Yeskey*, 524 U.S. at 209-12 (finding, beyond question, that a non-voluntary motivational boot camp in state prison was covered for participation by inmates with disabilities).

benefit from [an] aid, benefit, or service." 28 C.F.R. § 35.130(b)(1)(i); *see also* 45 C.F.R. § 84.4(b)(1)(i). Covered entities also may not "[a]fford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others." 28 C.F.R. § 35.130(b)(1)(ii); *see also* 45 C.F.R. § 84.4(b)(1)(ii).

Covered entities may not "utilize criteria or methods of administration "[t]hat have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability [or t]hat have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities." 28 C.F.R. § 35.130(b)(3)(i), (ii); *see also* 45 C.F.R. § 84.4(b)(4)(i), (ii). The preamble to the 1991 Title II regulation explains that the criteria and methods of administration are the policies and practices of the public entity. 28 C.F.R. pt. 35, App. B (discussing 28 C.F.R. § 35.130(b)(3)). A public entity may impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities only if those safety requirements are based on actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities. 28 C.F.R. § 35.130(h).

In addition to these prohibitions, covered entities must take certain steps to avoid discrimination on the basis of disability. In particular, covered entities are required to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity being offered." 28 C.F.R. § 35.130(b)(7); *see also* 45 C.F.R. § 84.4(a); U.S. Dep't of Justice, Title II Technical Assistance Manual § II-6.1000, Illustration 2 (1993) (explaining that public entities may need to make modifications to programs such as individualized assistance to permit individuals with disabilities to benefit).

The ADA and Section 504 thus 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. 42 U.S.C. § 12101(a)(5).

Findings

We conclude that DCF has repeatedly and continuously denied Ms. Gordon the opportunity to participate in and benefit from its services, programs, and activities, and has otherwise subjected her to discrimination in violation of Title II. 42 U.S.C. § 12132. The U.S. Department of Health and Human Services similarly finds that DCF has violated Section 504. 29 U.S.C. § 794(a). Initially, DCF failed to individually analyze Ms. Gordon to determine what services and supports were appropriate for her in an effort to prevent Dana's continued out-of-home placement. DCF then failed to (1) implement appropriate reunification services while Dana was in foster care; (2) identify appropriate service plan tasks; (3) assist Ms. Gordon in meeting service plan tasks to achieve reunification; (4) provide meaningful visitation and

opportunities to enhance Ms. Gordon's parenting skills; and (5) impose only necessary and legitimate safety requirements.

In particular, we conclude that DCF has violated its obligations under Title II and Section 504 at each stage of its process by (1) denying Ms. Gordon equal opportunities to participate in and benefit from its services, programs, and activities, 28 C.F.R. § 35.130(a), (b)(1)(i)-(ii); 45 C.F.R. § 84.4(a), (b)(1)(i)-(ii); (2) utilizing criteria and methods of administration having the effect of discriminating against Ms. Gordon on the basis of disability and defeating or substantially impairing accomplishment of the objectives of its reunification program with respect to Ms. Gordon, 28 C.F.R. § 35.130(b)(3); 45 C.F.R. § 84.4(b)(3); and (3) failing to reasonably modify its policies, practices, and procedures where necessary to avoid discriminating against Ms. Gordon on the basis of her disability, 28 C.F.R. § 35.130(b)(7). As a result, for more than two years, DCF has denied Ms. Gordon and Dana the opportunity to be a family and now threatens to deny them that opportunity permanently.

Instead, DCF has continually asserted that Ms. Gordon poses a safety risk to Dana if she were to parent on her own, without consideration of any supports. However, DCF has ignored the fact that Ms. Gordon is not proposing to parent on her own without any supports, has ignored its own ability and obligation to provide such supports, and has repeatedly ignored the objective evaluations of various clinical and service professionals (including the majority of the most recent Foster Care Review panel) who have reviewed this case and found that Ms. Gordon's plan to parent Dana with her family's support is appropriate. Instead, DCF has refused to reconsider the permanency plan for adoption and has sought to terminate Ms. Gordon's parental rights.[12]

I. DCF acted on assumptions about Ms. Gordon's disability and failed to individually analyze what services and supports would be appropriate considering her disability.

DCF failed to conduct an appropriate individualized analysis of Ms. Gordon and what family support services it needed to provide and accommodations it needed to make at the outset of its involvement, and for more than two years. Instead, it repeatedly acted on its own assumptions about Ms. Gordon's disability. Among the ADA's most "basic requirement[s]" is that covered entities evaluate persons with disabilities on an "individualized basis." *See PGA Tour, Inc. v. Martin*, 532 U.S. 661, 690 (2001). The guidance to the Title II regulation explained in 1991 that "[s]uch an inquiry is essential if the law is to achieve its goal of protecting disabled individuals from discrimination based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to legitimate concerns, such as the need to avoid exposing others to significant health and safety risks." 28 C.F.R. pt. 35, App. B (discussing definition of "qualified individual with a disability"). This obligation to act based on the facts of a person's disability and the situation at hand, rather than on assumptions and stereotypes, is necessary to comply with the obligation to provide individuals with disabilities opportunities to participate in and

[12] While we identify various ways that DCF denied Ms. Gordon opportunities under its own policies, ADA and Section 504 liability is not limited to such circumstances. DCF may be required to reasonably modify policies, practices, and procedures governing their services, programs, and activities when necessary to avoid discriminating on the basis of disability beyond the circumstances identified in this letter. *See* 28 C.F.R. § 35.130(b)(7); *Alexander v. Choate*, 469 U.S. 287, 300 (1985).

benefit from services, programs, and activities; to avoid utilizing criteria or methods of administration that discriminate or that substantially impair achievement of the objectives of a public entity's programs; and to reasonable modify policies, practices, and procedures where necessary to avoid discrimination on the basis of disability. 28 C.F.R. § 35.130(a), (b)(1), (b)(3), (b)(7); 45 C.F.R. § 84.4(a), (b)(1), (b)(3).

DCF clearly presumed from the initial opening of its case that Ms. Gordon lacked the capacity to parent Dana due to her developmental disability without consideration of appropriate supports and services. Indeed, DCF investigators reported their view that Ms. Gordon could not "recognize, comprehend and react to the demands of an infant," and that "[t]he concerns are there are no services in place," Ms. Gordon requires "parental education," and she "should engage in every service available to her as a new parent." 51A Emergency Investigation Report of Nov. 26, 2014. The report further explained: "[Ms. Gordon] has a previous history with DCF which indicates she has serious developmental delays." *Id.* During the Departments' interviews of DCF staff, one investigator explained that his view of Ms. Gordon's capacity to parent was based on his "intuition" and stating that "[w]hen you meet with someone, you get a vibe whether they are going to be able to do it or not."

Throughout the pendency of this matter, DCF acted on these unwarranted assumptions, repeatedly failing to conduct an individualized analysis of Ms. Gordon's current and future capacity to parent Dana with in-home services and family supports. After Dana's removal, DCF assigned a social worker and case supervisor to Ms. Gordon's case. Over the next two months, Ms. Gordon's social worker conducted what the agency terms a Comprehensive Assessment and the social worker and supervisor concluded that Ms. Gordon "needs to learn the basic skills in order to appropriately parent her child. There is concern that her cognitive limitations affect her ability to safely parent her child. It is hoped that by working with the appropriate services such as counseling, and working with a parent aide [Ms. Gordon] will learn how to provide for [Dana's] basic needs."[13] However, instead of evaluating the overall level of risk to Dana and focusing on the services that Ms. Gordon would need to be reunified with her daughter based on the ample information it had, the record indicates that DCF focused on obtaining a diagnosis for Ms. Gordon. Ms. Gordon's February 27, 2013 service plan, explained that, while Ms. Gordon had a "very supportive family," she has "cognitive limitations," and "[t]here was no diagnosis for the mother[']s mental retardation."[14] Indeed, staff involved in this case repeatedly told the Departments during interviews that they did not know how to assist Ms. Gordon because they

[13] Following a supported 51A investigation, a case is "opened for services" and DCF is required to complete a "full assessment" of the family's situation in order to evaluate the overall level of risk to the child, identify the family's strengths, determine the goal of the service plan, and identify the tasks and services in the service plan. *See* 100 C.M.R. § 5.01-5.03; DCF Assessment Policy, #85-011 (rev. Sept. 6, 2000). Notably, an "overall risk level rating" was not documented in the Comprehensive Assessment worksheet.

[14] Presumably, this focus was based on DCF's Assessment Protocol, "Factors Used to Determine Parental Unfitness," which states that in determining the goal of the case and developing a permanency plan, social workers are advised to consider whether "mental deficiency" is a parental condition that is likely to continue for a prolonged period of time and makes it unlikely for an individual to provide adequate caretaking and that it is "[i]mportant to have a formal diagnosis." DCF Assessment Policy, #85-011, Appendix F (Assessment Protocol # PR 94-007) at 204.

did not have a diagnosis of her disability, despite having extensive information and being unable to articulate why a diagnosis was necessary. Staff also repeatedly emphasized the importance of IQ in determining how to assist Ms. Gordon. However, as the U.S. Supreme Court recently noted, an "[i]ntellectual disability is a condition, not a number." *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2013).

In fact, DCF had sufficient information to meet its obligations under the ADA and Section 504. DCF was aware at intake that Ms. Gordon potentially had a disability that impacted her learning, DCF's investigators identified as much, and Ms. Gordon's social worker was able to observe her on multiple occasions. Furthermore, Ms. Gordon's social worker contacted Ms. Gordon's high school counselor, and documented in her Dictation Notes that Ms. Gordon "mostly had an intellectual diagnosis" but her school counselor was unsure of the "exact number" of her IQ. DCF's excessive focus on the need for a disability diagnosis and IQ, and reliance on the absence of this information as the basis for failing to consider or provide necessary services resulted in a denial of an equal opportunity to participate and benefit from DCF services, programs, and activities on the basis of disability. 28 C.F.R. § 35.130(a), (b); 45 C.F.R. § 84.4(a), (b). Even if DCF did not have all of the information it believed was necessary to optimally serve Ms. Gordon, DCF was still required to provide services and supports with the information it had. Instead, as discussed below, DCF imposed restrictions on Ms. Gordon's existing supports, undermining the supports and services DCF agreed to provide in Ms. Gordon's service plan.

Although the record is clear that DCF personnel recognized that the manifestation of Ms. Gordon's disability called for services and education, and although DCF had those services at its disposal, DCF failed to provide them. Specifically, DCF failed to provide her with repetitive, frequent, hands-on, visual learning. DCF was required to determine what would work for Ms. Gordon considering her disability, as it does for other parents involved in its system. Instead, DCF implemented minimal services and imposed unnecessary restrictions during visits, making it difficult for Ms. Gordon to learn some parenting skills. Instead of recognizing the need to adjust and provide appropriate supports and services, including additional time to learn, DCF personnel regularly asserted they simply had "concerns" about Ms. Gordon's independent ability to care for an infant because of her disability. If DCF requires all parents to show their independent proficiency to parent, DCF was required to reasonably modify that practice for Ms. Gordon. 28 C.F.R. § 35.130(b)(7). Instead, DCF speculated about Ms. Gordon's ability to parent, assumed she would never be able to learn, and refused to provide services to help her learn, thus creating a self-fulfilling circumstance leading to DCF's decision to seek to terminate Ms. Gordon's parental rights. Notwithstanding all of this, the community service providers and experts agree that Ms. Gordon has shown the ability to learn appropriate parenting techniques and that a family-supported parenting plan with Kim Gordon having guardianship would be appropriate.

Reliance on unwarranted assumptions about Ms. Gordon's developmental disability is precisely the sort of an outdated approach that the ADA and Section 504 were enacted to prohibit. *See* 28 C.F.R. pt. 35, App. B (providing in 1991 preamble to the Title II regulation that the provisions in 28 C.F.R. § 35.130(b) are, "[t]aken together, . . . intended to prohibit . . . 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 on presumptions as to what a class of individuals with disabilities can or cannot do.") As explained below, however, DCF did not implement appropriate services and supports, denying her an opportunity to benefit from DCF's reunification program.

II. DCF did not provide Ms. Gordon an opportunity to benefit from its services in support of reunification.

DCF failed to provide Ms. Gordon the opportunity to benefit from its services in support of reunification with her family, failed to reasonably modify its policies, practices, and procedures where necessary to avoid discriminating, and utilized methods of administration having the effect of discriminating and defeating or substantially impairing the objectives of DCF's program with respect to Ms. Gordon. 28 C.F.R. § 35.130(b)(1)(i), (b)(3), (b)(7); 45 C.F.R. § 84.4(b)(1)(i), (b)(3).

A. DCF denied Ms. Gordon the opportunity to utilize her family resources and individualized, in-home parenting supports in an effort to achieve reunification.

DCF denied Ms. Gordon the opportunity to benefit from her existing family resources and in-home parenting supports. This obstructed Ms. Gordon's ability to prevent Dana's continued placement into foster care and to address DCF's concerns regarding Ms. Gordon's ability to safely parent. *See* 28 C.F.R. § 35.130(a); 45 C.F.R. § 84.4(a).

Pursuant to state law, DCF is obligated to make reasonable efforts to maintain the family unit and to prevent the unnecessary removal of a child from his or her home. *See* M.G.L. c. 119 § 29C. Under DCF's own Placement Prevention and Placement Policy, the agency must make "reasonable efforts to prevent or eliminate the need for placement." Placement Prevention and Placement Policy, #90-004 at 355 (emphasis added). "Reasonable efforts" are defined in DCF's Placement Prevention and Placement Policy as DCF's

> best efforts to assess the individual child and family situation regarding the appropriateness and accessibility (within limits of available resources) of preventive services and to offer the family and assist (as appropriate) in providing such services to the family whenever possible. It is the responsibility of the Social Worker and Supervisor to develop a Service Plan with the family that identifies the resources and activities needed to enable the family to adequately care for and protect the child.

Id.

Ms. Gordon could have significantly benefitted from a number of supports and services the agency provides or makes available to families involved in the child welfare system and which could have prevented the ongoing placement of Dana into foster care. In particular, DCF first failed to consider a plan that relied on Ms. Gordon's own family resources. To the extent DCF continued to have concerns, it could have implemented various in-home supports to afford

Ms. Gordon the opportunity to have Dana at home. Instead, DCF immediately placed Dana into foster care and changed the permanency goal to adoption seven months later.

At the time of Dana's placement into foster care, Ms. Gordon already had family supports in place. Kim Gordon left her job to provide full time support for Ms. Gordon and Dana.[15] DCF investigators noted no concerns with the Gordons' home and found that the family had ample baby supplies. DCF's ongoing social worker and supervisor noted in January 2013 in the Comprehensive Assessment that Ms. Gordon had a "very supportive family" and identified it as one of her strengths. However, DCF continued to deny Ms. Gordon the opportunity to utilize her own family supports to prevent the continued out-of-home placement of Dana. Dana's court-appointed attorney repeatedly requested that DCF place Dana in Kim and Sam Gordon's custody.

When DCF continued with Dana's out-of-home placement, Ms. Gordon's parents presented DCF with a plan to be Dana's primary caregivers and seek legal guardianship of Dana, if necessary. Ms. Gordon's father agreed to provide financial support for the family and Ms. Gordon's mother would provide for Dana's day-to-day care.

DCF maintained that it had concerns about placement of Dana with the Gordons because DCF was involved with the family when Ms. Gordon was a child. However, experts who have reviewed this case find that the concerns about Ms. Gordon's parents in the 1990's do not represent the current functioning of the family. DCF personnel apparently also believed that its concerns were sufficiently resolved when it closed its services to the family in 2000. During the Departments' investigation, DCF did not cite any current or recent safety concerns about Kim or Sam Gordon. Reliance on family supports is one of DCF's regular tools for preventing removal. One reasonable modification DCF should have considered was an agreement that would have afforded Ms. Gordon the opportunity to parent Dana in the home with family supports by making Kim Gordon responsible for Dana's care. 28 C.F.R. § 35.130(b)(7).

If DCF had any legitimate safety concerns about Kim's supervision of Dana, it had a wide variety of supports and services at its disposal to mitigate such concerns. In fact, use of such supports and services is specifically called for in this type of situation by DCF's own policies. DCF's Placement Policy identifies an example of "reasonable efforts" DCF can take to prevent out-of-home placement in exactly the situation at issue here; namely, providing assistance in accessing parent aide services and/or specialized training to help the primary caretaker "compensate for deficits, if problem is due to primary caretaker's lack of certain capacities due to mental retardation, mental or physical illness." DSS Policy #90-004(R) (1998) at 363; *see also* 110 C.M.R. § 7.061.

[15] DCF investigators learned during the emergency investigation that the Gordon grandparents did not seek guardianship of Dana because they had not considered the formality to be necessary when the family had planned for Ms. Gordon and Dana to live in their home. However, in evaluating the risk to Dana and the family's overall functioning subsequent to the emergency removal, DCF did not consider whether guardianship or another arrangement could prevent the continued out-of-home placement of Dana. While Sam Gordon explained that he "wanted to do what is best for his daughter and grandchild," the record reflects that DCF personnel did not seek to interview Mr. Gordon to specifically evaluate any safety concerns until November 2013, after a DCF Foster Care Review panel recommended that the agency do so.

Ms. Gordon is a member of the "target population" for precisely such services. 110 C.M.R. § 7.061. According to DCF's regulations, the target population includes parents whose families are at risk of neglect "due to physical, developmental and/or emotional disability." *Id.* Yet, DCF did not consider or implement these supports until eight months after Dana was removed and, even then, for only limited time. Thus, DCF administered its program in a way that had the purpose or effect of defeating or substantially impairing accomplishment of the reunification program objectives with respect to Ms. Gordon. 28 C.F.R. § 35.130(b)(3)(ii); 45 C.F.R. § 84.4(b)(4)(ii).

Examples of these types of family supports are found in DCF's regulations. These include family support services, such as visiting nurse assistants and home health aides, and homemaker services.

Family support services: DCF denied Ms. Gordon the opportunity to benefit from in-home "family support services," which include a "spectrum of services that supports maintenance of the family unit, and enables adults or children to meet the goals of a service plan." 110 C.M.R. § 7.030. Such services are intended to "provide social and developmental opportunities for a family or for individual family members." *Id.* Family support services are broadly defined, and could include a visiting nurse assistant – a service that was discussed with Ms. Gordon and Kim Gordon by hospital staff, but not considered by DCF – or a home health aide.

Homemaker services: DCF also denied Ms. Gordon the opportunity to benefit from in-home "homemaker services," which "provide support, assistance and training to families in the activities of daily functioning. Homemakers provide a monitoring and teaching function within a family, and also help care for children and act as a role model for parents." 110 C.M.R. § 7.020. The regulations provide that homemaking services are appropriate in "assisting the family in ensuring that abuse and neglect are not occurring in the home." 110 C.M.R. § 7.021. Homemaking services can be authorized for a prolonged period of time. 110 C.M.R. § 7.022.

At any time over the past two years, DCF could have provided the opportunity for Dana to live at home with an agreement that Kim Gordon be primarily responsible for Dana and, if necessary, utilize homemaker, visiting nurse assistant, home health aide, or parent aide services to support Ms. Gordon in learning how to care for a child. Instead, despite its own policies, DCF refused to provide or did not consider in-home support services, and denied Ms. Gordon this natural learning environment and opportunity to spend critical time with her infant daughter. The failure to consider and provide these services denied Ms. Gordon an equal opportunity to benefit from DCF programs and services. 28 C.F.R. § 35.130(a); 45 C.F.R. § 84.4(a).

Even if in-home services such as parent aides, family support services, or homemaker services had not been specifically identified in DCF policies, DCF would be required to reasonably modify its policies to ensure that Ms. Gordon received the appropriate supports and services to prevent Dana's removal and ongoing foster care placement. Given the breadth of

services offered by DCF, we do not believe that offering these services to Ms. Gordon would have resulted in a fundamental alteration. 28 C.F.R. § 35.130(b)(7).[16]

B. DCF failed to implement services while Dana was placed in foster care to provide Ms. Gordon a meaningful opportunity to reunify her family.

After DCF placed Dana in foster care, the agency failed to implement services to provide Ms. Gordon a meaningful opportunity to reunify with Dana, including meaningful visitation and opportunities to learn how to respond to Dana's developmental delays. 28 C.F.R. § 35.130(b)(1)(i), (b)(3), (b)(7); 45 C.F.R. § 84.4(b)(1)(i), (b)(3).

At the time DCF opened Dana's case, DCF investigators and social workers noted their concern that Ms. Gordon did not have appropriate services in place. However, DCF did not design or implement services appropriate to her disability-related learning style. Ms. Gordon is a visual learner who requires repetition, modeled behavior, and hands-on assistance. Thus, appropriate service plans would have included frequent in-home visits with continual assistance, such as by Kim Gordon, VOC staff, or a parent aide. Appropriate service plans would also have included opportunities to attend Dana's medical and Early Intervention Services appointments.

DCF's Service Planning and Referral Policy, # 97-003 at 239 (rev. 2000) (Service Policy) explains that "[s]ervice planning is a fundamental component of social work practice and is intended to be a dynamic, interactive process which involves the Department, family members, substitute care and other service providers." Every family receiving services from DCF must have a written service plan, which is a time-limited agreement between DCF and the family describing the tasks to be undertaken and the services to be provided in support of the goal of the service plan. *See* 110 C.M.R. § 6.01-6.03. The service plan goal identifies the purpose of DCF's involvement with the family and identifies the permanency plan for the child, which may be to stabilize an intact family, to reunify a family, or to establish an alternative permanent plan such as guardianship, adoption, care with kin, etc. *See* 110 C.M.R. § 6.04. For families with children in substitute care, service plans are required to identify the reasons for the child's current placement, efforts made by DCF and the family to prevent placement, family visitation, and tasks the family needs to complete to achieve the permanency goal. *See* 110 C.M.R. § 6.03-6.04. Service planning is required to occur when a case is opened and reviewed at least every six months. *See* 110 C.M.R. § 6.07-6.08. As noted, DCF provides numerous services directly and through contractual arrangements, and services are broadly defined to allow individualization for each case.

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[16] In *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 689 (2001), the U.S. Supreme Court found under Title III's analogous reasonable modifications requirement that policies that facially restrict certain activities may need to be modified without working a fundamental alteration. Various federal courts have also found under Title II's reasonable modifications provision that it is not a fundamental alteration to provide in-home supports, even if it may carry significant expense and administration. *See, e.g., Pashby v. Delia*, 709 F.3d 307, 323-24 (4th Cir, 2013) (affirming preliminary injunction that state agency failed to reasonably modify a policy, implemented by statute, revoking in-home personal care assistance services for individuals with disabilities and placing them at risk of institutionalization, and finding that agency did not satisfy fundamental alteration defense based on budgetary arguments); *see also M.R. v. Dreyfus*, 663 F.3d 1100, 1121 (9th Cir. 2011); *Townsend v. Quasim*, 328 F.3d 511, 520 (9th Cir. 2003).

Once an ongoing social worker was assigned to Ms. Gordon's case, DCF implemented an emergency service plan on December 20, 2012, which required Ms. Gordon to "appropriately participate in visits" with Dana and work with a parent aide "to learn how to parent her child." While provision of a parent aide would have been (and indeed later was) an opportunity for Ms. Gordon to receive the hands-on, modeled behavior she needed, provision of a parent aide was delayed because DCF required Ms. Gordon to sign a consent form authorizing DCF to disclose her information before DCF would make a referral to The United Arc for parent aide services. Ms. Gordon's appointed counsel had concerns about the scope of information that could be disclosed between DCF and The United Arc based on the scope of the release. Thus, Ms. Gordon did not sign the form.

Although DCF's policies and regulations provide for a wide variety of services to be tailored to individual circumstances, while awaiting resolution of the problem with the consent form, DCF prevented Ms. Gordon from fully utilizing other assistance. Ms. Gordon was already working with staff from VOC outside of visits, and for parts of visits. However, DCF personnel insisted that only a parent aide from The United Arc would be appropriate, and VOC staff were not permitted to provide hands-on demonstrations during most visits. Nor would DCF permit Kim Gordon to provide Ms. Gordon hands-on assistance during the majority of visits. DCF's social worker also would only observe visits, with the occasional verbal prompts, which were not helpful to Ms. Gordon given her learning style.[17]

DCF's Service Plan for February 15, 2013-August 15, 2013, required Ms. Gordon to meet with DCF in her home once per month, participate in parenting classes at VOC, work with a parent aide, engage in individual counseling to "address stressors" and "cognitive limitations," participate in visits, and work with VOC staff. Ms. Gordon diligently complied with these requirements, with the exception of working with the parent aide because of the disagreement over the scope of the consent form. However, DCF still required Ms. Gordon to show that she could parent on her own *without assistance* during the majority of the supervised visits. DCF thus continued to hold her to a higher standard than necessary, to deny her a variety of available services, to insist on criteria and methods of administration that did not allow her to succeed because of her disability, and to fail to reasonably modify its practices. 28 C.F.R. § 35.130(b)(7).[18] DCF's subsequent Service Plans were modeled on this February 15, 2013-

[17] Ms. Gordon's objection to the DCF consent form does not provide a basis for DCF to refuse to provide appropriate services to her or to fail to reasonably modify its policies and practices to accommodate her disability. The ADA provides that an individual with a disability need not accept an accommodation, aid, service, opportunity, or benefit if she so chooses. 42 U.S.C. § 12201(d); 28 C.F.R. § 35.130(e)(1). However, such a refusal does not relieve a public entity of its obligations under the ADA. Even if DCF viewed Ms. Gordon's attorney's unwillingness to sign the consent form as Dana's non-cooperation, and as a basis to deny access to appropriate supports and services, DCF was required to offer and provide other reasonable services to Ms. Gordon that would have met her need to learn parenting skills in the interim.

[18] DCF also insisted that Ms. Gordon submit to a neuropsychological evaluation in order to understand Ms. Gordon's "learning style." Ms. Gordon did not consent to the evaluation on the advice of counsel, but did provide access to information from her high school about her learning style. In addition, DCF had extensive information about Sara's learning style – including dozens of observations during visits where she regularly had difficulty following verbal directions. While DCF's Service Policy repeatedly notes that the requirements of a service plan are to be jointly created and subject to negotiation, there is also no requirement in DCF regulations or policies that an individual submit to a neuropsychological evaluation, DCF refused to reconsider and negotiate on the required task

August 15, 2013 plan and were similarly deficient to address the objectives that DCF had identified for Ms. Gordon.

DCF denied Ms. Gordon the opportunity for frequent, meaningful visitation with support to learn appropriate care for her daughter and to address the agency's concerns. This denied Ms. Gordon an equal opportunity to benefit from DCF's programs. 28 C.F.R. § 35.130(a); 45 C.F.R. § 84.4(a). DCF is required to plan and promote regular and frequent visitation between children and their families consistent with their service plans. 110 C.M.R. § 7.128; Ongoing Casework Policy, Procedures, and Documentation, # 86-011 at 263-64 (rev. 1998).[19] While, in most cases, visitation occurs once a week, DCF policy explicitly contemplates circumstances when it may be necessary to increase the frequency of visits between a parent and a child. For example, DCF policy indicates that the social worker and supervisor should consider more frequent child-family visitation based on the age of the child and the projected date for the child's return home (or other permanent placement). Given Dana's age, Ms. Gordon's learning through repetition, hands-on instruction, and frequency, and the goal of reunification, DCF should have provided frequent visitation. Instead, DCF denied Ms. Gordon and Dana's attorney's request for daily visits with Dana. DCF also refused to modify the requirements it placed on Ms. Gordon during visitation, even though Ms. Gordon attended all visits, was actively engaged in services, and regularly made DCF aware that she intended to do whatever was necessary to reunify with her daughter. The failure to provide frequent visitation denied Ms. Gordon an equal opportunity to benefit from DCF's programs. 28 C.F.R. § 35.130(a); 45 C.F.R. § 84.4(a).

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of submitting to a neuropsychological evaluation. Notably, Dr. Brisson also explained in her Competence-Based Family Assessment that neuropsychological evaluations are often not conducted by individuals with specialized knowledge of parents with disabilities, they are standardized against a population that does not include appropriate norms or accommodations for parents with disabilities, and they often lead to improper conclusions. Dr. Brisson explained: "Parenting is a complex set of variables that cannot be reduced to simply tests. Instead the parents' learning style/ability is better evaluated through direct clinical observation." Brisson Evaluation at 22 (Oct. 24, 2014). As noted, Title II and Section 504 prohibit utilization of criteria or methods of administration that defeat or substantially impair accomplishment of program objectives for individuals with disabilities, and the failure to reasonably modify policies, practices, and procedures where necessary to avoid discriminating on the basis of disability. 28 C.F.R. § 35.130(b)(3)(ii), (b)(7); 45 C.F.R. § 84.4(b)(3)(ii), (b)(7). Though DCF had sufficient information, it continued to insist on the neuropsychological exam, so that the agency could understand her learning style and assess for any further services, well after its personnel reported to the Departments that they understood Ms. Gordon to have a visual, hands-on learning style. As recently as November 5, 2014, DCF reported that Ms. Gordon was partially out of compliance with her service plan, because she had not completed the evaluation, thus utilizing criteria (if a policy) or a method of administration (if a practice) in violation of this prohibition.

[19] The American Bar Association has articulated the importance of frequent, meaningful, and individualized visitation between parents and children between 0-3 years of age. Among other things, frequent visitation strengthens the parent-child relationship, helps parents gain confident and learn and practice new skills, provides a setting for a caseworker or parent coach to suggest how to improve on interactions, and helps with the transition to reunification. *See* American Bar Assoc., Visitation with Infants and Toddlers in Foster Care at 6 (2007). The ABA recommends that child welfare agencies implement daily visits for parents and infants, and visits every two-to-three days for parents and toddlers, because "physical proximity with the caregiver is central to the attachment process." *Id.* at 11. The ABA similarly recommends that visits occur in the least restrictive, most natural setting while ensuring the safety and well-being of the child. *Id.*

DCF also refused to allow Ms. Gordon and Dana to visit in her home. Home visits are commonly allowed for parents pursuing reunification, particularly when they are supervised or there are no concerns with the home. Despite the fact that DCF at no time noted any concerns about the Gordons' home, Dana was only ever permitted at the Gordons' home once, and it was for Dr. Brisson's assessment – nearly two years after the initial removal. Because the Gordons' home was the best environment for Ms. Gordon's learning style, requiring that such visits to occur in an office setting, or even at VOC, was a failure by DCF to reasonably modify its practices. 28 C.F.R. § 35.130(b)(7).

On a few visits, Dana cried and Ms. Gordon could not console her. DCF staff repeatedly told Ms. Gordon that if she could not stop Dana's crying, they would end visits, and indeed ended visits without seeking to show Ms. Gordon how to console Dana. As implemented by DCF, these visits were neither suited to assisting Ms. Gordon to learn effective parenting, nor suited to assisting with reunification. Nor were they justified by legitimate safety concerns. Under the Title II regulation, public entities may impose safety requirements for the safe operation of their programs, but they must be legitimate and necessary. 28 C.F.R. § 35.130(h). DCF staff told us during interviews that they ended visits because they did not believe it was in the best interests of a child to cry for 20 or more minutes. This requirement was *unnecessary* because DCF staff could have attempted to console Dana before ending visits – an opportune teaching moment. Similarly, if Kim Gordon or VOC staff were permitted in visits, they could have done the same.

During visits, DCF expected Ms. Gordon – a first-time young mother with a developmental disability – to demonstrate independent proficiency in caring for her daughter. This expectation was wholly unrealistic given that Ms. Gordon's opportunities to practice with support were so limited. Even if it were DCF's general practice to require parents without developmental disabilities to demonstrate independent proficiency during visits, DCF was required to reasonably modify its practices here. 28 C.F.R. § 35.130(b)(7).

DCF also denied Ms. Gordon the opportunity to participate in and benefit from attending Dana's medical and Early Intervention Services sessions and thereby denied her an equal opportunity to benefit from DCF's programs. *See* 28 C.F.R. § 35.130(b)(1)(i), 45 C.F.R. § 84.4(b)(1)(i). Dana has fine and gross physical and speech developmental delays, and has received early intervention services, including medical screenings and weekly physical therapy sessions. DCF's policy on Health Care Services to Children in Placement, # 85-003 (rev. 1998), provides that "[p]arents should be encouraged to assume as much responsibility in the provision of health care as possible, especially if the goal in the Service Plan is reunification."

Despite Ms. Gordon's repeated requests to attend these appointments so that she could learn how to respond to Dana's developmental delays, the records indicate that DCF permitted Ms. Gordon to attend only one medical appointment. Social workers either prevented Ms. Gordon from attending such appointments, or failed to make appropriate accommodations so Ms. Gordon could attend them. For example, DCF personnel repeatedly told Ms. Gordon and her advocates that Ms. Gordon and Kim Gordon were prohibited from participating in Dana's Early Intervention Services because the services were provided in the foster parent's home. DCF made no effort to move the location of the sessions despite the willingness of Early Intervention

Services personnel to do so. The Early Intervention program focuses, in part, on assisting parents in understanding the developmental needs of their children and in learning activities and strategies to help them grow. If DCF required Ms. Gordon to learn these specific parenting skills, the agency should have allowed her to participate in the program. The failure to do so provided Ms. Gordon an unequal opportunity to participate in and benefit from the guidance of Dana's healthcare providers, than was afforded to the foster family. 28 C.F.R. § 35.130(b)(1)(ii); 45 C.F.R. § 84.4(b)(1)(ii).

III. After DCF changed Dana's permanency goal to adoption, DCF failed to consider Ms. Gordon's continued engagement and progress.

Notwithstanding Ms. Gordon's active engagement and cooperation, on June 20, 2013 – seven months after the removal – DCF changed Dana's goal to adoption, and DCF subsequently initiated proceedings to terminate Ms. Gordon's parental rights. The stated reason for the goal change was Ms. Gordon's "cognitive limitations," and DCF's determination that Ms. Gordon was "not able to care" for Dana, and that Kim Gordon "does not seem to understand that [Ms. Gordon] cannot parent and has not intervened when [Ms. Gordon] has placed [Dana] at risk." DCF did not identify any instance where Kim Gordon failed to intervene, and indeed she was prevented by DCF from assisting her daughter during the majority of most visits. In making the goal change, DCF ignored the failure to provide a parent aide or any other supports mentioned above.

Under the ADA and Section 504, even if it changes the permanency goal to adoption, DCF had a continuing obligation to provide Ms. Gordon the opportunity to participate in and benefit from its aids, benefits, and services for reunification, 28 C.F.R. § 35.130(b)(1)(i); 45 C.F.R. § 84.4(b)(1)(i); *see also Santosky v. Kramer*, 455 U.S. 745, 760 (1982) ("[U]ntil the State proves parental unfitness, the child and [her] parents share a vital interest in preventing erroneous termination of their natural relationship."). Notwithstanding these obligations, DCF reduced visitation to once every other week for one hour, thus further undermining Ms. Gordon's ability to learn parenting skills and address the agency's concerns.

Despite this permanency goal change, Ms. Gordon redoubled her efforts to acquire additional parenting skills. She attended all visits with Dana, worked with the parent aide to the extent DCF's funding would permit, and engaged in a number of parenting courses that significantly increased her parenting capacity.[20] In addition, Kim and Sam Gordon also continued to engage in services. Sam Gordon made himself available to DCF to resolve any unarticulated concerns of the agency. Kim and Sam Gordon regularly participated in a Grandparent Support Group aimed at helping grandparents strengthen families, identify

[20] For example, Ms. Gordon completed "Changing Courses," a 10-week course provided focused on stress, communication, and interpersonal skills for parents with children in DCF custody. Ms. Gordon has participated in a series of "Positive Parenting" classes, which covered the importance of routines for children, responding appropriately to children's emotions, and role modeling for children. Ms. Gordon also received certification in CPR-AED for adults, infants, and children by the American Heart Association. Ms. Gordon has participated in and facilitated a number of groups focused on parenting and regularly volunteers in her community. Ms. Gordon and Kim Gordon attended several "Parent Cafes" together, which are parent support groups that focus on a variety of parenting challenges.

resources and services, and learn about topics such as healthy nutrition, technology safety, substance abuse and recovery options, and more. They also attended a conference aimed at grandparents raising grandchildren through Worcester State University. During this conference, the Gordons spoke directly with DCF executive staff about this case.

DCF has repeatedly refused to change Dana's permanency goal back to reunification and is seeking to terminate Ms. Gordon's parental rights by citing "concerns" about Ms. Gordon's independent parenting ability. However, as discussed here, DCF itself thwarted Ms. Gordon's attempts to learn how to parent.

Ms. Gordon has had some visits where she has had difficulties. On one occasion, she bumped Dana's head three times during a visit, and during another when Dana was learning to roll over, Dana bumped her head. But Dana did not cry and did not have bruises from either incident. On a few other occasions, Ms. Gordon walked away from a changing table or lost focus on play equipment.

While the safety of the child is paramount, DCF did not provide available services, imposed unnecessary restrictions on the services that were provided, and failed to reasonably modify its practices to provide Ms. Gordon an opportunity to learn how to safely parent. As noted by Dr. Brisson, there is no current risk when Ms. Gordon's mother or a parent aide is permitted to assist her. Furthermore, DCF's obligation to individually analyze an individual with a disability is ongoing. DCF staff explained during the interviews, as well as in Dictation Notes and assessments, that Ms. Gordon's parenting skills increased over time, particularly in 2014 when she had a parent aide. Beyond all of this, Ms. Gordon has entered an agreement with her parents where they will take guardianship of Dana, so Ms. Gordon can be involved in her life.

DCF held Ms. Gordon to a standard for Dana that was not met in Dana's pre-adoptive foster care placement. DCF was aware of, and dismissed, numerous injuries to Dana, including a black eye, bumps, bruises, cuts, and burnt hands that occurred during the time in foster care. When Dana was only a few weeks old, she was left unattended on a table in the foster home.[21]

IV. DCF has failed to provide appropriate policies and training for social workers to understand their obligation to ensure the civil rights of parents with disabilities.

It is clear that the social workers involved in this case were not provided appropriate policies and training to guide their decision-making. DCF regulations provide that "[t]he Department recognizes the special needs of handicapped clients. The Department shall make reasonable accommodations to ensure that its services . . . are accessible to all handicapped persons." 110 C.M.R. § 1.08. But the agency has no procedures for social workers to implement

[21] We note that DCF did not produce documents related to this incident in response to our request for information, dated August 20, 2014, for all records in DCF custody or control related to Dana, including all 51A Reports, and all records related to Dana's placement in a foster care or pre-adoptive home. DCF did not provide these documents during our interviews of DCF staff, where we specifically asked about a dictation note in their records that vaguely referenced this incident. These documents were withheld from production until mid-December 2014, and only after we specifically inquired as to what appeared to be missing documents.

or understand how this requirement applies to assessments, service planning and implementation, obligations during visits, the obligation to make reasonable modifications where necessary to avoid discrimination, and the imposition of legitimate safety requirements. Indeed, social workers involved in this case identified that services and supports were needed, but did not recognize how to implement them consistent with the requirements of Title II and Section 504.

While DCF does provide training concerning mental health issues, it does not provide formalized training concerning civil rights obligations related to individuals with disabilities, including training that would have assisted social workers in preventing the ADA and Section 504 violations identified in this letter.

The lack of procedures and training to guide social workers led to a focus on diagnoses and numbers, and assumptions and generalizations, and a failure to consider what services and modifications to policies and practices are appropriate to ensure an individual with a disability – in this case, Ms. Gordon – had an equal opportunity to fully benefit from DCF's reunification program.

Minimal Remedial Measures

DCF should promptly implement the following minimal measures to remedy the deficiencies discussed above.

- Withdraw the petition to terminate Ms. Gordon's parental rights.
- Immediately take all necessary actions to address the violations identified in this letter, including:
    - Implementation of services and supports appropriate to provide Ms. Gordon a full and equal opportunity to seek reunification consistent with and in consideration of the two years of violations identified in this letter; and
    - Once implemented for an amount of time appropriate for Ms. Gordon, an evaluation of the then-current functioning of the family based on the opinions of the experts, community-based service providers, and DCF's Foster Care Review.
- Pay compensatory damages to Ms. Gordon in an appropriate amount for injuries suffered as a result of the DCF's failure to comply with the law as set forth here.
- Develop and implement procedures addressing how ADA and Section 504 requirements apply to DCF programs, services, and activities, including assessments, service planning and implementation, visitation, and safety requirements.
- Implement a training program for all investigators, social workers, family resource workers, supervisors, and Area Program Managers on compliance with Title II and Section 504.

Conclusion

Please note that this Letter of Findings is a public document and will be posted on the Civil Rights Division's and OCR's website. We will provide a copy of this letter to any individual or entity upon request, and will share it with the complainants and other affected individuals who participated in our investigation.

Please also note that no one may intimidate, threaten, coerce, or engage in discriminatory conduct against anyone because he or she has taken action, assisted, or participated in an investigation to secure rights protected by the ADA and Section 504. *See* 42 U.S.C. § 12203; 28 C.F.R. § 35.134; 45 C.F.R. § 80.7(e)(incorporated by reference in the Section 504 implementing regulation at 45 C.F.R. § 84.61). Any individual alleging such harassment or intimidation may file a complaint with the Department of Justice or the Department of Health and Human Services. We would investigate such a complaint if the situation warrants.

We hope to be able to work with you and other officials in an amicable and cooperative fashion to resolve our concerns with respect to the Massachusetts child welfare system. Please contact William F. Lynch at (202) 305-2008 or William.Lynch@usdoj.gov of the U.S. Department of Justice and Susan M. Pezzullo Rhodes at (617) 565-1347 or Susan.Rhodes@hhs.gov of the U.S. Department of Health and Human Services by February 2, 2015 if you are willing to resolve this matter voluntarily in a manner that will bring DCF into compliance with Title II and Section 504.

We are obligated to advise you that, in the event that we are unable to reach a resolution regarding our concerns, the Attorney General may initiate litigation pursuant to the ADA and Section 504 once we have determined that we cannot secure compliance voluntarily to correct the deficiencies identified in this letter. *See* 42 U.S.C. § 12131-34; 29 U.S.C. § 794; 42 U.S.C. § 2000d-1. We would prefer, however, to resolve this matter by working cooperatively with you.

If you have any questions regarding this letter, you may call William Lynch, Trial Attorney, U.S. Department of Justice.

Sincerely,

Vanita Gupta
Acting Assistant Attorney General
Civil Rights Division
U.S. Department of Justice

Jocelyn Samuels
Director
Office for Civil Rights
U.S. Department of Health and Human Services

Susan M. Pezzullo Rhodes
Regional Manager
Office for Civil Rights, Region I
U.S. Department of Health and Human Services

Cc:

Andrew Rome, General Counsel
Patricia Casey, Deputy General Counsel
Counsel for Sara, Dana, Kim, and Sam Gordon

U.S. Department of Health And Human Services
Office for Civil Rights
Administration for Children And Families

U.S. Department of Justice

Civil Rights Division
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**

The United States Department of Health and Human Services (HHS) and the United States Department of Justice (DOJ) are issuing this technical assistance to assist state and local child welfare agencies and courts to ensure that the welfare of children and families is protected in a manner that also protects the civil rights of parents and prospective parents[1] with disabilities. This guidance provides an overview of the issues and application of civil rights laws, answers to specific questions and implementation examples for child welfare agencies and courts, and resources to consult for additional information.

Section 504 of the Rehabilitation Act of 1973 (Section 504)[2] and Title II of the Americans with Disabilities Act of 1990 (ADA)[3] protect parents and prospective parents with disabilities from unlawful discrimination in the administration of child welfare programs, activities, and services.[4] At the same time, child welfare agencies and courts have the responsibility to protect children from abuse and neglect. The goals of child welfare and disability non-discrimination are mutually attainable and complementary. For example, ensuring that parents and prospective parents with disabilities have equal access to parenting opportunities increases the opportunities for children to be placed in safe and caring homes.

Need for This Technical Assistance

Both the HHS Office for Civil Rights (OCR) and DOJ Civil Rights Division have received numerous complaints of discrimination from individuals with disabilities involved with the child welfare system, and the frequency of such complaints is rising. In the course of their civil rights enforcement activities, OCR and DOJ have found that child welfare agencies and courts vary in the extent to which they have implemented policies, practices, and procedures to prevent discrimination against parents and prospective parents with disabilities in the child welfare system.

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[1] The term "parents" includes biological, foster, and adoptive parents. It also includes caretakers such as legal guardians or relatives. Prospective parents include individuals who are seeking to become foster or adoptive parents.

[2] 29 U.S.C. § 794.

[3] 42 U.S.C. §§ 12131-12134.

[4] Children with disabilities also have nondiscrimination protections under Section 504 and Title II of the ADA, but the focus of this technical assistance is on parents and prospective parents with disabilities.

For example, in a recent joint investigation by OCR and DOJ of practices of a State child welfare agency, OCR and DOJ determined that the State agency engaged in discrimination against a parent with a disability.[5] The investigation arose from a complaint that a mother with a developmental disability was subject to discrimination on the basis of her disability because the State did not provide her with supports and services following the removal of her two-day-old infant. The supports and services provided and made available to nondisabled parents were not provided to this parent, and she was denied reasonable modifications to accommodate her disability. As a result, this family was separated for more than two years.

These issues are long-standing and widespread. According to a comprehensive 2012 report from the National Council on Disability (NCD), parents with disabilities are overly, and often inappropriately, referred to child welfare services, and once involved, are permanently separated at disproportionately high rates.[6] In a review of research studies and other data, NCD concluded that among parents with disabilities, parents with intellectual disabilities and parents with psychiatric disabilities face the most discrimination based on stereotypes, lack of individualized assessments, and failure to provide needed services.[7] Parents who are blind or deaf also report significant discrimination in the custody process, as do parents with other physical disabilities.[8] Individuals with disabilities seeking to become foster or adoptive parents also encounter bias and unnecessary barriers to foster care and adoption placements based on speculation and stereotypes about their parenting abilities.[9]

Discriminatory separation of parents from their children can result in long-term negative consequences to both parents and their children. In addition to the OCR and DOJ case where a mother and daughter were deprived of the opportunity for maternal/child bonding for two years, the National Council on Disability report is replete with case studies with similar consequences. For example, a child welfare agency removed a newborn for 57 days from a couple because of assumptions and stereotypes about their blindness, undermining precious moments for the baby and parents that can never be replaced.[10] Similarly, after a child welfare agency removed a three-year-old from his grandmother because she had arthritis and a mobility disability, the toddler developed behavioral issues and progressively detached from his grandmother, though he had had no such experiences before this separation.[11] Any case of discrimination against parents and caregivers due to their disability is not acceptable.

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[5] 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 andwww.hhs.gov/ocr/civilrights/activities/examples/Disability/mass_lof.pdf(Massachusetts Department of Children and Families).

[6] National Council on Disability, Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children at 14, 18 (2012), at www.ncd.gov/publications/2012/Sep272012/.

[7] *Id.* at 114, 122-26.

[8] *Id.* at 92-93.

[9] *Id.* at 194-199.

[10] Id. at 114.

[11] *Id.* at 125-26.

Role of HHS and DOJ

The Children's Bureau in the HHS Administration for Children and Families administers funding for child welfare agencies and courts and provides guidance and technical assistance to child welfare agencies regarding child welfare law. HHS OCR is responsible for ensuring that entities receiving Federal financial assistance from HHS, including child welfare agencies and state courts, comply with their legal obligation under Section 504 to provide equal access to child welfare services and activities in a nondiscriminatory manner. In addition, both DOJ and HHS OCR enforce Title II of the ADA against public entities, including child welfare agencies and state courts.

Overview of Legal Requirements

Title II of the ADA

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.[12] Title II of the ADA applies to the services, programs, and activities of all state and local governments throughout the United States, including child welfare agencies and court systems.[13] The "services, programs, and activities" provided by public entities include, but are not limited to, investigations, assessments, provision of in-home services, removal of children from their homes, case planning and service planning, visitation, guardianship, adoption, foster care, and reunification services. "Services, programs, and activities" also extend to child welfare hearings, custody hearings, and proceedings to terminate parental rights.

Section 504 of the Rehabilitation Act

Section 504 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.[14] Federal financial assistance includes grants, loans, and reimbursements from Federal agencies, including assistance provided to child welfare agencies and the courts.[15] An entity can be a recipient of Federal financial assistance either directly or as a sub-recipient.[16] Section 504 applies to all of the operations of agencies and sub-agencies of state and local governments, even if Federal financial assistance is directed to one component of the agency or for one purpose of the agency.[17] Recipients of Federal financial assistance must

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[12] 42 U.S.C. § 12132.
[13] 42 U.S.C. § 12131(1)(A), (B); *see also, e.g.,* 28 C.F.R. § 35.130(b)(l) (prohibiting disability discrimination directly or through contractual, licensing, or other arrangements), 35.130(b)(3) (prohibiting methods of administration that have a discriminatory effect). Private entities involved in the child welfare system may also be independently covered by Title III of the ADA, 42 U.S.C. §§ 12181-12189.
[14] 29 U.S.C. § 794(a).
[15] *See, e.g.,* 28 C.F.R. § 42.105; 45 C.F.R. § 84.5.
[16] *See Grove City College v. Bell,* 465 U.S. 555, 564 (1984).
[17] 29 U.S.C. § 794(b).

agree to comply with Section 504, and generally other civil rights laws, as a condition of receiving Federal financial assistance. [18]

Application

A child welfare agency or court may not, directly or through contract or other arrangements, engage in practices or methods of administration that have the effect of discriminating on the basis of disability, or that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the child welfare agency's or court's program for persons with disabilities. [19] Under these prohibitions, a child welfare agency could be responsible for the discriminatory actions of a private foster care or adoption agency with which it contracts when those actions are taken in fulfillment of the private entity's contractual obligations with the child welfare agency. For example, if the private foster care or adoption agency imposed discriminatory eligibility requirements for foster or adoptive parents that screened out prospective parents with HIV, the state child welfare agency would most likely be responsible for the contractor's practice of discriminating on the basis of disability.

Two principles that are fundamental to Title II of the ADA and Section 504 are: (1) individualized treatment; and (2) full and equal opportunity. Both of these principles are of particular importance to the administration of child welfare programs.

Individualized treatment. Individuals with disabilities must be treated on a case-by-case basis consistent with facts and objective evidence. [20] Persons with disabilities may not be treated on the basis of generalizations or stereotypes. [21] For example, prohibited treatment would include the removal of a child from a parent with a disability based on the stereotypical belief, unsupported by an individual assessment, that people with disabilities are unable to safely parent their children. Another example would be 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 provide appropriate care for a child.

Full and equal opportunity. Individuals with disabilities must be provided opportunities to benefit from or participate in child welfare programs, services, and activities that are equal to those extended to individuals without disabilities. [22] This principle can require the provision of aids, benefits, and services different from those provided to other parents and prospective parents

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[18] *See, e.g.,* 45 C.F.R. § 84.5.

[19] *See* 28 C.F.R. § 35.130(b)(3); 45 C.F.R. § 84.4(b)(4);); *see also* 28 C.F.R. § 42.503(b)(3).

[20] *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).

[21] *See, e.g., id.*

[22] *See* 28 C.F.R. §§ 35.130(b)(l)(ii)-(iv), (vii), (b)(7); 45 C.F.R. § 84.4(b)(l)(ii)-(iii); *see also* 28 C.F.R. § 42.503(b)(1)(ii), (iii).

where necessary to ensure an equal oEportunity to obtain the same result or gain the same benefit, such as family reunification. [3]

This does not mean lowering standards for individuals with disabilities; rather, in keeping with the requirements of individualized treatment, services must be adapted to meet the needs of a parent or prospective parent who has a disability to provide meaningful and equal access to the benefit. [24] In some cases, it may mean ensuring physical or programmatic accessibility or providing auxiliary aids and services to ensure adequate communication and participation, unless doing so would result in a fundamental alteration to the nature of the program or undue financial and administrative burden.[25] For example, a child welfare agency must provide an interpreter for a father who is deaf when necessary to ensure that he can participate in all aspects of the child welfare interaction. In other instances, this may mean making reasonable modifications to policies, procedures, or practices, unless doing so would result in a fundamental alteration to the nature of the program. [26] For example, if a child welfare agency provides classes on feeding and bathing children and a mother with an intellectual disability needs a different method of instruction to learn the techniques, the agency should provide the mother with the method of teaching that she needs.

Under Title II of the ADA or Section 504, in some cases, a parent or prospective parent with a disability may not be appropriate for child placement because he or she poses a significant risk to the health or safety of the child that cannot be eliminated by a reasonable modification. [27] This exception is consistent with the obligations of child welfare agencies and courts to ensure the safety of children. However, both the ADA and Section 504 require that decisions about child safety and whether a parent or prospective parent represents a threat to safety must be based on an individualized assessment and objective facts, including the nature, duration, and severity of the risk to the child, and the probability that the potential injury to the child will actually occur.[28] In addition, if the risk can be eliminated by a reasonable modification of policies, practices, or procedures, or by the provision of auxiliary aids or services, the child welfare agency must take such mitigating actions.[29] A public entity may impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities, but they may not be based on stereotypes or generalizations about persons with disabilities. [30]

By applying these principles consistently in the child welfare system, child welfare agencies and courts can ensure that parents and prospective parents with disabilities have equal access to parenting opportunities while ensuring children safely remain in or are placed in safe and caring homes. The attached Questions and Answers provide more detailed information and specific implementation examples for child welfare agencies and courts.

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[23] *See, e.g.,* 28 C.F.R. § 35.130(b)(l)(ii)-(iv).
[24] *Id; see also Alexander v. Choate,* 469 U.S. 287 (1985).
[25] 28 C.F.R. §§ 35.149-151, 160-164; 45 C.F.R. §§ 84.21-23, 84.52(d); *see also* 28 C.F.R. §§ 42.503(e), (f), 42.520-522.
[26] *See* 45 C.F.R. §§ 84.12(a), 84.22(a) and (f), and 84.52(d); and 28 C.F.R. § 35.130(b)(7).
[27] 28 C.F.R. § 35.139(a)-(b); *Arline,* 273 U.S. at 287.
[28] 28 C.F.R. § 35.139(b); *Arline,* 273 U.S. at 288.
[29]28 C.F.R. § 35.139(b); *Arline,* 273 U.S. at 288.
[30] *See* 28 C.F.R. § 35.130(h).

QUESTIONS AND ANSWERS

1. What are the basic requirements of ADA Title II and Section 504?

Answer: Title II of the ADA provides that no qualified individual with a disability shall, by reason of such disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in, the services, programs, or activities of state and local government entities.[31] Section 504 similarly prohibits discrimination on the basis of disability against qualified individuals with a disability in programs, services, and activities receiving Federal financial assistance.[32]

Under the ADA and Section 504, programs cannot deny people with disabilities an opportunity to participate,[33] and must provide people with disabilities with meaningful and equal access to programs, services, and activities.[34] Programs and services must be accessible to and usable by people with disabilities.[35] In addition, programs must provide people with disabilities with an equal opportunity to participate in and benefit from the programs, services and activities of the entity;[36] they are also prohibited from using methods of program administration, which includes written rules as well as agency practices, that have a discriminatory effect on individuals with disabilities.[37] Moreover, programs must provide reasonable modifications in policies, practices, and procedures when necessary to avoid discrimination;[38] and must take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others through the provision of auxiliary aids and services.[39]

Who is protected by disability nondiscrimination laws?

2. Who is considered a person with a disability under Title II of the ADA and Section 504?

Answer: The ADA and Section 504 protect the rights of individuals with disabilities.[40] A "disability" is defined as a physical or mental impairment that substantially limits a major life activity, such as caring for oneself, performing manual tasks, breathing, standing, lifting, bending, speaking, walking, reading, thinking, learning, concentrating, seeing, hearing, eating, sleeping, or working.[41] Major life activities also include the operation of major bodily functions, including but not limited to, functions of the immune system, normal cell growth, digestive,

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[31] 42 U.S.C. § 12132.
[32] 29 U.S.C. § 794(a).
[33] 42 U.S.C. § 12132; 29 U.S.C. § 794(a); 28 C.F.R. § 35.130(a); 45 C.F.R. § 84.4(a).
[34] *Choate,* 469 U.S. 287.
[35] 28 C.F.R. § 35.150(a); 45 C.F.R. § 84.22(a).
[36] 28 C.F.R. § 35.130(b)(1)(ii); 45 C.F.R. § 84.4(b)(1)(ii);
[37] 28 C.F.R. § 35.130(b)(3); 45 C.F.R. § 84.4(b)(4).
[38] 28 C.F.R. § 35.130(b)(7); *Choate,* 469 U.S. at 301.
[39] 28 C.F.R.§ 35.160(a)(l); *see also* 45 C.F.R. § 84.52(d) (requiring health and social services entities to provide appropriate auxiliary aids to persons with impaired sensory, manual, or speaking skills, where necessary to afford such persons an equal opportunity to benefit from the service in question).
[40] 42 U.S.C. § 12132; 29 U.S.C. § 794(a).
[41] 42 U.S.C. § 12102(1), (2)(A); 29 U.S.C. § 705(9)(B).

bowel, or bladder, neurological, brain, and respiratory, circulatory, endocrine, and reproductive functions.[42]

Congress has made clear that the definition of disability in the ADA and Section 504 is to be interpreted broadly.[43] Even if an individual's substantially limiting impairment can be mitigated through the use of medication; medical supplies, equipment, and devices; learned behavioral or adaptive neurological modifications; assistive technology (e.g. a person with a hearing disability who uses hearing aids that substantially restores the sense of hearing); or reasonable modifications to policies, practices, or procedures, the individual is still protected by the ADA and Section 504.[44] The ADA and Section 504 also apply to people who have a record of having a substantial impairment (e.g., medical, military, or employment records denoting such an impairment), or are regarded as having such an impairment, regardless of actually having an impairment.[45]

An "individual with a disability" under the ADA and Section 504 does not include an individual who is currently engaged in the illegal use of drugs, when the state or local government program or program receiving Federal financial assistance acts on the basis of the illegal drug use.[46] However, an individual is not excluded from the definition of disability on the basis of the illegal use of drugs if he or she (1) has successfully completed a drug rehabilitation program or has otherwise been successfully rehabilitated and is no longer engaging in drug use, or (2) is participating in a supervised rehabilitation program and is no longer engaging in drug use.[47]

To be eligible, an individual with a disability must be "qualified." An individual with a disability is qualified if he or she meets the essential eligibility requirements of a service, program, or activity, with or without the provision of reasonable modifications, the provision of appropriate auxiliary aids and services, or the removal of architectural and communication barriers.[48]

3. Who do Title II of the ADA and Section 504 protect in child welfare programs?

Answer: Title II of the ADA and Section 504 protect qualified individuals with disabilities, which can include children, parents, legal guardians, relatives, other caretakers, foster and adoptive parents, and individuals seeking to become foster or adoptive parents, from

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[42] 42 U.S.C. § 12102(2)(B).
[43] 42 U.S.C. § 12102(4)(A); 29 U.S.C. § 705(9)(B).
[44] 42 U.S.C. § 12102(4)(E)(i); 29 U.S.C. § 705(9)(B); *see also* Equal Employment Opportunity Commission, Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008, at www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm.
[45] 42 U.S.C. § 12102(2)(l)(B)-(C); 29 U.S.C. § 705(9)(B). The ADA Amendments Act of2008 amended the definition of disability for Titles I, II, and III of the ADA as well as Section 504. Pub. L. No. 110 - 325, 122 Stat. 3553 (2008). For a discussion of the United States Department of Justice's (DOJ's) interpretation of the changes to the definition, see DOJ's Notice of Proposed Rulemaking to Implement ADA Amendments Act of 2008, 79 Fed. Reg. 4839 (January 30, 2014). *See also* Equal Employment Opportunity Commission, Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008, at www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm.
[46] 42 U.S.C. § 12210(a); 29 U.S.C. § 794(d).
[47] 42 U.S.C. § 12210(b)(l)-(2); 29 U.S.C. § 794(d).
[48] 42 U.S.C. § 12131(1); 28 C.F.R. § 35.104; *see also* 45 C.F.R. § 84.3(1)(4) (defining "qualified handicapped person" under HHS' Section 504 regulation).

discrimination by child welfare agencies and courts.[49] Title II also protects individuals or entities from being denied or excluded from child welfare services, programs or activities because of association with an individual with a disability.[50] For example, Title II prohibits a child welfare agency from refusing to place a child with a prospective foster or adoptive parent because the parent has a friend or relative with HIV.

Title II and Section 504 also protect "companions" of individuals involved in the child welfare system when the companion is an appropriate person with whom the child welfare agency or court should communicate. A companion may include any family member, friend, or associate of a person seeking or receiving child welfare services.[51] For instance, when a child welfare agency communicates with an individual's family member who is deaf, appropriate auxiliary aids and services to the family member must be provided by the agency to ensure effective communication.[52]

Finally, the ADA and Section 504 protect individuals from any retaliation or coercion for exercising their right not to experience discrimination on the basis of disability. Individuals enjoy this protection whether or not they have a disability.[53]

Who is required to comply with the disability nondiscrimination laws?

4. What types of child welfare programs and activities are covered by these laws?

All activities of child welfare agencies are covered by Title II and Section 504, including removal proceedings and agencies' programs and activities must not discriminate on the basis of disability.

Answer: Title II covers *all* of the programs, services, and activities of state and local governments, their agencies, and departments.[54] Similarly, Section 504 applies to all of the activities of agencies that receive Federal financial assistance.[55] Therefore, all child welfare-related activities and programs of child welfare agencies and courts are covered, including, but not limited to, investigations, witness interviews, assessments, removal of children from their homes, case planning and service planning, visitation, guardianship, adoption, foster care, reunification services, and family court proceedings. Title II and Section 504 also make child welfare agencies responsible for the programs and activities of private and non-profit agencies that provide services to children and families on behalf of the state or municipality.[56]

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[49] For a discussion of a "qualified individual with a disability," *see* discussion *supra* at Q&A 2.
[50] 28 C.F.R. § 35.130(g); 28 C.F.R. pt. 35, App. B.
[51] 28 C.F.R. § 35.160(a)(2).
[52] 28 C.F.R. § 35.160(a)(l); 28 C.F.R. pt. 35, App. A., Subpt. E (2010).
[53] 42 U.S.C. § 12203; 28 C.F.R. § 35.134; 45 C.F.R. § 84.61; 45 C.F.R. § 80.7(e).
[54] *See Pa. Dep't. ofCorrs. v. Yeskey,* 524 U.S. 206, 209-12 (1998) (discussing the breadth of Title II's coverage).
[55] *See* 29 U.S.C. § 794(b)(l)(A), (B).
[56] *See* 28 C.F.R. §§ 35.130(b)(l), (3), 42.503(b)(l), (3); 45 C.F.R. § 84.4(b)(l), (4).

5. Do Title II and Section 504 apply to the programs, services, and activities of family courts?

Answer: Yes. State court proceedings, such as termination of parental rights proceedings, are state activities and services for purposes of Title II.[57] Section 504 also applies to state court proceedings to the extent that court systems receive Federal financial assistance.[58]

Title II and Section 504 require court proceedings to be accessible to persons with disabilities, and persons with disabilities must have an equal opportunity to participate in proceedings.[59] For example, if a conference or hearing is scheduled in a location that is inaccessible to wheelchair users, it should be moved to an accessible location in order to ensure a wheelchair user can participate fully in the conference or hearing.

Courts are required to provide auxiliary aids and services when necessary to ensure effective communication, unless an undue burden or fundamental alteration would result.[60] For example, courts should provide appropriate auxiliary aids and services to a parent who is deaf so that he or she can access court proceedings as fully and effectively as those who are not deaf.

Like child welfare agencies, courts must also make reasonable modifications to policies, practices, and procedures where necessary to avoid discrimination on the basis of disability.[61] For example, it may be necessary to adjust hearing schedules to accommodate the needs of persons with disabilities, if the need for the adjustment is related to the individual's disability. Or it may be necessary to provide an aide or other assistive services in order for a person with a disability to participate fully in a court event.[62] Such assistance should be provided unless doing so would result in a fundamental alteration.[63]

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[57] *See Yeskey,* 524 U.S. at 209-12 (discussing the breadth of Title Il's coverage); *cf Shelley v. Kraemer,* 334 U.S. 1 (1948) (finding judicial enforcement of racially discriminatory restrictive covenants state action in violation of the Fourteenth Amendment). *See also* 28 C.F.R. § 35.190(b)(6) (designating to the DOJ responsibility for investigation of complaints and compliance reviews of"[a]11 programs, services, and regulatory activities relating to ... the administration of justice, including courts.").

[58] 29 U.S.C. § 794; *see US. Dep't ofTransp. v. Paralyzed Veterans of America,* 477 U.S. 597,600 n.4 (1986). We also remind judges and court personnel of their obligations under the American Bar Association, Model Code of Judicial Conduct, Rule 2.3 (b) that states: "A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, ... and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so."

[59] *See* 28 C.F.R. § 35.130; 45 C.F.R. § 84.4; *see also* 28 C.F.R. § 42.503.

[60] 28 C.F.R. § 35.160-.164; 45 C.F.R. § 84.52(d); *see also* 28 C.F.R. § 42.503(t).

[61] 28 C.F.R. § 35.130(b)(7); *see also Choate,* 469 U.S. at 304-06.

[62] In addition, advocacy organizations, such as those within the Protection and Advocacy system, may provide assistance to individuals with disabilities when they become involved with the child welfare system.

[63] *See* 28 C.F.R. § 35.130(b)(7), 35.160-.164; *see also Choate,* 469 U.S. at 300-309.

6. Do Title II and Section 504 apply to private contractors of child welfare agencies and courts?

Answer: Yes. Title II prohibits discrimination in child welfare programs and services when those services are provided by contractors.[64] Section 504 prohibits discrimination in child welfare programs receiving federal financial assistance, including programs receiving federal financial assistance operated by private entities under contract with child welfare agencies.[65] Accordingly, to the extent that courts and agencies contract with private agencies and providers to conduct child welfare activities, the agencies should ensure that in the performance of their contractual duties contractors comply with the prohibition of discrimination in Title II and Section 504.[66]

What do the disability nondiscrimination laws require of child welfare agencies and courts?

7. What is a reasonable modification?

Answer: Under Title II of the ADA and Section 504, child welfare agencies and courts must make changes in policies, practices, and procedures to accommodate the individual needs of a qualified person with a disability, unless the change would result in a fundamental alteration to the nature of the program.[67] Parenting skills do not come naturally to many parents, with or without disabilities. To provide assistance to parents with disabilities that is equal to that offered to parents without disabilities, child welfare agencies may be required to provide enhanced or supplemental training, to increase frequency of training opportunities, or to provide such training in familiar environments conducive to learning. For example, child welfare agencies may have a parenting skills class once per week. For a parent with a disability who requires individualized assistance in learning new skills because of her or his disability, child welfare agencies may need to modify this training to allow more frequent, longer, or more meaningful training.

8. What are auxiliary aids and services? What does it mean to provide effective communication?

Answer: Child welfare agencies and courts are required to take appropriate steps - including the provision of appropriate auxiliary aids and services - where necessary to ensure that individuals with communication disabilities understand what is said or written and can communicate as

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[64] *See* 28 C.F.R. § 35.130(b)(l), (3).
[65] 29 U.S.C. § 794(a); 45 C.F.R. §§ 84.3(h); 84.4(b)(l), (4).
[66] Private entities involved in child welfare activities may also be public accommodations with their own nondiscrimination obligations under Title III of the ADA. *See* 42 U.S.C. §§ 12181-12189 (Title III of the ADA).
[67] *See* 28 C.F.R. § 35.130(b)(7); 45 C.F.R. § 84.22(a). A fundamental alteration can be a change that is so significant that it alters the essential nature of the public entity's service, program, or activity. *Id.; cf* U.S. Dep't of Justice, ADA Title III Technical Assistance Manual Covering Public Accommodations and Commercial Facilities § III-4.3600 (discussing a fundamental alteration as a modification that is so significant it alters the essential nature of services, privileges, and accommodations). A fundamental alteration is necessarily highly fact-specific. Child welfare entities have the burden of establishing that a proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens. A public entity still must take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the public entity.

effectively as individuals without disabilities.[68] Examples of auxiliary aids and services include, among others, qualified interpreters, note takers, computer-aided transcription services, accessible electronic and information technology, written materials, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons (TDD's), videotext displays, qualified readers, taped texts, audio recordings, braille materials, large print materials, and modifications to existing devices.[69]

Child welfare agencies and courts should consider whether they are taking appropriate steps to ensure that effective communication is provided in different settings and as cases develop. For example, a qualified interpreter may be necessary for smaller settings involving only a few people, such as home visits or assessments, whereas the use of real-time captioning may be appropriate during larger group meetings, such as family team meetings or in court, where numerous people are present or where the layout of the room makes it difficult to view an interpreter and obtain visual cues from the speaker.

The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual with a disability; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place.[70] For example, a local child welfare agency may be required to provide qualified interpreters to ensure effective communication with individuals with disabilities during agency meetings to discuss service planning. However, to communicate a simple message such as an appointment date or address, handwritten notes may be sufficient.

> Child welfare agencies must refrain from using minor children as interpreters except in limited exigent circumstances. Adult companions may be used as interpreters only in emergencies and only when other factors are met.

State and local child welfare agencies and courts must give primary consideration to the auxiliary aid or service requested by the individual.[71] This means, for example, that if a parent with a disability requests a qualified interpreter who is an oral transliterator (a type of interpreter who facilitates spoken communication between individuals who are deaf or hard of hearing and individuals who are not), the agency must provide a qualified oral transliterator, unless the agency can demonstrate that it would pose a fundamental alteration or an undue administrative or financial burden and an alternative auxiliary aid or service provides communication to the individual that is as effective as communication provided to others.[72] If provision of a particular auxiliary aid or service would result in a fundamental alteration in the nature of a service, program, or activity, or if it would result in undue financial

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[68] 28 C.F.R. § 35.160; 45 C.F.R. § 84.52(d).
[69] 42 U.S.C. § 12103(1); 28 C.F.R. § 35.104.
[70] 28 C.F.R. § 35.160(b)(2). For further information on ensuring effective communication, *see* U.S. Dep't of Justice, ADA Requirements: Effective Communication (Jan. 31, 2014), at www.ada.gov/effective-comm.htm; *see also* U.S. Dep't of Justice and U.S. Dep't of Educ., Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools (2015), at www.ada.gov/doe_doj_eff_comm/doe_doj_eff_comm_faqs.pdf.
[71] 28 C.F.R. § 35.160(b)(2).
[72] 28 C.F.R. §§ 35.160(b)(2); 35.164.

Child welfare agencies should consult with and include organizations that support and advocate for the rights of individuals with disabilities in their policy-making and training efforts.

and administrative burdens, a child welfare agency or court need not provide it.[73] These entities must nonetheless provide auxiliary aids or services that do not result in a fundamental alteration or undue burdens that place the individual with a disability on equal footing with individuals without disabilities to the maximum extent possible.

In order to be effective, auxiliary aids and services must be provided in a timely manner and in such a way as to protect the privacy and independence of the individual with a disability.[74]

Child welfare agencies and courts are prohibited from requiring individuals with disabilities to supply their own interpreters or other auxiliary aids and services.[75] Child welfare agencies and courts may not rely on minor children accompanying individuals with disabilities to interpret, except in emergencies involving imminent threats to the safety or welfare of an individual or the public where no interpreter is available.[76] Child welfare agencies and courts may rely on adults accompanying individuals with disabilities to interpret, but only in emergencies or where the individual with a disability specifically makes such a request, the accompanying adult agrees to provide such assistance, and reliance on that adult for such assistance is appropriate under the circumstances.[77] State and local child welfare agencies and courts are also prohibited from placing a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of the provision of auxiliary aids or other services that are required to provide that individual or group with nondiscriminatory treatment.[78]

9. What steps are child welfare agencies required to take to ensure that parents and prospective parents with disabilities involved with the child welfare system have an equal opportunity to participate in and benefit from their programs and activities?

Title II and Section 504 require that agency staff refrain from basing assessments, services, or decisions on assumptions, generalizations, or stereotypes about disability.

Answer: Child welfare agencies are required to ensure that parents and prospective parents with disabilities involved in the child welfare system are afforded an opportunity to preserve their families and/or to become parents that is equal to the opportunity that the entities offer to individuals without disabilities.[79]

Agencies should take steps to ensure, for example, that investigators, social workers, supervisors, and others base their assessments of and decisions regarding individuals with disabilities on actual facts that pertain to the individual person, and not on assumptions, generalizations, fears, or stereotypes about disabilities and how they might manifest. The child welfare agency's obligation to ensure individualized assessments applies at

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[73] *See supra* footnote 67.
[74] 28 C.F.R. § 35.160(b)(2).
[75] 28 C.F.R. § 35.160(c)(l).
[76] 28 C.F.R. § 35.160(c)(2)(i), (3).
[77] 28 C.F.R. § 35.160(c)(2)(ii).
[78] *See* 28 C.F.R. § 35.130(f).
[79] 28 C.F.R. § 35.130(b)(l)(ii); 45 C.F.R. §§ 84.4(b)(l)(ii), 84.52(a)(2).

the outset and throughout any involvement that an individual with a disability has with the child welfare system.

Service plans for parents and prospective parents should address the individual's disability-related needs and the auxiliary aids and services the agency will provide to ensure equal opportunities. At the same time, service plans should not rely on fears or stereotypes to require parents with disabilities to accept unnecessary services or complete unnecessary tasks to prove their fitness to parent when nondisabled parents would not be required to do so.

Agencies also have an obligation to ensure that the aids, benefits, and services provided to parents and prospective parents in support of appropriate service plan activities and goals - such as visitation, parenting skills training, transportation assistance, counseling, respite, and other "family preservation services" and "family support services" - are appropriately tailored to be useful to the individual.[8] For example, if a child welfare agency provides transportation to visits for individuals without disabilities, it should provide accessible transportation to individuals with disabilities to ensure equal opportunity.

> Child welfare agencies should take steps to ensure that their obligations under Title II and Section 504 are met by reviewing the following:
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> (1) existing policies, practices, and procedures;
> (2) how the agency actually processes cases;
> (3) the agency's licensing and eligibility requirements for foster parents and guardians; and
> (4) whether there are staff training or professional development needs.

To ensure that persons with disabilities have equal opportunity to retain or reunify with their children, it may be necessary for the agency to reasonably modify policies, practices, and procedures in child welfare proceedings. In general, agencies should consider whether their existing policies, practices, and procedures; their actual processing of cases; and their training materials comply with the nondiscrimination requirements of Title II and Section 504 for individuals with disabilities. Agencies should also take appropriate steps to ensure that components of child welfare processing, such as "fast-track" and concurrent planning, are not applied to persons with disabilities in a manner that has a discriminatory effect and that denies parents with disabilities the opportunity to participate fully and meaningfully in family reunification efforts.

In some instances, providing appropriate supports for persons with disabilities means selecting an appropriate alternative already provided in the Federal child welfare statutes. For instance, section 475 of the Social Security Act provides that the child welfare agency is required to file a petition to terminate parental rights when the child is in foster care for the preceding 15 out of 22 months. However, the law provides exceptions to this requirement and gives child welfare agencies the flexibility to work with parents who have a child in foster care beyond the 15 month

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so "Family preservation services" are services for children and families to protect children from harm and to help families at risk or in crisis. 42 U.S.C. § 629a(a)(l); 45 C.F.R. § 1357.l0(c). "Family support services" are community-based services to promote the safety and well-being of children and families, to increase the strength and stability of families in various ways, and to enhance child development. 42 U.S.C. § 629a (a)(2); 45 C.F.R. § 1357.l0(c).

period, including parents with disabilities.[81] Exceptions to the termination of parental rights requirement include situations where: **(1)** at the state's discretion, the child is being cared for by a relative; (2) there is a compelling reason for determining that filing the petition would not be in the best interests of the child; or (3) the state, when reasonable efforts are to be made, has failed to provide such services deemed necessary for the safe return of the child to his or her home. [82] As to number (3), a child welfare agency should provide the family of the child with the services necessary for the safe return of the child to the child's home in a manner that meets the unique needs of the family. Failure to provide services, including services to address family members' disability-related needs, could qualify as an exception to the termination of parental rights requirement. Decisions about whether this exception applies to a situation in which the supports necessary for a person with a disability to access services were not provided should be made on a case-by-case basis.

Given the responsibilities of agencies discussed above, we also recommend that courts consider whether parents and prospective parents with disabilities have been afforded an equal opportunity to attain reunification, including whether they have been provided with appropriate services and supports and other reasonable modifications to enable them to participate fully and meaningfully in family preservation efforts. Additionally, we suggest that courts consider whether any reasonable modifications are necessary and should be made for parents with disabilities. We also recommend that courts consider evidence concerning the manner in which the use of adaptive equipment or supportive services may enable a parent with disabilities to carry out the responsibilities of parenting.

Foster care and adoption agencies must also ensure that qualified foster parents and prospective parents with disabilities are provided opportunities to participate in foster care and adoption programs equal to opportunities that agencies provide to individuals without disabilities.[83] This may require foster care and adoption agencies to reasonably modify policies, practices, and procedures, where necessary to avoid discrimination on the basis of disability. For example, an adoption agency may be required to provide large print and electronically accessible adoption materials to accommodate the known needs of a visually impaired adoption program applicant.

10. When a child welfare agency or court provides or requires an assessment of a parent during the processing of the child welfare case, what do Title II and Section 504 require regarding the assessment?

Answer: Title II and Section 504 require that assessments be individualized.[84] 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. Child welfare agencies and courts may also be required to provide reasonable modifications to their policies, practices, or

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[81] 42 U.S.C. § 675(5)(E); 45 C.F.R. § 1356.2 l(i).
[82] 42 U.S.C. § 675(5)(E)(i)-(iii); 45 C.F.R. § 1356.2l(i)(2)(i)-(iii).
[83] 42 U.S.C. § 12132; 29 U.S.C. § 794(a); 28 C.F.R. pt. 35 (Title IT); 28 C.F.R. pt. 42, subpt. G (DOJ Section 504 regulation); 45 C.F.R. pt. 84 (HHS Section 504 regulation).
[84] *See* 28 C.F.R. pt. 35, App. B; *cf PGA Tour, Inc. v. Martin,* 532 U.S. 661,690 (2001) (explaining that an individualized inquiry is among the ADA's most "basic requirement[s].").

Child welfare agencies may be required to modify their own services, or, when necessary, to arrange for services outside of the agency, in order to ensure equal opportunity for parents and prospective parents with disabilities

procedures and/or appropriate auxiliary aids and services during assessments to ensure equal opportunities for individuals with disabilities. For example, a child welfare agency or court may be required to provide a qualified sign language interpreter to accommodate an individual with a communication disability during an evaluation to ensure an accurate assessment.

11. How does the equal opportunity requirement apply to case planning activities of child welfare agencies?

Answer: The equal opportunity requirement applies throughout the continuum of a child welfare case, including case planning activities. In many instances, providing the same services and resources to an individual with a disability that are provided to individuals without disabilities will not be sufficient to provide an equal opportunity to an individual with a disability. Where this is the case, Title II and Section 504 may require agencies to provide additional, individually tailored services and resources to meet the requirement to provide an equal opportunity to participate in and benefit from the program. For example, when providing training to parents, agencies should consider the individual learning techniques of persons with disabilities and may need to incorporate the use of visual modeling or other individualized techniques to ensure equal opportunity to participate in and benefit from the training.

Staff should consider whether the agency is appropriately assisting family members in meeting service plan tasks and case goals, and whether modifications must be made. For example, if parenting training is not working, staff should evaluate whether there are any unnecessary barriers to the training that could be removed or reasonably modified, such as increased opportunities for modeling behavior. Agencies should also ensure that staff members develop appropriate service plan tasks and goals that address the individualized needs of all affected family members with disabilities, recognizing that allowing parents with disabilities to use family members as part of their support network may be appropriate.

12. Is an agency required to arrange for services to parents and prospective parents with disabilities that are necessary to avoid discrimination but are not available within the agency's programs?

Answer: In addition to providing to parents with disabilities all reunification services that it provides to parents without disabilities, a child welfare agency may be required, under Title II and Section 504, to arrange for available services from sources outside of the agency as a reasonable modification of its procedures and practices for parents with disabilities so long as doing so would not constitute a fundamental alteration. Arranging for such services from outside sources may be necessary to provide an equal opportunity to participate in and benefit from the agency's programs. Many specialized services to support persons with disabilities are often available from other social service agencies, as well as disability organizations. For example, for a person with a mental health disability, mental health services and supports, such as supportive housing, peer supports, assertive community treatment, and other community-based supports are often available from mental health service agencies. Child welfare agencies should coordinate with such agencies and organizations to ensure that parents and prospective parents with

disabilities receive the most complete set of support services possible, and also to ensure that reunification and other services are specifically tailored to their needs.[85] This requirement does not change an entity's responsibility to make available those reunification services provided to parents without disabilities or to reasonably modify them to provide equal opportunity.

13. Are child welfare agencies and courts permitted to impose a surcharge on persons with disabilities for the provision of reasonable modifications or auxiliary aids and services?

Answer: No. Title II prohibits the imposition of surcharges to cover the costs of measures required to provide an individual with nondiscriminatory treatment.[86] For example, child welfare agencies and courts may not charge persons with disabilities for any costs associated with providing effective communication during visitation, meetings, and court hearings, and may be required to provide transportation to accessible facilities when needed to fulfill their program access obligations.

14. Child welfare agencies have an obligation to ensure the health and safety of children. How can agencies comply with the ADA and Section 504 while also ensuring health and safety?

Answer: Under child welfare law, child welfare agencies must make decisions to protect the safety of children. The ADA and Section 504 are consistent with the principle of child safety. For example, the ADA explicitly makes an exception where an individual with a disability represents a "direct threat."[87] Section 504 incorporates a similar principle.[88]

Under the ADA and Section 504, a direct threat is 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.[89] In determining whether an individual poses a direct threat to the health or safety of a child or others, child welfare agencies and courts 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 to the child; the probability that the potential injury to the child will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk.[90]

As such, in some cases an individual with a disability may not be a qualified individual with a disability for child placement purposes. What both the ADA and Section 504 require, however, is that decisions about child safety and whether a parent, prospective parent, or foster parent represents a direct threat to the safety of the child must be based on an individualized assessment and objective facts and may not be based on stereotypes or generalizations about persons with disabilities.[91]

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[85] *See* 28 C.F.R. § 35.130(b)(l)(i)-(iv), (b)(7).
[86] *See* 28 C.F.R. § 35.130(f).
[87] 28 C.F.R. § 35.139.
[88] *See Arline,* 480 U.S. 273.
[89] 28 C.F.R. § 35.139(b).
[90] *Id.*
[91] *See* 28 C.F.R. § 35.139.

15. What are some other best practices for child welfare agencies and courts?

Answer: We recommend that child welfare agencies and courts review and update their policies and procedures on a regular basis to ensure that they comply with the ADA and Section 504. We recommend that child welfare agencies and courts also ensure that their employees and contractors are sufficiently trained in ADA and Section 504 compliance. In addition, we recommend that they look for ways to coordinate with disability organizations and agencies to assist in service planning and to support them in their efforts to ensure equal opportunity for parents and prospective parents with disabilities.

How can aggrieved persons file a complaint?

16. What can individuals do when they believe they have been subjected to discrimination in violation of Title II or Section 504?

Answer: An aggrieved person may raise a Title II or Section 504 claim in child welfare proceedings. Additionally, subject to certain limitations, an aggrieved person may pursue a complaint regarding discrimination in child welfare services, programs, or activities under Title II or Section 504 in federal court. [92]

Aggrieved individuals may also file complaints with HHS and DOJ. HHS and DOJ also have authority to initiate compliance review investigations of child welfare agencies and courts with or without receiving a complaint. If an investigation of a complaint or a compliance review reveals a violation, HHS or DOJ may issue letters of findings and initiate resolution efforts.[93] DOJ may initiate litigation when it finds that a child welfare agency or court is not in compliance with Title II. HHS may also refer cases to DOJ for litigation where a violation is found and is not voluntarily resolved. [94]

Title II and Section 504 allow for declaratory and injunctive relief, such as an order from a court finding a violation and requiring the provision of reasonable modifications. Title II and Section 504 also allow for compensatory damages for aggrieved individuals. Individuals who prevail as parties in litigation may also obtain reasonable attorney's fees, costs, and litigation expenses.[95]

Under Section 504, remedies also include suspension and termination of Federal financial assistance, the use of cautionary language or attachment of special conditions when awarding Federal financial assistance, and bypassing recalcitrant agencies and providing Federal financial assistance directly to sub-recipients.[96]

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[92] *See* 28 C.F.R. §§ 35.170-172; 45 C.F.R. § 84.61; *see also* 28 C.F.R. § 42.530. In addition, child welfare agencies and courts that employ 50 or more persons are required to have grievance procedures for prompt and equitable resolution of complaints alleging actions prohibited by Title II and Section 504. 28 C.F.R. § 35.107; 45 C.F.R. § 84.6; *see also* 28 C.F.R. § 42.505.

[93] 28 C.F.R. §§ 35.172(c), 35.173; 45 C.F.R. § 84.61; *see also* 28 C.F.R. § 42.530.

[94] 28 C.F.R. § 35.174; 45 C.F.R. § 84.61.

[95] 42 U.S.C. § 12205; 29 U.S.C. § 794a(b); 28 C.F.R. § 35.175.

[96] *See* 42 U.S.C. § 2000d-l.

Additional Resources

For more information about the ADA and Section 504, you may call the DOJ's toll-free ADA information line at 800-514-0301 or 800-514-0383 (TDD), or access its ADA website at www.ada.gov. For more information about the responsibilities of child welfare agencies under the ADA and Rehabilitation Act, see "DOJ/HHS Joint Letter to Massachusetts Department of Children and Families," at www.ada.gov/new.htm. For more information about Title II of the ADA, including the Title II Technical Assistance Manual and Revised ADA Requirements: Effective Communication, see www.ada.gov/ta-pubs-pg2.htm.

Information about filing an ADA or Section 504 complaint with DOJ can be found at www.ada.gov/filing complaint.htm. Individuals who believe they have been aggrieved under Title II or Section 504 should file complaints at the earliest opportunity.

You can also file a Section 504 or Title II ADA complaint with OCR at http://www.hhs.gov/ocr/civilrights/complaints/index.html.

General information about civil rights and child welfare issues can be found at: http://www.hhs.gov/ocr/civilrights/resources/specialtopics/adoption/index.html.

For information about ACF's Children Bureau, please visit: http://www.acf.hhs.gov/programs/cb.

For ACF and OCR regional offices, please visit:

- http://www.acf.hhs.gov/programs/oro
- http://www.hhs.gov/ocr/office/about/rgn-hqaddresses.html

Duplication of this document is encouraged.

August 2015

187 A.D.3d 659
Supreme Court, Appellate Division, First Department, New York.

IN RE XAVIER BLADE LEE BILLY JOE S., etc., and Another, Dependent Children Under Eighteen Years of Age, etc.
The Children's Aid society, Petitioner–Appellant,
v.
Josefina S., Respondent–Respondent.
The Arc, The Autistic Self-Advocacy Network, The Civil Rights and Enforcement Center, Disability Rights Advocates, Professor Robyn M. Powell, and Professor Charisa Smith, Amici Curiae.

11929 & M–3154
|
Dkt. No. B7087/14
|
Case No. 2019-1648
|
Entered: October 29, 2020

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Kapnick, J.P., Gesmer, González, Scarpulla, JJ.

Opinion

****542 *659** Order, Family Court, Bronx County (Valerie Pels, J.), entered ***660** on or about January 9, 2019, which dismissed the petition to terminate the parental rights of respondent mother as to the subject children Xavier S. and Claudia S., unanimously affirmed, without costs.

As discussed in Family Court's well-reasoned decision, petitioner did not meet its burden of showing that it exercised diligent efforts to strengthen the parent-child relationship and reunite the family (Social Services Law § 384–b[7]). To satisfy its obligation, the agency must offer services adapted to the particular needs of the parent and children (*see Matter of Sheila G.,* 61 N.Y.2d 368, 385, 474 N.Y.S.2d 421, 462 N.E.2d 1139 [1984]; *Matter of Colinia D. [Thomas F.J,* 84 A.D.3d 1755, 922 N.Y.S.2d 831 [4th Dept. 2011]). Here, petitioner does not address its failure to assign this matter, which involved a cognitively impaired mother, to a caseworker with relevant expertise, or ensure that its caseworker was appropriately trained or consulted at the outset with individuals with relevant expertise in devising the mother's service plan. Nor does petitioner adequately acknowledge its failure to expand visitation, but justifies it based on its caseworker's safety concerns, and provides no reason to revisit Family Court's determination that those concerns were exaggerated. Petitioner further fails to address the logistical challenges presented by the visitation space provided for the mother and her four special needs children.

Petitioner also did not refer the mother to ongoing day habilitation services offered by the Office for People with Developmental Disabilities (OPWDD). Petitioner became aware that the mother should have such services in October 2012, but the caseworker testified that she was unaware OPWDD offered such services and was not familiar with how to refer an adult to OPWDD. Furthermore, the record shows that the mother substantially completed the services to which she

had been referred.

As amici curiae note, people with intellectual disabilities possess the ability to be successful parents and should receive services and support appropriately tailored to their needs.

We have considered petitioner's remaining arguments and find them unavailing.

M-3154 - In re S., Children

Motion by The Arc, the Autistic Self–Advocacy Network, the Civil Rights and Enforcement Center, Disability Rights Advocates, Professor Robyn M. Powell, and Professor Charisa Smith for file ****543** leave to file a brief as amici curiae granted and ***661** the brief accepted as filed.

All Citations

187 A.D.3d 659, 131 N.Y.S.3d 541 (Mem), 2020 N.Y. Slip Op. 06196

End of Document

New York Official Reports

Unreported Disposition
70 Misc.3d 1211(A), 136 N.Y.S.3d 875 (Table),
2020 WL 8262246 (N.Y.Fam.Ct.), 2020 N.Y.
Slip Op. 51600(U)

*1 In the Matter of Jose F., Ann Marie F., A Child Under Eighteen Years of Age Alleged to be Neglected by Christina L., Isaiah F., Respondents.

Family Court, Kings County
NN-XXXX-18, NN-XXXX-19
Decided on December 21, 2020

CITE TITLE AS: Matter of Jose F. (Christina L.)

ABSTRACT

Parent, Child and Family
Abused or Neglected Child

Reasonable Reunification Efforts—Foster care agency failed to make reasonable efforts toward goal of return to parent where agency failed to provide cognitively-delayed parents with individualized support they needed to learn proper parenting techniques and life skills necessary to having children returned to them.

Jose F., Matter of (Christina L.), 2020 NY Slip Op 51600(U). Parent, Child and Family—Abused or Neglected Child—Reasonable Reunification Efforts—Foster care agency failed to make reasonable efforts toward goal of return to parent where agency failed to provide cognitively-delayed parents with individualized support they needed to learn proper parenting techniques and life skills necessary to having children returned to them. (Fam Ct, Kings County, Dec. 21, 2020, Deane, J.)

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OPINION OF THE COURT

Jacqueline B. Deane, J.

Procedural Background

This proceeding began with the filing of a neglect petition against the Respondent mother, Christina L, and the Respondent father, Isaiah F, pursuant to Article 10 of the Family Court Act ("FCA") on February 8, 2018 as to their son Jose, who was 6 weeks old at the time. Petitioner, the Administration Children's Services ("ACS") alleged that Jose was brought to the hospital significantly underweight and malnourished and that the parents were "visibly physically mentally delayed" and that the hospital was "concerned that the subject child could die without someone overseeing [the parents] caretaking of the subject

child." It is further alleged that the hospital stated the parents were "completely unaware of how to care for a child." Additionally, the Respondent mother was alleged to have a mental illness, specifically bipolar disorder, which she was not taking her medication for nor receiving any mental health services. Neglect Petition, dated February 8, 2018.

By the time of the filing of the petition for the child Ann Marie, who was born one year later, the parents had made sufficient progress that they were having some limited unsupervised time in the middle of their agency-supervised visits with Jose. This new petition repeated the allegations of the first and alleged that, "despite recurring direction and reminders about proper feedings, the respondent parents continue to be inconsistent in feeding [Jose]." Neglect Petition, dated February 20, 2019. Both children were remanded to ACS from the time of filing of their respective petitions and have been in non-kinship care except for a brief period when the paternal aunt was a resource but then was unable to continue caring for the children. Both children remain in foster care to date. Neither neglect petition has yet proceeded to trial as the fact-finding date was vacated due to the COVID-19 pandemic.

This permanency hearing originally began on November 13, 2019 and was continued on December 20, 2019, February 14, 2020 and then was adjourned to April 22nd for summations.

The hearing was delayed in part by other proceedings related to the family including the filing of a termination of parental rights petition as to the child Jose as well as decisions on various motions including ones related to the temporary placement of the children and a motion *in limine*. Unfortunately, by the scheduled April date, the Court was closed due to the COVID-19 pandemic and there was only very limited capacity for virtual proceedings.

At the hearing, ACS introduced a total of eight exhibits--primarily various Heartshare foster care agency court reports--as well as the testimony of the agency case planner Ms. ***2** Anderson and rested. The Respondent mother introduced seven exhibits and the Respondent father introduced three. The attorney for the child ("AFC") rested without introducing any witnesses or evidence. After a period of time passed in the hopes that the courthouse might soon be able to re-open, the Court reached out to counsel about proceeding with the conclusion of the hearing virtually; counsel ultimately decided to submit their summation in writing along with two additional exhibits by ACS and the mother.

Prior to the courthouse closure, the Respondent mother had just recently requested a hearing for the return of the children pursuant to FCA § 1028 but, given the limited court operations due to COVID, Ms. L decided to reserve her right to that hearing and the Court held a phone conference with counsel on March 25, 2020 in which the following order was entered:

> In light of the public health emergency due to the coronavirus, the Court held a conference call with the attorney for ACS, the Respondent mother Ms. L, and the AFC regarding Ms. L's pending motion for a hearing pursuant to FCA 1028. Given the decreased availability of the Court at this time, an expedited hearing on whether the subject children would be at imminent risk if returned to their parents cannot be held. However, the needs and best interests of the subject children and the rights of the Respondent parents to maintain some minimum, regular contact with each other during this pandemic by video and/or phone, if not in person, require the Court to enter the following order over the objection of ACS:
>
> 1. ACS is to make every effort, consistent with any emergency public health restrictions put in place by NYC or NYS, to arrange in person visits with the subject children in a park or other outdoor location near the agency.
> 2. ACS is to explore the availability of free phone minutes and any existing, convenient free WIFI to render Ms. L's phone operational for phone and video contacts with the agency and the subject children.
> 3. If free options are not available or are not located by Friday 3/27, ACS is ordered to pay for a minimum of 10 hours of phone service per month for the Respondent mother.
> 4. ACS is to insure that the foster parent has the capability to do video/facetime visits in her home and make best efforts to encourage and enable the foster parent to conduct such visits. If video visits in the

> foster home are impossible, speaker phone conversations should be utilized and the parents are to be provided with regular photographs of the children. Visits of some type should be scheduled atleast once per week.
>
> The agency is ordered to provide the parents with regular phone updates on the status of the children's emotional and physical growth and well-being.
>
> All of these orders are to be executed by the agency while being cognizant of the parents' cognitive limitations and take all steps to insure their comprehension and ability to maintain regular contact with their children during this pandemic. Order (March 25, 2020) (emphasis added).

Factual and Legal Findings

Article 10-A of the Family Court Act "establish[es] uniform procedures for permanency hearings for all children who are placed in foster care . . . [in order] to provide children placed out of their homes timely and effective judicial review that promotes permanency, safety and well-being in their lives." Family Court Act § 1086. The permanency plan must include a "description of the reasonable efforts to achieve the child's permanency plan that have been taken by [ACS] since the last hearing" and, when the permanency goal is reunification, the ***3** description "shall include . . . the reasonable efforts that have been made by [ACS] to eliminate the need for placement of the child and to enable the child to safely return home, including a description of any services that have been provided." Family Court Act § 1089(c)(4)(i). At the conclusion of a permanency hearing, the Family Court "shall, upon the proof adduced, and in accordance with the best interests and safety of the child, including whether the child would be at risk of abuse or neglect if returned to the parent or other person legally responsible, determine and issue its findings, and enter an order of disposition in writing." Family Court Act § 1089(d). If the child is not returned to the parent, the order must state, among other things, "whether reasonable efforts have been made to effectuate the child's permanency plan." Family Court Act § 1089(d)(2)(iii). *See also Lacee L. v Stephanie L.*, 32 NY3d 219, 226 (2018).

"The Family Court Act's requirement that ACS undertake 'reasonable efforts' toward family reunification reflects the Legislature's finding that a child is ordinarily given the best opportunity to thrive and develop when they are raised by their parent." *Lacee L. v Stephanie L.*, 32 NY3d 219, 239 [2018] (citing *Matter of Michael B.*, 80 NY2d 299, 308-309, 590 N.Y.S.2d 60, 604 N.E.2d 122 [1992]; Soc Serv Law § 384--b [1] [a] [i], [ii]). The "Family Court's determinations following a permanency hearing must be made 'in accordance with the best interests and safety of the child, including whether the child would be at risk of abuse or neglect if returned to the parent.'" *Matter of Victoria B.*, 164 AD3d 578, 581 [2d Dept 2018] (quoting Family Ct Act § 1089(d); other quotation marks omitted). New York law further requires that ACS's reasonable efforts be "tailored to the particular circumstances and individuals in a given case." *In re Lacee L.*, 153 AD3d 1151, 1152 [1st Dept 2017], *affd sub nom. Lacee L. v Stephanie L.*, 32 NY3d 219 [2018] (*Matter of In re Cloey S.*, 99 AD3d 1080, 1081 [3d Dept 2012]).

This Court credits the testimony of the case planner in this matter as well as the contents of the various court reports and other exhibits. The Petitioner and the AFC contend that this evidence establishes that the agency made "reasonable efforts" towards the goal of return to parents as required by FCA § 1089. The Respondents argue that the evidence does not support this finding for the following reasons:

> 1. Although the agency noted that both parents would benefit from OPWDD services, it failed to support them during the application process.
> 2. The agency did not help Ms. L apply for SSI despite the need for her to maintain a stable source of income.
> 3. The agency did not adequately follow up on and assist with the transfer of Mr. F's mental health services when he moved to Staten Island and then subsequently to Brooklyn to ensure Mr. F was receiving adequate support.
> 4. The agency failed to explore the parents' eligibility for supportive housing and did not assist them in securing a NYCHA safety transfer.
> 5. The agency failed to move the visits to a more convenient location than Brooklyn for the parents given their Staten Island residence and did not make sufficient efforts to assist them with the logistics of their transportation.

As is evident from the allegations in this petition, the agency was aware of the Respondent parents' intellectual and cognitive delays from the outset of this case. The permanency hearing reports also referred to the parents' "notable cognitive delays." Petitioner's Exs. 1 & 2 in evidence. The parents' mental impairment necessitated a tailored approach by the agency and a focus on accessing the resources that exist to support parents in their position. Ms. Anderson acknowledged on cross-examination that she did not have any specialized training in ***4** working with parents with cognitive disabilities. When asked if there was "anyone in [her] office who has specialized training to organize logistics for people with cognitive delays," Ms. Anderson answered "no." (Permanency Hearing Transcript dated 11/13/19, p. 14). There was no testimony that the foster care agency, Heartshare St. Vincents, or ACS provided Ms. Anderson with any additional training or guidance in working with these parents.[1] This fact in and of itself is concerning to the Court as it certainly increased the likelihood that the agency, as a whole, would fail to provide the parents with the individualized support they needed to learn proper parenting techniques and life skills necessary to having the children returned to them. As noted by Justice Rivera in her dissent in *Lacee L.,* "[i]t is axiomatic that if ACS does not understand a parent's disability it cannot provide services 'tailored to the particular circumstances and individuals in a given case.'" *Lacee L. v Stephanie L.*, 32 NY3d 219, 244 [2018] (Rivera, J., dissenting) (quoting *Matter of Cloey S.*, 99 AD3d at 1081, 952 N.Y.S.2d 657)). The caseworker also acknowledged that she was unaware of the curriculum of the parenting class completed by the parents entitled "We are Parents Too," which was specifically developed for diverse learners, or the recommendation of the social worker who directs that program. (*See* Permanency Hearing Transcript dated 12/20/19, p. 20-21). This untapped contact would have been an excellent source of information for the agency to learn how to better support the parents towards greater independence in caring for the children.

Of particular note to the Court in assessing the reasonableness of the agency's efforts is the failure to help the parents in any meaningful way with a primary issue Ms. Anderson identified in her testimony--namely, the parents apparent inability to manage their monthly income in a way that ensured they had a sufficient supply of food until their next public assistance check. Ms. Anderson's concern was based on the lack of food she observed at times during home visits. Additionally, at times the parents missed visits because they lacked funds to travel to the agency even though the agency would provide reimbursement once they arrived. Yet, despite this fact, Ms. Anderson testified that she did not assist the parents with locating food banks in Staten Island. Nor did Ms. Anderson offer to sit down with the parents to create an itemized budget with them or offer other concrete tips for improving their money management. While the caseworker expressed her concerns around their spending to the parents and made efforts to engage them in conversation around their budgeting, when asked about the specifics of these conversations, Ms. Anderson testified that she spoke "in terms of considering what they're using their money for versus addressing their needs per month." (Permanency Hearing Transcript dated 12/20/19, p. 56). Such general and vague guidance is insufficient to enable people with cognitive limitations to know how to attempt behavior change around their spending ***5** habits. The agency must not only identify the problems the parent is facing but must make "affirmative, repeated and meaningful efforts to assist" the parent in overcoming them. *Matter of Children's Aid Socy. for Guardianship of Xavier Blade Lee Billy Joe S.*, 62 Misc 3d 1212(A) [Fam Ct 2019] (citing *Matter of Sheila G.*, 61 NY2d 368, 385 [1984]), *affd sub nom. In re Xavier Blade Lee Billy Joe S.*, 187 AD3d 659 [1st Dept 2020].

Additionally, there was no evidence of agency efforts to secure or enhance the parents' sources of income. Although Ms. Anderson testified that the parents had obtained SNAP benefits through HRA, she acknowledged that *she* had not assisted the parents in obtaining them. The caseworker neither set up the appointments nor attended any of them with Ms. L despite the challenges for a person with cognitive delays of dealing with an agency bureaucracy like HRA. Ms. Anderson also admitted that the agency did not provide any help to Ms. L in pursuing her appeal of her SSI denial.

Ms. Anderson testified that she was aware, "to an extent," that some of the many supports OPWDD could provide to the parents would be to assist them with budgeting, grocery shopping, meal preparation and obtaining available benefits. (Permanency Hearing Transcript dated 12/20/19,

pp. 46-47). Although Ms. Anderson testified that she had spoken with the parents about obtaining OPWDD services, she did nothing to assist them in navigating the complex process of eligibility nor did she attend their OPWDD intake meeting. Furthermore, it does not appear that Ms. Anderson attempted to fully learn what the OPWDD application process involved. Specifically, she testified that she was unaware that the parents had to attend and complete self-direction classes to be eligible.

Although the agency did ensure that the parents had regular opportunities to visit with the children in person prior to the pandemic interfering and generally provided MetroCards for their travel, the case planner admitted that no visits were ever arranged in the borough of Staten Island after the parents relocated there. Rather, Ms. Anderson acknowledged that the Respondents' trip from Staten Island to the agency office in Brooklyn could take approximately one hour and fifteen minutes and would require travel by bus, ferry and subway. Despite the fact that the agency raised issues with the parents' lateness to and cancellation of some visits, Ms. Anderson admitted she never attempted to plan the route with the parents to determine whether any faster, more reliable or less complex options existed.

After the December 2019 testimony by Ms. Anderson -- which raised these various issues with the level of assistance the agency had provided to the parents at that point -- the Court entered the following order:

> The agency is ordered to work with CASA to compare the list of what is needed for an OPWDD application with whatever documents the agency has to determine what is still needed to complete the application.
>
> The agency is ordered to create a budget with the parents to help them with their monthly spending choices and insure the parents have adequate MetroCards for all visits.

Order, December 20, 2019.

Despite the existence of this order, there was no evidence of any significant increase in agency support on these matters presented at the subsequent hearing dates or even in the most recent exhibits submitted. In fact, all of the efforts tailored to the Respondents' disabilities were made by the Respondent mother's BDS social worker and/or the CASA representative appointed by the Court. (Quote). For example, it was CASA who provided Ms. L with a working phone as the Court had ordered ACS to do on March 25th. *See* CASA Report dated 11/30/20.

In the *Matter of Xavier Blade Lee Billy Joe S.* ("*Xavier S.")*, the First Department affirmed a Family Court finding that the agency failed to exercise diligent efforts to reunite a family in a termination of parental rights case when working with a mother with a cognitive impairment. The diligent efforts requirement under the Social Services Law ("SSL") is analogous to the reasonable efforts requirement in Article 10. Initially the First Department noted that "[t]o satisfy its obligation, the agency must offer services adapted to the particular needs of the parent and children." *In re Xavier S.*, 187 AD3d 659 [1st Dept 2020] (citing *Matter of Sheila G.*, 61 NY2d 368, 384 [1984]); *Maria Ann P.*, 296 AD2d 574 [2d Dept. 2002] ("The agency failed to tailor its efforts to the needs of this particular parent and child."). In applying that requirement to the facts in *Xavier S.*, which are similar to those here, the Court then noted: "Here, petitioner does not address its failure to assign this matter, which involved a cognitively impaired mother, to a caseworker with relevant expertise, or ensure that its caseworker was appropriately trained or consulted at the outset with individuals with relevant expertise in devising the mother's service plan." *Id.* In *Xavier S.*, ACS also failed to refer the mother to OPWDD and admitted not being knowledgeable about how to make that referral. Given the inadequate level of support provided by the agency to Ms. L and Mr. F thus far, as well as the complications and added stressors the parents faced due to the COVID pandemic, the Court cannot determine whether the parents can safely and capably parent their children despite their intellectual disabilities and mental health challenges. As noted by Judge Pels in her decision in *Matter of Children's Aid Socy. for Guardianship of Xavier Blade Lee Billy Joe S.*, "the lack of expertise and resources in working with parents with intellectual disabilities who are involved in the child welfare system is a pervasive national problem." *Matter of Children's Aid Socy. for Guardianship of Xavier Blade Lee Billy Joe S.*, ("*Matter of Ch. Aid Soc.")* 62 Misc 3d 1212(A) [Fam Ct 2019], *affd sub nom. In re Xavier Blade*

Lee Billy Joe S., 187 AD3d 659 [1st Dept 2020] (citing National Council on Disability ("NCD"), "Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children" [September 27, 2012]).[2] However, in the eight years since the NCD report cited in *Matter of Ch. Aid Soc*. was written, there is greater awareness that the child welfare system must be attuned to the needs of this parent population. In 2015, The United States Department of Health and Human Services (HHS) and the United States Department of Justice (DOJ) jointly issued guidelines for state agencies on "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. August 2015. *See* http://www.ada.gov/doj_hhs_ta/child_welfare_ta.pdf (last accessed Dec. 21, 2020). As a result, NYC ACS has broadened its Developmental Disability Unit, which can be accessed by any caseworker or foster care agency to gain expertise, to address the needs of not only children, but ***6** parents, with intellectual disabilities. As the available knowledge and expertise increase, so does the threshold of what is "reasonable" in a given case.

In its recent decision finding general applicability of the American with Disabilities Act ("ADA") to ACS, though not always synonymously with what constitutes reasonable efforts in the context of a permanency hearing, the Court of Appeals held that "Family Court should not blind itself to the ADA's requirements placed on ACS and like agencies. The courts may look at the accommodations that have been ordered in ADA cases to provide guidance as to what courts have determined in other contexts to be feasible or appropriate with respect to a given disability." *Lacee L.*, 32 NY3d at 231. Based on this Court's review of the exhibits and considering the credibility of the witness, and this Court's extensive knowledge of the history and progression of this case, this Court finds that, although some efforts towards reunification were made, the totality of those efforts and the importance of the areas where the efforts were deficient do not amount to a showing of "reasonable efforts " towards the goal of return to parent. Therefore, the Court enters the following orders:

Placement

The subject children Jose and Ann Marie continue to be temporarily placed with the Commissioner of ACS until the completion of the next permanency hearing absent any contrary order at the fact-finding hearing.

Permanency goal

Jose's permanency planning goal remains return to parent but with concurrent planning towards adoption.

Ann Marie's permanency planning goal remains return to parent.

Reasonable efforts

The Court makes a finding that the agency has not made reasonable efforts towards the goal of return to parent based for the reasons detailed in this decision.

The Court orders the following future reasonable efforts:

The agency is to support the continued placement of the subject children in the pre-adoptive foster home.

The agency is to follow up on and encourage the Respondent parents' engagement in mental health services and medication management;

The agency is to engage a parent coach or locate a dyadic parenting program that is capable of working with parents with cognitive impairments to work directly with the parents.

Visitation

The subject children's visits will continue to be agency or approved resource supervised with 1 hour of unsupervised time as long as Mr. F's is calm and mentally stable during the initial supervised portion. ACS has discretion to expand the length of the unsupervised portion.

ACS is to make best efforts to increase the in person visits to twice per week given the limitations in space and staffing due to the COVID pandemic.

ACS is to arrange virtual video visits twice per week.

Dated: December 21, 2020

Hon. Jacqueline B. Deane, JFC

FOOTNOTES

Footnotes

1 The Court wants to be clear that these failures are not the individual responsibility of Ms. Anderson who at all times through out her testimony seemed well intentioned in her efforts to address the needs of the parents. Rather it is the agencies involved, Hearthshare St. Vincents and by extension ACS that are responsible for having, or obtaining, the specialized knowledge of how to work effectively with parents with cognitive impairments. This expertise would include both knowledge about community services, programs and benefits available to these parents as well as strategies to enhance direct parent engagement.

2 This NCD report found that "[t]he child welfare system is ill-equipped to support parents with disabilities and their families [including parents with intellectual disabilities], resulting in disproportionately high rates of involvement in child welfare services and devastatingly high rates of parents with disabilities losing their parental rights" (National Council on Disability, Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children [September 27, 2012], Finding 2 at 242).

New York Official Reports

32 N.Y.3d 928, 108 N.E.3d 1019, 84 N.Y.S.3d 73 (Mem), 2018 N.Y. Slip Op. 81870

In the Matter of Lacee L., an Infant. Stephanie L., Appellant; Administration for Children's Services, Respondent, et al., Respondent.

Court of Appeals of New York
2018-789
Submitted August 6, 2018
Decided August 30, 2018

CITE TITLE AS: Matter of Lacee L. (Stephanie L.)

Reported below, 153 AD3d 1151.

Motion by Brooklyn Defender Services et al. for leave to file a brief amici curiae on the appeal herein granted and the proposed brief is accepted as filed. Two copies of the brief must be served, an original and nine copies filed, and the brief submitted in digital format within seven days.

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500 Mich. 79
Supreme Court of Michigan.

IN RE HICKS/BROWN, Minors.

No. 153786
|
Argued December 7, 2016
|
Decided May 8, 2017

Synopsis

Background: The Department of Health and Human Services (DHHS) filed a petition to terminate mother's parental rights to two minor children. The Circuit Court, Wayne County, Family Division, Christopher D. Dingell, J., terminated mother's parental rights. Mother appealed. The Court of Appeals, 315 Mich.App. 251, 890 N.W.2d 696, vacated and remanded. DHHS and children's guardian ad litem, who was also children's attorney, appealed.

Holdings: The Supreme Court, Larsen, J., held that:

DHHS could not argue on appeal that mother did not timely raise her objection that DHHS did not make reasonably accommodate her intellectual disability, and

trial court made insufficient findings to support a determination that the DHHS made the required reasonable efforts at reunification tailored to mother's intellectual disability prior to termination of her parental rights.

Affirmed in part, vacated in part, and remanded.

****638** BEFORE THE ENTIRE BENCH

OPINION

Larsen, J.

***82** Respondent Brown is an intellectually disabled person whose parental rights to two children ***83** were terminated. Before a court may enter an order terminating parental rights, Michigan's Probate Code, MCL 710.21 *et seq*., requires a finding that the Department of Health and Human Services (the Department) has made reasonable efforts at family reunification. Brown argues that the Department's efforts at family reunification were not reasonable because they failed to reasonably accommodate her disability. This case presents two questions: whether Brown timely raised her claim for accommodation before the circuit court, and if so, whether the Department's efforts at family reunification were reasonable. For the reasons stated, we affirm in part the judgment of the Court of Appeals, vacate in part the opinion of the Court of Appeals, and remand this case to the Wayne Circuit Court for further proceedings consistent with this opinion.

I

In April 2012, respondent Brown brought her infant daughter to the Department, stating that she could not care for her. On April 10, the Wayne Circuit Court granted the Department's motion to place the child in protective custody. The court took jurisdiction over the daughter on January 29, 2013, and instituted a service plan provided by the Department.[1] At the time, Brown was pregnant with a son. After he was born in February 2013, the court took jurisdiction over him as well.

***84** For most of 2013, Brown appears to have inconsistently participated in the services required by the plan, but her attorney later argued that the services did not meet her needs. At a January 2014 hearing, ****639** Brown's attorney asked how her client could obtain more individualized assistance. On at least five occasions between August 2014

and the trial for termination of parental rights in July 2015, Brown's attorney inquired about the Department's efforts to ensure that her client receive services through a community mental health agency called the Neighborhood Services Organization (NSO) to accommodate her intellectual disability. Brown never received these services.

On June 18, 2015, the Department filed a petition to terminate Brown's parental rights to both children, alleging three grounds for termination.[2] On July 27, 2015, the circuit court granted the petition, finding that two grounds for termination had been established[3] and that termination was in the children's best interests.

Brown sought relief in the Court of Appeals, arguing that the Department's reunification efforts had failed to accommodate her intellectual disability as required by the Americans with Disabilities Act (ADA), 42 USC 12101 *et seq*., and that this failure should have prevented ***85** the termination of her parental rights. The Department and the children's lawyer-guardian ad litem argued that Brown had waived any claim stemming from her disability because she had not raised her objection "when [the] service plan [was] adopted or soon afterward." See *In re Terry*, 240 Mich.App. 14, 26, 610 N.W.2d 563 (2000). The Court of Appeals panel rejected this argument, holding that Brown had preserved her claim by objecting sufficiently in advance of the termination proceedings to comply with *Terry*'s preservation requirements. *In re Hicks*, 315 Mich.App. 251, 269–271, 890 N.W.2d 696 (2016). On the merits, the panel concluded that because "the case service plan never included reasonable accommodations to provide respondent a meaningful opportunity to benefit," the Department had "failed in its statutory duty to make reasonable efforts to reunify the family unit." *Id*. at 255, 890 N.W.2d 696. Any termination order was therefore premature. *Id*. at 286, 890 N.W.2d 696.

The children's lawyer-guardian ad litem sought leave to appeal in this Court. We ordered oral argument on the application. *In re Hicks/Brown*, 499 Mich. 982, 882 N.W.2d 136 (2016).

II

Under Michigan's Probate Code, the Department has an affirmative duty to make reasonable efforts to reunify a family before seeking termination of parental rights. MCL 712A.18f(3)(b) and (c); MCL 712A.19a(2).[4] As part of these reasonable efforts, the Department must create a service plan outlining the steps that both it and the parent will take to rectify the issues that led ***86** to court involvement and to achieve reunification. MCL 712A.18f(3)(d) (stating that the service plan shall include a "[s]chedule of services to be provided to ****640** the parent ... to facilitate the child's return to his or her home").

The Department also has obligations under the ADA that dovetail with its obligations under the Probate Code. Title II of the ADA requires 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 any such entity." 42 U.S.C 12132. Public entities, such as the Department, must make "reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless ... the modifications would fundamentally alter ... the service" provided. 28 CFR 35.130(b)(7) (2016).

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 under the Probate Code to offer services designed to facilitate the child's return to his or her home, see MCL 712A.18f(3)(d), and has, therefore, failed in its duty to make reasonable efforts at reunification under MCL 712A.19a(2). As a result, we conclude that efforts at reunification cannot be reasonable under the Probate Code if the Department has failed to modify its standard procedures in ways that are reasonably necessary to accommodate a disability under the ADA. The Department seems to agree. See the Department's Supplemental Brief, p. 19, quoting Michigan Department of Health and Human Services, ***87** *Children's Foster Care Manual*, FOM 722–06F (2016) ("[W]here a parent is suffering from a disability, the Department recognizes as a matter of policy and federal law that it must 'make all programs and services

available and fully accessible to persons with disabilities.' ... [I]n a case with a disabled parent, the Department's obligation to make reasonable accommodations for the disabled parent will be a part of the statutory duty to make 'reasonable efforts' unless one of the enumerated exceptions apply.").

The Department, of course, cannot accommodate a disability of which it is unaware. See *Robertson v. Las Animas Co. Sheriff's Dep't*, 500 F.3d 1185, 1196 (C.A. 10, 2007) ("[B]efore a public entity can be required under the ADA to provide [reasonable accommodations], the entity must have knowledge that the individual is disabled, either because that disability is obvious or because that individual (or someone else) has informed the entity of the disability."). In the instant case, however, it is clear that the Department knew of Brown's disability.[5] Once the Department ****641** knew of the ***88** disability, its affirmative duty to make reasonable efforts at reunification meant that it could not be "passive in [its] approach ... as far as the provision of accommodations is concerned." *Pierce v. Dist. of Columbia*, 128 F.Supp.3d 250, 269 (D. D.C., 2015).[6]

The Department and the children's lawyer-guardian ad litem argue that Brown did not timely raise in the circuit court her disability-based objection and that she has therefore forfeited that argument on appeal. Relying on dictum in *Terry*,[7] they argue that objections to a service plan are always untimely if not raised "either when a service plan is adopted or soon afterward." *Terry*, 240 Mich.App. at 26, 610 N.W.2d 563. With the exception of the panel below, the Court of Appeals has treated this language as the rule since the *Terry* decision.[8] While ***89** skeptical of this categorical rule,[9] we have no occasion to decide whether the objection in this case was timely because neither the Department nor the children's lawyer-guardian ad litem raised a timeliness concern in the circuit court.

Brown's counsel argued at a hearing held over a year after adoption of the initial service plan—but roughly 11 months before the termination hearing—that the services offered by the Department did not sufficiently accommodate her client's intellectual disability. She specifically requested services through the NSO—services that she argued would provide support for Brown's disability. The Department did not object to counsel's request as untimely; nor, apparently, did the circuit court find the request untimely because the court granted the request and ordered the Department to assist Brown in obtaining the requested services. The Department registered no objection when the NSO services were discussed at four subsequent hearings, instead explaining its attempts (and failures) to provide Brown with the court-ordered ****642** services. In short, the Department and the circuit court operated as if Brown's request had been timely; the Department cannot now complain otherwise.[10]

Despite the recommendations of the Department's medical professionals that Brown could benefit from ***90** services tailored to her disability through an organization such as the NSO, and despite the Department's failure to provide those court-ordered services, the circuit court nonetheless concluded that the Department had made reasonable efforts at reunification and terminated Brown's parental rights. The circuit court seemed not to have considered the fact that the Department had failed to provide the specific services the court had ordered to accommodate Brown's intellectual disability; nor did it consider whether, despite this failing, the Department's efforts nonetheless complied with its statutory obligations to reasonably accommodate Brown's disability. This was error. As stated earlier, efforts at reunification cannot be reasonable under the Probate Code 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.

Accordingly, we vacate the termination order, which was predicated on an incomplete analysis of whether reasonable efforts were made, and remand to the circuit court for further proceedings. On remand, the circuit court should consider whether the Department reasonably accommodated Brown's disability as part of its reunification efforts in light of the fact that Brown never received the court-ordered NSO services.[11]

***91** For the reasons stated in this opinion, we affirm in part the judgment of the Court of Appeals, vacate in part the Court of Appeals' opinion, and remand to the Wayne Circuit Court for further proceedings consistent with this opinion.

Stephen J. Markman, C.J. and Brian K. Zahra, Bridget M. McCormack, David F. Viviano, Richard H. Bernstein, JJ., concur.

500 Mich. 79, 893 N.W.2d 637

All Citations

Footnotes

1 The plan required Brown to participate in and benefit from parenting classes, attend individual counseling sessions, visit her daughter in a supervised setting, remain in regular contact with the Department, complete high school or obtain a GED, find a suitable home, find a legal source of income, and attend a clinic that would evaluate her sociological and psychological ability to care for a child. The Department's treatment plan included a goal that Brown would "obtain the intellectual capacity to fully be able to care for herself and her daughter."

2 The petition alleged that (1) the conditions leading to adjudication continued to exist, and there was no reasonable likelihood that the conditions would be rectified within a reasonable time, MCL 712A.19b(3)(c)(*i*); (2) respondent failed to provide proper care or custody for the children, and there was no reasonable expectation that she would be able to provide proper care or custody within a reasonable time, MCL 712A.19b(3)(g); and (3) there was a reasonable likelihood that the children would be harmed if returned to the home of respondent, MCL 712A.19b(3)(j).

3 The judge found grounds for termination under MCL 712A.19b(3)(c)(*i*) and MCL 712A.19b(3)(g). The judge did not rule regarding MCL 712A.19b(3)(j).

4 There are certain enumerated exceptions to this rule, see MCL 712A.19a(2), none of which apply to this case.

5 The Department's January 2013 treatment plan included a goal that Brown would "obtain the intellectual capacity to fully be able to care for herself and her daughter." At a preliminary hearing the following month, a Department caseworker observed that Brown had barriers to overcome, including emotional and cognitive impairments. The Department's initial service plan in her son's case, dated March 2013, noted that Brown "appear[ed] to have some intellectual impairments" and that she struggled to understand complex tasks and terms. A functional assessment conducted in April 2013 by the Wayne County Department of Children and Family Services concluded that Brown had a "moderate to severe" cognitive performance problem, noting that she had impaired judgment. And a psychological assessment conducted the following month described Brown's "immediately observ[able]" cognitive defects and reported that she had an IQ of 70, within the borderline of intellectual functioning. A court-ordered psychiatric evaluation concluded, in an apparent recognition of Brown's cognitive disability, that she could benefit from receiving services through a community mental health agency. Thus, the record shows that the Department had knowledge of Brown's disability since at least January 2013.

6 We agree with the Court of Appeals that the Department had an affirmative duty to accommodate Brown's disability. We disagree, however, with its prescription of steps that courts and the Department "must" complete "when faced with a parent with *a known or suspected* intellectual, cognitive, or developmental impairment." *In re Hicks*, 315 Mich.App. at 281–282, 890 N.W.2d 696. While the Court of Appeals reasonably identified measures the Department should consider when determining how to reasonably accommodate a disabled individual, we do not believe these steps will necessarily be implicated in every disability case. Trial courts are in the best position, in the first instance, to determine whether the steps taken by the Department in individual cases are reasonable.

Accordingly, we vacate this portion of the Court of Appeals' opinion.

7 *Terry*'s holding with respect to timeliness was that the objection in that case came too late because the objection was not raised until closing arguments at the hearing to terminate parental rights. See *Terry*, 240 Mich.App. at 27, 610 N.W.2d 563 ("In the present case, respondent did not raise a challenge to the nature of the services or accommodations offered until her closing argument at the hearing regarding the petition to terminate her parental rights. This was too late in the proceedings to raise the issue.").

8 See, e.g., *In re Frey*, 297 Mich.App. 242, 247, 824 N.W.2d 569 (2012); *In re Hawkins*, unpublished per curiam opinion of the Court of Appeals, issued December 29, 2016 (Docket No. 332957), p. 6., 2016 WL 7493986

9 Certainly, a service plan deficient on its face should produce an immediate objection. But it will not always be apparent at the time a service plan is adopted, or even soon afterward, that the service plan is insufficient, either in design or execution, to reasonably accommodate a parent's disability. This is perhaps especially true with respect to intellectual disabilities, which may present in subtle ways and require fine-tuned, albeit reasonable, accommodations.

10 The lawyer-guardian ad litem participated in the circuit court proceedings but similarly raised no objection to the timing of the request.

11 The Department argues that, even if it failed to make reasonable efforts at reunification, we should still reverse the Court of Appeals because the circuit court concluded, as an independent ground for termination, that Brown lacked the motivation to be reunited with her children. This argument sits uncomfortably with the Department's concession in its brief before this Court that "[w]here the Department fails to [make reasonable accommodations for a disabled parent], this failure will ordinarily foreclose the Department's ability to prove that the grounds for termination were established." The circuit court's reasonable-efforts determination in this case was incomplete. Remand is, therefore, the only proper course.

New York Official Reports

23 A.D.3d 271, 803 N.Y.S.2d 568, 2005 N.Y. Slip Op. 08840

*1 In the Matter of La'Asia Lanae S. and Another, Children Alleged to be Permanently Neglected. Tamara Litisha S., Appellant; The Salvation Army, Respondent.

Supreme Court, Appellate Division, First Department, New York
7094, 7094A
November 17, 2005

CITE TITLE AS: Matter of La'Asia Lanae S.

HEADNOTE

Parent, Child and Family
Termination of Parental Rights

Permanent Neglect

Respondent, who failed to complete drug treatment, parenting skills and domestic violence programs within statutorily relevant period, or secure suitable housing, permanently neglected children—agency efforts reasonably accommodated respondent's hearing impairment—termination of parental rights was in children's best interests since respondent could not ameliorate conditions that led to children's placement.

Orders of disposition, Family Court, New York County (Mary E. Bednar, J.), entered on or about October 24, 2002, which, upon fact-finding determinations of permanent neglect, terminated respondent-appellant's parental rights to the subject children and committed their custody and guardianship to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The finding of permanent neglect is supported by clear and convincing evidence that despite the agency's diligent efforts to encourage and strengthen the parental relationship, which reasonably accommodated respondent's hearing impairment, respondent failed to successfully complete drug treatment, parenting skills and domestic violence programs within the statutorily relevant period, or secure suitable housing (*see Matter of Jamie M.*, 63 NY2d 388, 393 [1984]; *Matter of Sheila G.*, 61 NY2d 368, 384-385 [1984]). Family Court correctly held that the Americans with Disabilities Act (42 USC § 12101 *et seq.*) has no bearing on the proceeding (*see Matter of Chance Jahmel B.*, 187 Misc 2d 626 [2001]). The finding that termination of parental rights is in the children's best interests is supported by a preponderance of the evidence showing *2 that respondent cannot presently ameliorate the conditions that led to the children's placement (*see Matter of Michael B.*, 80 NY2d 299, 311 [1992]; *Matter of Desmond Sinclair G.*, 202 AD2d 156, 158 [1994]). Concur—Tom, J.P., Marlow, Ellerin, Sweeny and Catterson, JJ.

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