



TERMINATION OF PARENTAL RIGHTS OF PARENTS WITH MENTAL DISABILITIES¹

Many parents with mental disabilities find themselves fighting to keep custody of their children or to prevent their parental rights from being terminated. Often, these parents are ill-served by the child welfare system because in-home training and other family preservation services are not designed to meet their specialized needs. Without modifications, these services may be completely ineffective in achieving their purpose and, as a result, parents with mental disabilities may lose their children.

Efforts to prevent loss of parental rights by this population have fared very poorly in the courts. Frequently, child welfare agencies and courts act based on generalized assumptions about a parent's disability rather than specific instances of abuse or neglect or based on evidence of the effects of a disability that have since been corrected. In many cases, parents with mental disabilities lose their children because they do not receive services that address the effects of their disability on parenting. These service needs are rarely identified. As a result, some parents are unable to complete their case plan, while others do complete their case plan but lose their children anyway because their needs remain unaddressed.

Strong advocacy and strategic planning are needed to prevent these trends from continuing. Collaboration between protection and advocacy system lawyers and lawyers who represent parents in custody and termination proceedings may help generate more positive results in this area. This information sheet outlines some of the problems that arise in seeking to prevent individuals with mental disabilities from losing parental rights and suggests strategies to improve outcomes in this area of law.

Background

Historically, individuals with mental disabilities have faced enormous societal biases concerning their fitness to serve as parents. For many years, the chief governmental response to the issues and challenges of parenting with a mental disability was to sterilize individuals with

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mental disabilities and prevent them from having children.² As attitudes have evolved, involuntary sterilization has been replaced, some would argue, by taking away these parents' children after they are born. Child welfare systems provide services to assist parents with mental disabilities to overcome parenting difficulties. However, stereotyped notions that individuals with mental disabilities are inadequate parents and place their children at high of abuse or neglect continue to be prevalent.³ These deeply ingrained notions, together with a widespread lack of understanding of what types of parenting services are effective for individuals with mental disabilities, have made it very difficult for parents with mental disabilities to maintain parental rights.

Applicable Law

The Americans with Disabilities Act (ADA)

By its terms, the ADA is applicable to the provision of services designed to help parents maintain or regain custody as well as to the initiation of termination of parental rights proceedings. Title II of the ADA prohibits state and local government entities from discriminating against individuals with disabilities in their programs, services, and activities. 42 U.S.C. § 12132. Specifically, a public entity cannot provide individuals with disabilities an unequal opportunity to participate in its programs, services or activities, and must make

² See, e.g., Linda Dowdney & David Skuse, *Parenting Provided by Adults with Mental Retardation*, 34 J. Child Psychiatry 25, 25 (1993). Involuntary sterilization was implemented not simply because of fears that individuals with mental disabilities would be unfit parents, but also because of perceptions that it was necessary to prevent large numbers of offspring with mental retardation. *Id.* In *Buck v. Bell*, 274 U.S. 200 (1927), the Supreme Court upheld a Virginia statute permitting superintendents of institutions for individuals with mental disabilities to condition release of residents on involuntary sterilization if they determined that sterilization was in the “best interests of the patient and of society.” The Court concluded that “[i]t would be strange if [the state] could not call upon those who already sap the strength of the State for these lesser sacrifices . . . in order to prevent our being swamped with incompetence.” 274 U.S. at 207. According to the Court, “[i]t is better for all the world, if . . . society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough.” *Id.*

³ See Alexander J. Tymchuk & Linda Andron, *Mothers with Mental Retardation Who Do or Do Not Abuse or Neglect their Children*, 14 Child Abuse & Neglect 313 (1990) (despite criticism of literature suggesting individuals with mental retardation are inadequate parents, attitudes continue to prevail that children of such individuals are at higher risk of abuse or neglect). See also Katherine A. Judge, *Serving Children, Siblings, and Spouses: Understanding the Needs of Other Family Members*, in *Helping Families Cope with Mental Illness* (Harriet P. Lefley ed. 1994) 161, 164 (citing evidence that individuals with serious mental illness lose custody of their children or parental rights at disproportionately high rates despite low rates of child abuse).

reasonable modifications in its programs, services and activities to ensure equally effective participation. 28 C.F.R. §§ 35.130(b)(1)(ii), (b)(7). Reunification and other family preservation services are services, programs or activities. Similarly, initiation of proceedings to terminate parental rights should be considered a program or activity.⁴

Thus, parents with mental disabilities who require modifications in the services provided to assist them in maintaining or regaining custody or preventing the termination of parental rights should be able to assert an ADA claim if the state fails to make needed reasonable modifications in those services. *See, e.g., In re J.A.*, No. 03-1260, 2003 WL 22203471, *1 (Iowa Ct. App. Sept. 24, 2003) (recognizing that ADA requires reasonable modifications to services in order to provide parents with disabilities equal opportunity); *In the Interest of K.K.W.*, No. CCL-86-2039, 7 National Disability Law Reporter ¶ 111 (Tex. County Ct., Anderson County July 11, 1995) (on file with author) (state failed to make reasonable modifications to its reunification services to assure equally effective services to parent with schizophrenia; state provided only the homemaker services and six-week parenting class offered to parents without disabilities). *See also In re Adoption/Guardianship Nos. J9610436 and J9711031*, 796 A.2d 778, 783 (Md. 2002) (court need not decide applicability of ADA in present case, but child welfare agencies and courts must recognize that Congress “expressed a concern [in the ADA] that extra steps be taken to insure that the disabled are not subject to discrimination, however inadvertent it may be in a given case”). In addition, a parent with a mental disability should be able to assert an ADA claim if the state has refused parenting services based on her disability, or has initiated termination or dependency proceedings due to her disability and would not normally initiate such proceedings against a parent without a disability under similar circumstances.⁵

⁴ As described below, however, many courts have disagreed.

⁵ Such conduct might, of course, give rise to a constitutional claim as well. However, ADA and constitutional claims are seldom used to challenge this type of straightforward disparate treatment because they generally do not add anything to the state law arguments raised in such situations. The refusal to provide services due to a disability would violate the state law duty to make “reasonable efforts” to prevent the loss of parental rights; the unwarranted initiation of termination of parental rights proceedings would not be in the best interests of the child under state law.

A parent with a mental disability would also be able to assert an ADA claim where a child welfare statute treats parents with mental disabilities less favorably than parents without disabilities. This type of facial challenge to termination statutes is generally not viable, however, because virtually every statute permitting termination based on a mental disability requires that the individual be unable to parent due to the disability. Hence challenges to the application of the statute are more likely to succeed than facial challenges. *Cf. In the Interest of N.R.*, 967 P.2d 951 (Utah Ct. App. 1998) (termination statute was not unconstitutional because there was a rational basis for permitting termination where a mental illness renders a parent unable to

The caselaw concerning the ADA and parental rights has overwhelmingly rejected the claims of parents with mental disabilities. Many courts have held the ADA may not be raised as a defense to termination of parental rights (TPR) proceedings for a variety of reasons. Some courts have refused to apply the ADA based on the conclusion that TPR proceedings are not a “service, program or activity” within the meaning of the ADA.⁶ Some courts have held the ADA inapplicable to TPR proceedings because their jurisdiction is limited to interpreting the state child welfare law, such as determining the “best interests of the child” or “reasonable efforts,” rather than conducting “an open-ended inquiry into how the parents might respond to alternative services and why those services have not been provided.”⁷ Finally, some courts have concluded that the ADA provides no defense to TPR proceedings because Title II contemplates only affirmative action on the part of the injured party rather than defenses against a legal action by a public entity.⁸

Not all courts have held that the ADA is inapplicable to TPR proceedings. Some courts have held that the ADA does provide a defense in such proceedings,⁹ and others have applied the ADA in TPR proceedings without specifically ruling on its applicability.¹⁰ Overwhelmingly,

respond to reunification services, and other parents incapable of responding to services were also subject to termination).

⁶ See, e.g., *In re Adoption of Gregory*, 747 N.E.2d 120, 125 (Mass. 2001); *In the Matter of Terry*, No. 214617, 2000 WL 244425, *5 (Mich. Ct. App. Feb. 29, 2000); *In re Antony B.*, 54 A.2d 893, 899 (Conn. App. Ct. 1999); *In the Interest of B.K.F.*, 704 So.2d 314, 317 (La. Ct. App. 1997); *In re B.S.*, 693 A.2d 716, 720 (Vt. 1997).

⁷ *In re B.S.*, 693 A.2d at 721. See also *In the Interest of Torrance P.*, 522 N.W.2d 243, 244-45 (Wis. Ct. App. 1994) (duty to make diligent effort to provide court-ordered services is defined by the TPR statute and not the ADA; ADA does not increase those responsibilities or dictate how they must be discharged); *In re Maryia R.*, 1997 WL 178082, *5 (Conn. Super. Ct. Apr. 1, 1997) (while father’s developmental disability must be considered in determining reasonableness of county’s efforts, neither his disability nor the ADA changes inquiry or burden of proof).

⁸ *In re Doe*, 60 P.3d 285, 293 (Haw. 2002); *In the Matter of Rodriguez*, No. 98CA007073, 1999 WL 568115, *8 (Ohio Ct. App. Aug. 4, 1999).

⁹ *In the Matter of John D.*, 934 P.2d 308, 313-14 (N.M. Ct. App. 1997) (ADA provides a defense to evidence of presumptive abandonment when parent can show that she or he lacked responsibility for the destruction of the parent-child relationship due to the state’s violation of the ADA).

¹⁰ See, e.g., *In the Matter of J.B.*, No. 95CA1698, 1996 WL 309979, *3 (Ohio Ct. App. 1996) (assuming without deciding that ADA applies to TPR proceedings); *In re Caresse B.*, 1997

however, those courts have concluded that sufficient reasonable modifications in family preservation services were made to accommodate individuals' mental disabilities, and therefore no ADA violations occurred.¹¹

In October 2006, a cert petition was filed in the Supreme Court seeking review of a Rhode Island court's decision that a termination of parental rights proceeding "does not constitute the sort of service, program or activity that would be governed by the dictates of the ADA."¹² The question presented was "[w]hether Title II applies to termination of parental rights proceedings initiated by state agencies and prosecuted in state courts." *Irving N. v. Rhode Island Dep't of Children, Youth and Families*, No. 06-603 (cert. petition filed Oct. 30, 2006), cert. denied, 127 S.Ct. 1372 (2007). The petition noted that the Rhode Island decision is inconsistent with the plain language of the ADA and with the Supreme Court's ruling in *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206 (1998), which made clear that the ADA makes no exceptions for activities that implicate particularly strong state interests. Because the Court declined to accept the case, the conflict among the courts remains unresolved.

Even the courts that have rejected the ADA's applicability in TPR proceedings have generally agreed, however, that it can be raised either in earlier proceedings or as a separate cause of action to challenge the failure to make reasonable modifications in reunification services.¹³ Some courts have held that, in order for the issue of reasonable accommodations in

WL 133402, *5 (applying ADA); *In the Interest of C.C.*, No. 95-1022, 1995 WL 810019, *5-7 (Iowa Ct. App. Dec. 22, 1995) (applying ADA); *In re Dependency of C.C.*, No. 40888-7-I, 1999 WL 106824, *5-6 (Wash. Ct. App. Mar. 1, 1999) (applying ADA); *J.T. v. Arkansas Dep't of Hum. Servs.*, 947 S.W.2d 761, 766-68 (Ark. 1997) (applying ADA); *In re Karrlo K.*, 669 A.2d 1249, 1259 (Conn. Super. Ct. 1994) (applying ADA); *In the Matter of K.D.W.*, No. C5-93-2262, 1994 WL 149450 (Minn. Ct. App. 1994) (applying ADA).

¹¹ But see *In the Interest of K.K.W.*, No. CCL-86-2039, 7 NDLR ¶ 111 (Tex. County Ct., Anderson County July 11, 1995) (state violated ADA by failing to modify its reunification services to assure equally effective services to parent with schizophrenia; state provided only the homemaker services and six-week parenting class offered to parents without disabilities).

¹² See *In re Kayla N.*, 900 A.2d 1202, 1208 (R.I. 2006).

¹³ See, e.g., *Stone v. Daviess*, 656 N.E.2d 824, 830 (Ind. Ct. App. 1995) (ADA does not apply to TPR proceedings because Indiana does not require services to be provided before parental rights are terminated, but ADA does require state to make reasonable accommodations to services provided in CHINS proceedings); *In re Antony B.*, 54 A.2d at 473 n.9 (ADA does apply to reunification services and programs; failure to provide adequate services due to a parent's mental condition would give rise to a separate cause of action under the ADA); *In re B.S.*, 693 A.2d at 722 ("we do not mean to suggest that parents lack any remedy for SRS's

services to be preserved at the TPR stage, it must have been raised at the removal or review hearing where the services are offered.¹⁴ Generally, courts have expressed the view that ADA claims based on the failure to modify services must be raised early on in the process.¹⁵ At least one court has held, however, that the ADA may not be raised in dependency proceedings either.¹⁶

Where courts have agreed that the ADA requires modification of family preservation services to meet the needs of parents with disabilities, they have often limited their analysis of modified services to services that are already “available” or provided to others in the state. *See, e.g., In the Matter of Terry*, 2000 WL 244425, at *6 (state had no other services available that would address mother’s disability beyond those provided to her; ADA does not require full-time live-in assistance with her children); *In the Matter of the Welfare of H.S.*, 973 P.2d 474, 481 (Wash. Ct. App. Mar. 9, 1999) (ADA does not require provision of services to people with disabilities not provided to others); *In re Caresse B.*, 1997 WL 133402, at *5 (mother failed to

alleged violations of the ADA;” parents should raise complaints about services in a timely fashion).

¹⁴ *In re M.J.M.*, No. 02-0499, 2002 WL 987437, *1 (Iowa Ct. App. 2002) (ADA was not violated because neither parent had requested specific reunification services prior to the termination hearing); *In the Interest of S.L.P.*, Nos. 9-383, 98-1345, 1999 WL 975765, *4 (Iowa Ct. App. Oct. 27, 1999); *In the Matter of Terry*, No. 214617, 2000 WL 244425, *6 (Mich. Ct. App. Feb. 29, 2000) (parent must claim violation of ADA when service plan is adopted or soon afterward; where person fails to make timely claim that services provided are inadequate to meet her needs due to a disability, she cannot raise the ADA at a TPR dispositional hearing and only remedy is to bring a separate action under the ADA).

¹⁵ *See In the Matter of Terry*, 2000 WL 244425, at *6 (“Any claim that the FIA is violating the ADA must be raised in a timely manner, however, so that any reasonable accommodations can be made. Accordingly, if a parent believes that the FIA is unreasonably refusing to accommodate a disability, the parent should claim a violation of her rights under the ADA, either when a service plan is adopted or soon afterward.”); *In the Interest of S.L.P.*, 1999 WL 975765, at *4 (“Not only the sufficiency of services but also the issue of reasonable accommodation should be raised at the removal or review hearing or when they are offered . . . It is too late to challenge the service plan at the termination hearing.”); *In the Interest of A.M.*, No. 99-420, 1999 WL 780586, *3 (Iowa Ct. App. Sept. 29, 1999) (“parents have the responsibility to demand services if they are not offered prior to the termination hearing”); *In re B.S.*, 693 A.2d at 722 (“We hope that the effect of this decision is to encourage parents and other recipients of SFS services to raise complaints about services vigorously and in a timely fashion.”).

¹⁶ *M.C. v. Dep’t of Children & Families*, 750 So.2d 705, 706 (Fla. Ct. App. 2000) (dependency proceedings are held for the benefit of the child, not the parent, and therefore ADA may not be used as defense in such proceedings).

show that the services she requested as an accommodation were available); *Bartley v. State*, No. 36698-0-I, 1996 WL 737308, *3 (Wash. Ct. App. Dec. 23, 1996) (mother was provided “all reasonably available services”). These courts have generally not specified the rationale for so limiting the requirement of modified services, but presumably requiring services not available in the state might constitute a fundamental alteration in the family preservation program. The fact that such services are not provided to other parents by the child welfare system, however, should not be the touchstone of whether they would constitute a fundamental alteration if they could reasonably be procured. If it were, the mandate to provide reasonable modifications would be rendered meaningless in this context.

Finally, the ADA does not permit accommodations to be forced on individuals who do not want them. 28 C.F.R. § 35.130(e)(1). Thus, in situations where parents have refused certain family preservation services, courts have held that accommodations cannot be forced on them under the ADA. *See, e.g., In the Interest of Matthew S.*, 1999 WL 545359, *9-10 (Conn. Super. Ct. Jul. 16, 1999); *In the Interest of Natalia G.*, 1998 WL 433894, *4 (Conn. Super. Ct. Jul. 22, 1998).

Section 504 of the Rehabilitation Act

Section 504 of the Rehabilitation Act also requires reasonable modifications to be provided to ensure individuals with disabilities equal opportunity to participate in and benefit from programs and activities receiving federal funding. 29 U.S.C. § 794; 45 C.F.R. §§ 84.4; *Alexander v. Choate*, 469 U.S. 287, 300 (1985). As child welfare agencies receive federal funds, they should be covered entities under Section 504.

The Adoption and Safe Families Act (ASFA) & State Law “Reasonable Efforts” Requirements

In addition to the ADA’s reasonable modification requirement, the federal Adoption and Safe Families Act (ASFA) requires states to make “reasonable efforts” to preserve and reunify families to prevent or eliminate the need for removing a child from the home.¹⁷ ASFA does not provide a private right of action for parents to enforce the “reasonable efforts” provision.¹⁸ However, states generally require the provision of reasonable efforts as part of their statutory schemes in order to comply with ASFA. Neither ASFA nor most state child welfare statutes specifically require the reasonable efforts to be designed to meet the needs of parents with disabilities.¹⁹ Arguably, family preservation efforts are not reasonable if they do not take into

¹⁷ 42 U.S.C. § 671(a)(15).

¹⁸ *Suter v. Artist M.*, 503 U.S. 347 (1992).

¹⁹ Arkansas’s child welfare statute does require that the state make reasonable accommodations in accordance with the ADA to parents with disabilities in order to allow them meaningful access to reunification and preservation services. Ark Code Ann. § 9-27-341.

account a parent's disability, as such failure means that the services will have little chance of success. The bulk of the caselaw concludes that the efforts made by states to provide individualized services to prevent individuals with disabilities from losing parental rights constitute "reasonable efforts," even where they appear to be inadequate.²⁰

A number of courts have found, however, that parental rights should not be terminated because the state had not made reasonable efforts.²¹ See, e.g., *In re Adoption/Guardianship Nos. J9610436 and J9711031*, 796 A.2d 778 (Md. 2002) (state failed to provide adequate reunification services tailored to meet the needs of father with mental disability); *Mary Ellen C. v. Arizona Dep't of Economic Security*, No. 1 CA-JV 98-0130 (Ariz. Ct. App. Jan. 19, 1999) (state is obliged to undertake measures that offer a reasonable possibility of success; state did not offer mother significant reunification services for almost a year after removing child; state failed to follow recommendations of evaluating psychologist, such as providing intensive psychiatric services; state merely provided mother with phone number of state's contract MCO and failed to follow up with the MCO);²² *In re the Dependency of H.W. & V.W.*, 961 P.2d 963, 967 (Wash. Ct. App. 1998) (while state attempted to tailor parenting classes and other services to mother's developmental disability through providing hands-on and one-on-one training, mother was never referred to the Division of Developmental Disabilities for services and no attempt was made to investigate what services might be available through DDD; mother was in fact eligible for an assisted living program for herself and the child); *In re Victoria M.*, 207 Cal. App.3d 1317, 1327-30 (Cal. Ct. App. 1989) (reversing termination order because findings unsupported by sufficient evidence; mother with developmental disability was given no assistance in finding housing required by her reunification plan, her parenting skills counseling was tailored to her special needs only by requiring her to obtain counseling in protecting herself and her children from sexual abuse; mother was never referred to a regional developmental disabilities service center that might have addressed her problems).

Significantly, these decisions carefully scrutinize the states' assertions that services were tailored to accommodate the needs of parents with disabilities. The decisions also require child welfare authorities to work with the developmental disabilities or mental health service system. Two other favorable decisions are worth mentioning for their useful discussion. In *In re P.A.B.*, 570 A.2d 522 (Pa. Super. Ct. 1990), the court reversed a termination order, holding that the trial court erred in failing to consider the role of the parental bond between parents with mental retardation and their children in determining the best interests of the child. In *Division of Family*

²⁰ Virtually every one of the ADA cases cited in this memorandum also holds that the state made reasonable efforts under state law to prevent the loss of parental rights.

²¹ The following cases are not the product of an exhaustive search of relevant caselaw in every state. They are merely a sample of the positive rulings in "reasonable efforts" cases.

²² Copies of this and other unpublished decisions cited in this memorandum are available through the Bazelon Center for Mental Health Law.

Servs. v. Murphy, Nos. 98-28600, 98-28773, * 25 (Del. Fam. Ct. Feb. 14, 2000) (on file with author), the court returned custody to two parents with mental retardation, finding that while parents each had limitations, they were able to adequately address these issues by working as a parental team. The court also noted that the fact that the parents might require agency assistance from time to time in raising the child did not make the child dependent. *Id.* at 27.

Some appeals courts have also reversed decisions to terminate parental rights where those decisions were based on generalized assumptions or speculation about the effects of a parent's disability. *See In re C.W.*, 211 S.W.3d 93 (Mo. 2007) (en banc) (trial court inappropriately relied on out of date psychiatric assessment and unwarranted assumptions that mother's mental illness would make her unfit to parent, and had no current evidence of mother's mental health status or the present needs of the child, nor was there any expert testimony about the mother's prognosis for recovery); *In re Adoption/Guardianship Nos. J9610436 and J9711031*, 796 A.2d 778 (Md. 2002) (trial court inappropriately relied on report of psychiatric examiner who provided only speculative testimony concerning the ability to parent of father with a mental disability).

Strategies

Following are some suggestions concerning how to navigate the child welfare system on behalf of a parent with a mental disability.

- **Raise modification issues early.** If a parent requires modifications in training or other family preservation services due to a disability, the need for modifications should be raised as early as possible, whether under the ADA, state law or both. The issue should be raised during dependency (custody) proceedings when services are offered or if the services provided appear to be ineffective. In any event, the issue should be raised long before the initiation of termination of parental rights proceedings. Indeed, as noted above, a number of courts have strongly emphasized the importance of raising this issue early.

There are several reasons for raising these issues early. First, as discussed above, some courts require that the issue be raised during dependency proceedings in order for it to be preserved at the TPR stage. Moreover, ADA claims for modifications are weaker when raised during TPR proceedings, which several courts have held are not a service, program or activity within the meaning of Title II. Additionally, the longer the child has been removed from the parent's home, the more difficult it becomes to demonstrate the parent's capabilities, and the more reluctant courts are to order the provision of additional services. The ideal situation in which to demonstrate that modifications in services would help the parent learn appropriate skills is where the child still resides with the parent.

- **How to raise the issue.** First, advocates should look to controlling law to determine what limitations exist on how these issues may be raised – for example, whether ADA

claims may be raised as an affirmative defense to TPR proceedings. In addition to **raising an ADA claim for failure to accommodate as an affirmative defense**, advocates may consider **raising an ADA claim as a counterclaim** in dependency or TPR proceedings.

Advocates should also consider the possibility of **bringing a separate ADA lawsuit** in state or federal court. This course of action entails certain risks. Raising an ADA claim in federal court may result in the federal court abstaining under the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971). The *Younger* abstention doctrine permits a federal court to abstain where deciding the federal claims would interfere with ongoing state court proceedings in which there is an important state interest, if there was an adequate opportunity to raise the federal claims in the state proceedings. At least one federal court has declined, based on *Younger* abstention grounds, to exercise jurisdiction over ADA and constitutional claims challenging the application of a TPR statute. See *Thompson v. Vacco*, No. 96 Civ. 8670(SS), 1997 WL 539949 (S.D.N.Y. Aug. 29, 1997).

Additionally, once a state court decision has been made, either in dependency or TPR proceedings, federal claims challenging the failure to modify parenting services may invite dismissal on *Rooker-Feldman* grounds. Under this doctrine, arising out of the decisions in *Rooker v. Fidelity Trust*, 263 U.S. 413, 416 (1923), and *District of Columbia Ct. of Appeals v. Feldman*, 460 U.S. 462, 486 (1983), a federal court lacks subject matter jurisdiction to review final state court determinations or to decide claims that are “inextricably intertwined” with a state court determination. This has been interpreted to mean that a federal court cannot decide a claim where granting the relief the plaintiff seeks would require the court to decide that a state court determination was wrong or render the state court determination effectively void. Thus, a federal ADA suit that effectively seeks to change the result of a custody or TPR decision is vulnerable to dismissal under the *Rooker-Feldman* doctrine.

If there is no adequate opportunity to raise the issues in the state court proceedings, however, then neither the *Younger* doctrine nor the *Rooker-Feldman* doctrine should bar a federal court from hearing an ADA claim for failure to modify services.²³ Advocates should look to caselaw and jurisdictional statutes to determine whether a court deciding child welfare issues has jurisdiction to decide ADA claims. In addition, it would be useful to know whether the state has taken the position in previous

²³ A plaintiff’s federal claims will not be barred by the *Rooker-Feldman* doctrine if the plaintiff did not have a reasonable opportunity to raise these claims in the state court proceedings. See, e.g., *Brown & Root, Inc. v. Breckenridge*, No. 99-1831, 2000 WL 526068, at *6 (4th Cir. May 2, 2000); *Long v. Shorebank Devel. Corp.*, 182 F.3d 548, 558 (7th Cir. 1999); *Dale v. Moore*, 121 F.3d 624, 626 (11th Cir. 1997). Neither will *Younger* abstention bar federal claims under those circumstances.

cases that federal claims cannot be raised in dependency or TPR proceedings. Absent a clear answer on the scope of the state court's jurisdiction, advocates should raise these issues first in child welfare proceedings. If the state court rules that ADA claims cannot be raised in these proceedings, advocates should be able to raise the ADA claims in federal court.

If advocates plan to file a separate ADA claim in either state or federal court, they should attempt to have the dependency or TPR proceedings stayed pending a decision on the modifications claim under the ADA. If the proceedings are not stayed, once a TPR decision is issued, it will be extremely difficult to obtain any effective relief under the ADA.

The best course of action will generally be to raise the ADA initially as a defense (and possibly counterclaim as well) in dependency proceedings and see what the court does. If the court indicates that the ADA is not properly raised in these proceedings but may be raised in a separate action, then counsel may consider filing an ADA action in state or federal court.

- **Where possible, advocates should attempt to characterize the services sought as modified versions of the services provided by the child welfare system.** In doing so, advocates should be able to minimize vulnerability to the ADA's "fundamental alteration" defense. If the services needed are essentially modified versions of the services provided to others in child welfare system (for example, parenting classes with more hands-on instruction or instruction provided in the home rather than in a clinic setting), as opposed to services not normally provided by the child welfare system, the fundamental alteration defense should pose less of a problem.

However, the fact that the service needed is not provided to anyone else does not necessarily make it a fundamental alteration. If providers can be procured and the service does not fundamentally change the nature of family preservation services in the state, then strong arguments may be made that the service is not a fundamental alteration.

- **Advocates should also look to the developmental disabilities or mental health system as well to determine whether these systems provide services that would assist the parent.** Usually the parenting services required by parents with mental disabilities will involve at least some services that are provided through these systems. The fact that these services are not ordinarily provided through the child welfare system should not mean that providing them would fundamentally alter that system. For example, if a parent requires medication monitoring and that service is available through the mental health system, it would not be difficult for the child welfare system to work with the mental health system to assure that the parent receives these services; frequently the two systems do work together in some respects anyway. Indeed, some courts have found that working with the DD or MH system is required as part of the state's duty to make

reasonable efforts under state law.²⁴

- **It is crucial to build a good record, including the opinions of a knowledgeable expert.** Generally, states have successfully argued that they have made reasonable modifications to family preservation services, though in many instances those modifications were insufficient to make the services effective. Given the reluctance of courts to order further modifications when some modifications have already been provided, the importance of an expert who can explain why the services provided were ineffective, and what services the parent needs, cannot be overstated.²⁵ The expert should be able to provide an opinion about the parent's prognosis for recovery²⁶ and to explain the inadequacies of the evaluations relied upon by the agency. In addition, building a careful record detailing the parent's strengths and bonds with the child is necessary to combat the stigma attached to parents with mental disabilities.
- Advocates may wish to consider seeking **legislative or regulatory change** to incorporate into the child welfare laws the responsibility to ensure appropriate assessments of the service needs of parents with disabilities and to make reasonable modifications in compliance with the ADA, including the responsibility of child welfare system employees to work with the MH/MR system to provide appropriate family preservation services to parents with mental disabilities.

²⁴ See, e.g., *In re the Dependency of H.W. & V.W.*, 961 P.2d at 967 (state failed to make reasonable efforts because mother was never referred to the Division of Developmental Disabilities for services and no attempt was made to investigate what services might be available through DDD; mother was in fact eligible for an assisted living program for herself and the child); *In re Victoria M.*, 207 Cal. App.3d at 1330 (state failed to make reasonable efforts; among other things, mother was never referred to a regional developmental disabilities service center that might have addressed her problems).

²⁵ The following example demonstrates how modifications can be insufficient. One of the studies of parenting skills in mothers with mental retardation notes that even when in-home, hands-on services were successfully provided to teach a mother with mental retardation how to cook pancakes, followup visits revealed that the mother subsequently fed her child pancakes for breakfast, lunch and dinner. Steven A. Rosenberg & Gay Angel McTate, *Intellectually Handicapped Mothers: Problems and Prospects*, *Children Today*, Jan/Feb. 1982, at 24, 25. While the modifications provided were effective in helping the mother learn to cook, they were not sufficient to help her improve childcare skills and further assistance was required.

²⁶ "Recovery" refers to the idea of living successfully with a disability and not necessarily to "curing" the disability.

