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I. Introduction

On an average evening in the late 1950s, Charlotte L. discovered that she could no longer walk upstairs to her bedroom. A visit to the doctor later, Charlotte was diagnosed with polio, a disease that would render her wheelchair bound. With no available family resources, Charlotte found herself residing in a home for polio patients while her two young sons were split up and sent to different foster homes. Even when Charlotte’s polio no longer posed a threat to her sons’ health, her disability created an enormous roadblock to family reintegration. How could she provide for the family if she could not walk or work? Where would she live? How would she look after two small boys? It would be years before her children returned to her care.¹

The passage of the Americans with Disabilities Act (ADA) in 1990 barred the discrimination of qualified disabled individuals by public entities.² Within the definition of public entities are government agencies, including those that address child welfare.³ The ADA’s goal of preventing discrimination against individuals with disabilities has influenced the development of a vibrant field: disability law.⁴ Additionally, most states

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¹ Telephone interview with Debra Butler, niece of Charlotte L., Ill. (Mar. 7, 2013). Charlotte’s last name was omitted.
³ See id. § 12131(1)(B).
now recognize that disability alone cannot be a ground for either the removal of a child from the home or the termination of parental rights (TPR). 5

But despite these changes in the policy and procedures of state child-welfare statutes, issues of parental physical disability still arise in TPR cases. Several states have explicitly curtailed the effectiveness of the ADA, ruling either that it does not apply to TPR proceedings 6 or that it imposes no additional burdens on the state. 7 Many scholars are currently clamoring for increased protection under the ADA for mentally ill parents, but physically disabled parents continue to slip through the cracks. With some states still including physical disability as a ground for TPR, 8 it is important that agencies and advocates understand not only the requirements of the law, but also the potential strategies and remedies available to protect these vulnerable individuals.

By examining existing child welfare and TPR law, this article will attempt to provide a series of best practices to both agencies and legal professionals working with physically disabled parents of children in the child welfare system. Initially, this article will discuss the background of child welfare law. It will examine the interplay between the ADA and child welfare law. Then, there will be a two-part consideration of practices and strategies that may assist those working with disabled parents. Foremost in this consideration will be an analysis of the benefits and pitfalls to raising the ADA as an issue or defense in child welfare proceedings. This article will consider whether lawyers in a state that has yet to consider the ADA’s relationship should raise the ADA as an issue and what other avenues are available to examine ADA compliance. Secondly, this article will provide suggestions on how agencies and lawyers can better protect physically disabled parents prior to and during TPR proceedings.

II. Background

The 2000 United States Census counted more than forty-nine million Americans with some type of disability. 9 This number represents nearly twenty percent of the population, “or nearly one in five.” 10 Of these forty-nine million individuals, nearly ten million reported a sensory disability, and another twenty-one million reported a physical condition limiting

5. See, e.g., KAN. STAT. ANN. § 38-2201(c) (Supp. 2012).
10. Id.
“basic physical activity.”11 Although the majority of individuals reporting physical or sensory disabilities were over the age of sixty-five, individuals sixteen to sixty-four constituted nine percent of the overall total.12 Some of those nine percent will inevitably become parents.13

Families in which at least one parent is disabled constitute approximately 6.5% of all families.14 This number is even higher in minority and nontraditional family settings.15 Statistics indicate that the removal of children from the homes of parents with disabilities is staggering, and, in a recent study, nearly fifteen percent of disabled parents reported discriminatory treatment in custody litigation.16

In 2010 alone, at least 12.9 percent of children involved in child welfare proceedings had one or more parent with a disability, although scholars caution that those disabilities are often unidentified or unreported.17 That same year, the organization, Through the Looking Glass, reported that roughly thirty-eight percent of its legal assistance calls involved a parent with a physical disability, and the majority of these parents’ calls related to either a family court or child welfare court issue.18

With such a high prevalence of disabled individuals interacting with the child welfare system, it is important that agencies and attorneys understand what the law requires. Specifically, individuals working within the field must comprehend the substance and procedure of child welfare law, the substantive provisions of the ADA, and the interactions between these two very different bodies of law.

A. Child Welfare Proceedings: A Primer

Child welfare cases in Kansas, called child in need of care (CINC), are governed by state law.19 Each individual state defines the conditions allowing a child to be removed from the home,20 the findings required to
adjudicate a child as a CINC, and the grounds for TPR. Additionally, pursuant to the federal Adoption and Safe Families Act (ASFA), child welfare agencies in each state must make reasonable efforts to reunify the family before TPR can occur.

1. STATE TPR STATUTES AND PARENTAL DISABILITY

Each state defines the conditions precedent to TPR, usually by listing a number of individual grounds. These grounds vary, but generally include both affirmative acts by the parents (e.g., certain crimes or behaviors) and omissions by the parents (e.g., failure to visit the child or participate in a reintegration plan). Some states also provide presumptions of unfitness leading to TPR, which then shifts the burden of proof to the parents.

Presently, states are split on whether physical disability serves as an explicit ground for termination of parental rights. In Kansas, for example, physical disability may be considered provided it is “of such duration or nature as to render the parent unable to care for the ongoing physical, mental and emotional needs of the child.” However, even those statutes that exclude disability as a ground for termination may implicate disability in some way. Although disability is not an explicit ground for TPR in Utah, the Utah statute allows for termination when the parent has neglected the child or when the court finds the parent is “unfit or incompetent.” If a parent’s physical disability complicates her care for the child or otherwise affects her competence as a parent, she may fall under these categories.

Scholars in the field of disability law favor those states with statutes that do not explicitly reference disability but instead rely on other factors, regardless of whether those factors may implicate disability.

21. See, e.g., id. § 38-2202(d).
22. See, e.g., id. § 38-2269, § 38-2271.
24. See, e.g., id. § 38-2269.
25. See, e.g., KAN. STAT. ANN. § 38-2269(b)(5) (“conviction of a felony and imprisonment”), § 38-2269(b)(6) (“use of intoxicating liquors or narcotic or dangerous drugs . . . ”).
26. See, e.g., id. § 38-2269(c)(2) (“failure to maintain regular visitation, contact or communication with the child. . . .”), § 38-2269(c)(3) (failure to carry out reintegration plan).
27. See, e.g., id. § 38-2271.
28. Compare id. § 38-2269(b)(1) with UTAH CODE ANN. § 78A-6-507 (West 2012).
29. KAN. STAT. ANN. § 38-2269(b)(1).
30. See, e.g., UTAH CODE ANN. § 78A-6-507.
31. Id. § 78A-6-507(1)(b) to (c).
32. See id.
scholars note that when TPR grounds include more complicated factors such as child safety and “the parent’s ability to ‘provide the child with love,’” the court is allowed additional discretion in its decision-making role.\textsuperscript{34} However, scholars also note that in many cases, the factors courts rely on are quite vague and may invoke the parent’s disability.\textsuperscript{35}

2. Reasonable Efforts

Federal law requires that, in the CINC arena, state agencies make reasonable efforts to reunite a family.\textsuperscript{36} These reasonable efforts must first attempt to prevent the child’s placement in foster care, and then, once the child is removed, must be geared toward returning the child to his home.\textsuperscript{37} ASFA does, however, allow for limited circumstances in which reasonable efforts are not required.\textsuperscript{38}

Because CINC proceedings are handled by each individual state, states interpret the reasonable efforts requirement in different ways.\textsuperscript{39} Variances in interpretation include what types of efforts are counted as reasonable and what behaviors are required to trigger the reasonable efforts exceptions.\textsuperscript{40} Examples of exceptions that lie outside ASFA’s express language include when a child tests positive for drugs or alcohol at birth;\textsuperscript{41} when the parent is a convicted, sexually-violent predator;\textsuperscript{42} or when the parent withheld food or medical care.\textsuperscript{43}

B. A Brief Introduction to the ADA

The ADA, passed initially in 1990 and amended most recently in 2008, exists “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”\textsuperscript{44} The ADA addresses discrimination against people with disabilities in three general areas: employment, public services and public accommodations.

\textsuperscript{34} Id. at 550.
\textsuperscript{35} See id. at 552–53.
\textsuperscript{37} Id. § 671(a)(15)(B)(i)–(ii).
\textsuperscript{38} Id. § 671(a)(15)(D) (including when a parent subjects “the child to aggravated circumstances,” when the parent has murdered, otherwise killed, or assaulted another of her children, or had involuntary TPR on another of her children).
\textsuperscript{40} See id.
\textsuperscript{41} FLA. STAT. ANN § 39.806(1)(k) (West 2012).
\textsuperscript{42} WASH. REV. CODE ANN. § 13.34.132(f) (West 2011).
\textsuperscript{43} OHIO REV. CODE ANN. § 2151.419(b) (West 2008).
\textsuperscript{44} 42 U.S.C. § 12101(b)(1) (Supp. 2008).
that are provided by private entities. The ADA states that “no qualified individual with a disability shall . . . be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” In relevant part, the statute describes a public entity as “any department, agency, special purpose district, or other instrumentality of a State or States or local government.” By this definition, state child welfare agencies are subject to the requirements of the ADA.

The enacting regulations of the ADA require that public entities make reasonable modifications to avoid discrimination against individuals with disabilities. Additionally, these entities must afford both disabled and nondisabled individuals equal opportunities and cannot force a disabled individual to participate in a separate program “despite the existence of permissibly separate or different programs or activities.” In short, public entities must treat individuals with disabilities substantially the same as those without, and accommodate their programming to allow those with disabilities to participate. Private entities that contract with public entities may also be subject to the ADA. In the CINC context, this category may include private entities that contract with the state to offer parenting classes, therapy, or other CINC-related services.

C. Explicit and Implicit Considerations of ADA Issues in CINC Proceedings

With the high likelihood that a parent’s disability will be implicated in termination proceedings and the application of the ADA to child welfare agencies, one would assume that ADA litigation in a CINC context is a common occurrence. This, however, is not the case. Only a handful of U.S. states have considered the interplay between TPR proceedings and the ADA, and all of the decisions have skirted applying the ADA to TPR actions. However, issues related to parental physical disability have been litigated in certain circumstances, and litigant success has varied.

46. Id. § 12131.
47. Id. § 12132.
48. Id. § 12131(1)(B).
49. 28 C.F.R. § 35.130(b)(7) (2010).
50. Id.; see also id. § 35.130(h).
51. Id. § 35.130(b)(1)–(2).
1. **Express Consideration of ADA Issues**

Generally speaking, courts examining the interplay between the ADA and termination proceedings have considered one of three issues: (1) whether the ADA applies to TPR actions, (2) whether the ADA increases or otherwise alters state obligations in a TPR context, or (3) whether the ADA creates a defense to TPR. Some states, including New York and Wisconsin, have additionally considered the question of how parents should address ADA issues in a CINC context. Standing alone, Louisiana includes a statutory mechanism by which parents may assert the affirmative defense of mental or physical disability when defending against the TPR ground of child abandonment.

Several states have expressly addressed the question of whether the ADA applies to TPR proceedings. One of the earliest of these cases, *In the Interest of Torrance P.*, dealt with a developmentally-disabled father who argued that the ADA required the county to make additional measures to help reunite the family. The court found that the county’s obligation to provide services existed pursuant to the TPR statutes, not the ADA, and the ADA only served to help define the reasonableness of the county’s efforts. Because the ADA did not change the requirement that the county provide reasonable efforts, the court decided that the county’s compliance with the ADA was a separate inquiry “unrelated to the [TPR] proceedings.” Although the court did note that the father “may have a separate cause of action under the ADA based on the County’s actions or inactions,” the father ultimately could not use the ADA to attack the TPR proceedings.

After *Torrance P.*, several other states established similar precedent. Relying on *Torrance P.* and also on the Supremacy Clause, the Indiana Court of Appeals ruled that the ADA comported with the Indiana TPR statutes and did not change the duties of the state agency involved. The Vermont Supreme Court expressly determined that the ADA “does not apply directly to [TPR] proceedings,” further holding that “there is no specific discrimination against disabled persons in the [TPR] process.”

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54. LA. REV. STAT. ANN. § 8:1035 (1997)
55. 522 N.W.2d at 244.
56. *Id.* at 245.
57. *Id.* at 246.
58. *Id.*
60. *In re* B.S., 693 A.2d 716 (Vt. 1997).
Other state courts, including those in Connecticut, Louisiana, New York, and North Carolina, have also held that the ADA does not apply to termination actions.

Other litigants, anxious to apply the ADA’s “reasonable modifications” requirement to TPR proceedings, have argued that the ADA increases the state’s burden in providing reasonable efforts. As an exemplar, the Appellate Court of Connecticut relied on prior state precedent and the language of Torrance P. in holding that “the proper test in evaluating the department’s reunification efforts” is not the ADA, but rather the state’s termination statutes.

In addition to considering the applicability of the ADA to TPR proceedings, some states have considered whether violations of the ADA constitute a defense against TPR. In In re Adoption of Gregory, a father raised issues of ADA noncompliance during termination proceedings. The Supreme Judicial Court of Massachusetts held that nothing in the ADA suggests that ADA noncompliance is meant to limit or inhibit the state’s abilities to bring a termination action. Therefore, the court determined that the ADA did not offer the father a defense to termination. The Michigan Court of Appeals found the same.

Despite these rulings, all of which seem to indicate that the ADA will not apply to termination proceedings, courts agree that the state agencies that serve to rehabilitate families are required to comport with the “public entities” language of the ADA. As such, state courts have found that the ADA can be raised at other times, such as when considering whether an agency has made reasonable efforts, in an administrative hearing, or through separate ADA litigation.

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64. In re C.M.S., 646 S.E.2d 592 (N.C. Ct. App. 2007).
66. In re Antony B., 735 A.2d at 899 (finding that the ADA does not “create[] special obligations in a termination proceeding.”).
69. Id. at 125.
70. Id.
72. See, e.g., id. at 570.
2. CONSIDERATION OF ISSUES RELATED TO THE ADA

Despite the general reluctance of courts to apply the ADA to termination proceedings, many state courts have considered whether a trial court relied improperly on a parent’s physical disability when terminating parental rights. In one Georgia case, a child was removed from a family in which the father suffered from muscular dystrophy and received Supplemental Security Income (SSI) benefits due to his disability. The parents were not provided with a plan on how to be reunited with their child, and at trial no evidence was presented to demonstrate that the father’s disability affected his parenting. The appellate court vacated the TPR and remanded the case to the trial court. Other TPR cases have likewise been overturned for a lack of connection between the parent’s disability and her parenting. Additionally, a recent Florida case overturned TPR by default after the mother, who was blind and suffered from other health problems, was denied the opportunity to participate in the hearing by telephone. The court stated that holding a TPR trial without a parent present when the parent was otherwise making efforts to attend was impermissible. These decisions all suggest that the courts will not tolerate TPR findings based on bias against those parents with physical disabilities.

Additionally, a handful of state courts across the country have examined the services offered to physically disabled parents in an attempt to determine whether TPR was appropriate. The results of these cases, however, vary dramatically. In Tracy J. v. Superior Court of San Diego County, for instance, a mother who reported to suffer from the genetic disorder Prader-Willi syndrome was not offered services to address her physical disability. The California Court of Appeals found that, without adequate services, it could not be assessed whether the mother’s initial inability to care for the child could be rectified. Contrasting this is the Arkansas Court of

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76. There is also case law discussing when courts rely impermissibly on a parent’s mental disability when terminating parental rights; however, as the focus of this article’s analysis is physical disability, the case law will be limited to cases involving physically disabled parents.
78. Id. at 174.
79. Id.
82. Id. at 740.
83. 136 Cal. Rptr. 3d 505, 514–15 (Ct. App. 2012). Prader-Willi syndrome “results in a variety of physical and behavioral characteristics, including obesity, health problems related to obesity, and mild to moderate cognitive impairment.” Id. at 508.
84. Id.
Appeals case Meriweather v. Arkansas Department of Health and Human Services. In Meriweather, the mother suffered from both intellectual and physical disabilities, including severe asthma and rheumatoid arthritis. The court found that because the parent could not care for the child without long-term support from social services, TPR was proper. It is also important to note that failure for a parent to progress in services offered, even if the parent feels the services are unnecessary or ill-suited, may lead to TPR, regardless of the parent’s disability.

III. Analysis

With such varied treatment of ADA issues across the country, the question becomes: what next? How can those individuals working with a disabled parent in a CINC context provide protection for that parent? Moreover, how can those individuals ensure compliance with both state and federal law? This section will consider the benefits and detriments of raising ADA issues in CINC proceedings, as well as propose a framework for ensuring ADA compliance. Additionally, this section will provide best practices for both agencies and attorneys to ensure that the needs of disabled parents are being met.

A. Raising the ADA During CINC Proceedings

Scholars in the field disagree on whether an attorney should raise an ADA objection during TPR proceedings. Arguments on this topic range from the practical implications of raising disability issues in litigation to those involving complicated issues of federalism and statutory interpretation. These complications may leave attorneys in states without relevant ADA precedent questioning whether they should raise the ADA during CINC proceedings at all.
1. **Arguments For and Against Raising ADA Issues in the CINC Context**

One recent article on the interplay between CINC proceedings and parental disabilities refers to raising ADA issues during TPR proceedings as “a blueprint for failure.”\(^9\) Susan Stefan of the Center for Public Representation in Newton, Massachusetts, examined the long line of cases declining to apply the ADA to TPR actions, stating, “[t]his resistance [to applying the ADA to TPR proceedings] seems explicitly rooted in courts’ hostility toward the . . . disabled parent, which often appears to be a reflection of the social service agencies’ hostility to the disabled parent.”\(^2\) A disabled parent who relies on the ADA is therefore placed in the “anomalous and paradoxical role” of attempting to prove herself as a parent while also requesting additional modifications or services.\(^3\) Stefan warns that over-emphasizing needed accommodations may remind judges of affirmative action or special treatment and may be viewed as opposing the needs or best interests of the child.\(^4\)

Additionally, Stefan points out that raising issues of a parent’s disability requires focusing on the disability’s effects on the parent’s life—and the difficulties and flaws associated with the disability.\(^5\) Stefan argues that the aspect of the disability that requires accommodation may be treated as the parent’s personal flaw, rather than a flaw on the part of the state agency.\(^6\) Although Stefan’s article focuses primarily on parents with mental or psychiatric disabilities, her concerns may also apply to physically disabled parents, especially as some disabilities and medical conditions manifest very differently in different individuals.

Another scholar argues that reliance on the ADA in TPR proceedings is misplaced for reasons beyond the detriment to the individual parent-litigant. Because the Supremacy Clause only preempts contrary state law, existing CINC law in the several states is unaffected by the ADA’s mandates.\(^7\) As mentioned above, multiple state courts have found that the ADA does not serve to change the obligations and duties of existing state child welfare agencies.\(^8\) If the ADA does not change those duties, it therefore stands to reason that the two laws—that is, the state TPR statute and the federal ADA—do not conflict, ruling out the possibility of pre-

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\(^9\) Stefan, supra note 89, at 161.
\(^2\) Id.
\(^3\) Id. at 162.
\(^4\) Id.
\(^5\) Id.
\(^6\) Id.
\(^7\) Burke, supra note 90, at 378.
\(^8\) Id. at 379; see also supra Part II. C.1.
emtion. Additionally, many courts that have declined to consider the ADA issue have embedded language in their decisions suggesting that even if the ADA had applied, the agencies in question acted properly.

Other scholars oppose the pessimistic view on the applicability of the ADA to TPR proceedings. Dave Shade argues that the logic state courts rely upon when declining to apply the ADA to TPR actions is “faulty.” Shade reasons that because ASFA requires that state agencies provide services, courts should then require that those agencies follow the mandates of the ADA. Under Shade’s framework, failure to adequately accommodate a disabled parent would be considered per se unreasonable when making a “reasonable efforts” determination; without reasonable efforts, TPR could not occur. Additionally, the ADA’s mandate applies to all public entities without exception, and no language in the ADA suggests that state courts or legislatures may create work-arounds or exemptions from its requirements. As such, the breadth of the statute suggests that it should apply to state TPR proceedings regardless of court findings to the contrary.

Along a similar vein, Jude Pannell argues that barring ADA defenses actually undermines its purpose. Pannell observes that in drafting the ADA, Congress used broad language when discussing the provision of services. Many of the courts that decline to apply the ADA theorize that the federal statute is unrelated to the issue of TPR. Pannell notes that because TPR proceedings place a high importance on evaluating an agency’s attempts to rehabilitate the family, these proceedings are actually an opportune time to consider ADA compliance. Granting TPR without first ensuring that the state has complied with the requirements of the ADA thus undermines the statute and should not be tolerated.

2. Raising ADA Issues in Other States

In many states without relevant ADA case law, raising ADA issues in a TPR context will be an issue of first impression. As courts often look to other states’ precedents when considering such issues, invoking the ADA

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99. Burke, supra note 90, at 379.
100. Id.
101. Shade, supra note 89, at 215.
102. Id. at 213. At the time of Shade’s article, the federal statute in force was ASFA’s predecessor, the Adoption Assistance and Child Welfare Act.
103. Id.
104. Id. at 216.
106. Id.
107. Id.
108. Id. at 1181.
is a dangerous gamble for litigants. With the volume of cases declining to apply the ADA to TPR proceedings, a court in a state without ADA precedent could easily find that the ADA does not apply. A court could easily rely on the rationale used in cases such as Torrance P. and In re Brendan C. to hold that the ADA does not alter the burdens placed on the state by the existing statutory scheme.

Additionally, an unfavorable ADA ruling creates a large number of other pitfalls for disabled parents. Several states maintain that when a parent believes a state agency has failed to accommodate her disabilities, she should raise separate ADA litigation. The enacting regulations of the ADA include a procedure in which an individual claiming discrimination is to file a complaint with “any agency that he or she believes to be the appropriate agency designated under subpart G of this part, or with any agency that provides funding to the public entity that is the subject of the complaint, or with the Department of Justice for referral as provided in” another section of the regulations. According to subpart G, the “appropriate agency” for complaints regarding state child welfare agencies is likely the U.S. Department of Health and Human Services. Once a complaint is filed with the agency, that agency must: (1) review the information to determine jurisdiction; (2) investigate the complaint first by attempting to achieve an informal resolution and then by sending a Letter of Finding to the noncompliant agency; and (3) refer the agency to the attorney general for further action if the violation is not resolved. This lengthy and complicated process is difficult and time-consuming for seasoned practitioners in the area of disability law and may be too daunting for a parent at risk of TPR to navigate. Additionally, nothing in the ADA complaint process purports to stay pending state law proceedings, meaning that as the parent attempts to navigate the requirements of the statute and its enacting regulations, she will still face TPR proceedings in state court.

The ADA regulations also state that, even if the investigation finds no violation, the complaining party may at any time file a private suit. However, attempts at federal ADA litigation against state child welfare...
agencies have historically failed. In one such case, a blind mother sued the state and various state agencies after TPR, seeking damages for ADA violations. The U.S. Circuit Court of Appeals for the Tenth Circuit ruled that the suit was barred due to Eleventh Amendment immunity. In a case in which a mentally ill mother sued the state agency and employees of that agency who were involved in her child’s CINC case, the Eastern District of Michigan held that the state agents were entitled to qualified immunity. The Sixth Circuit agreed, holding that the ADA does not negate qualified immunity for state agencies. A similar challenge also failed in the Southern District of New York.

Interestingly, the enacting regulations for the ADA explicitly state that Eleventh Amendment immunity does not apply to ADA causes of action. Although the Tenth Circuit fails to discuss this regulation in its decision, the Sixth Circuit skirts the issue by addressing the immunity question as one limited solely to qualified immunity. The inconsistencies between the ADA’s rejection of immunity and these rulings suggests that federal courts are unwilling to interfere with state CINC proceedings, even in the face of ADA violations. Regardless, an unsuccessful attempt to raise the ADA at the state level could leave a parent with absolutely no ADA recourse at any level.

However, not all hope is lost. If, as Dave Shade reasons, a failure to accommodate a parent’s disability is per se unreasonable in a “reasonable efforts” context, a parent may benefit most by challenging the sufficiency of agency accommodations on this ground. A lack of accommodation or modification may therefore constitute a lack of reasonable efforts; the agency would then be in violation of ASFA, rather than the ADA.

Raising failure to modify as a lack of reasonable efforts offers other benefits as well. Because reasonable efforts are considered at every stage of a CINC proceeding, the parent is afforded many opportunities to challenge the sufficiency of agency accommodations. Lawyers who represent disabled clients in CINC and custody proceedings stress the importance of

120. Id. at *1.
121. Id.
125. 28 C.F.R. § 35.178 (2010).
127. See Shade, supra note 89, at 213.
By raising the issue as early as is practicable, the court and agencies are on notice of the parent’s needs. Additionally, repeatedly raising issues of accommodations may better preserve the issue for a reviewing court and allow a future reversal based on the trial court’s failure to address those accommodations. This tactic also helps avoid the backlash of special treatment and flaw-focus that Susan Stefan discusses in her article; instead of attempting to pack all of the parent’s needs into the TPR proceeding, which is the last step in the CINC system, the parent’s needs can be consistently reiterated. The disability will then not appear as a last-ditch effort to rescue a parent’s noncompliance with case plan tasks, but rather as a long-standing part of the litigation.

B. Best Practices for Agencies and Attorneys

Despite the fact that courts across the country decline to apply the ADA to TPR proceedings, accommodating parents with disabilities must become a priority for all state child welfare agencies and CINC courts. The ADA’s goal is to include disabled individuals in all aspects of community life; included in this goal should be the preservation of the millions of families with disabled parents. As courts continue to increase their sensitivity to disability issues, the fairness in CINC and TPR proceedings continues to increase. Sensitivity, however, is not always enough. Many issues still remain as courts order inappropriate services or as appropriate services remain unavailable to parents with profound needs. It is therefore important that both agencies and attorneys working with disabled parents to adopt certain best practices when addressing the parents’ disabilities.

Currently, the most frequently litigated area of disability in a TPR context is that of mental disability. Susan Stefan notes that many of the attitudes toward mental disability in the area of CINC law mirror the attitudes applied to physical disability a handful of years ago. Although Stefan is correct in stating that “social service agencies and family court judges

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130. See id. at 238–39.

131. Id. at 240.

132. Stefan, supra note 89, at 163.


134. See id. at 544–45.

135. See id.

136. Stefan, supra note 89, at 140.
believed that certain physical disabilities” such as blindness, deafness, and being paralyzed “completely precluded successful parenting” in the past, these issues are not fully resolved in modern CINC contexts.\textsuperscript{137} In many places, social service agencies still struggle to adequately accommodate physically disabled parents, and indeed assume that their parenting skills are limited.\textsuperscript{138} These best practices then focus on the needs of physically disabled parents, but can be easily applied to mentally or emotionally impaired individuals as well.

1. Agencies

As the public entities subject to the requirements of the ADA, it is important that state social service agencies accommodate the disabilities of parents involved in CINC cases. The first key to ensuring that all the needs of these parents are met is, predictably, training.\textsuperscript{139} Social workers and others working at the agency must first receive training in understanding the different types of disability and physical illness that call for accommodation. Commonly considered disabilities such as blindness and deafness are easily recognizable; illnesses such as multiple sclerosis, severe forms of diabetes and other diseases may severely impact an individual’s physical capabilities while still not being considered a “traditional” disability. Social workers and agencies must be prepared to analyze how these less-common ailments affect an individual’s parenting, and whether modifications are necessary. As such, social workers must not only understand reasonable efforts, but also the interplay between reasonable efforts and reasonable modifications. Social workers must be trained in which services are required in a given case and also in ways to assess what other services and modifications might benefit a given parent.\textsuperscript{140}

One common criticism of state agencies is that many common social work practices are not well-suited to the needs of physically disabled parents.\textsuperscript{141} Typical parenting assessments, for instance, focus on observation in a neutral location, whereas parents with physical or sensory disabilities may benefit from assessments that take place within the home.\textsuperscript{142} Additionally, these adapted assessments often consider information about the parent not considered in more typical assessments, including the timing of the test, the adaptive equipment relied upon by the parent, and meas-
ures that might skew results (such as learning disabilities). 143 Adapted assessments for physically disabled parents also involve occupational therapists, professionals who are best suited to suggest equipment and strategies that could improve a parent’s abilities. 144

Understanding what equipment and support are available to a disabled parent in the community is also important to ensuring that his or her needs are met. Many social service agencies are unaware of the adaptive equipment available to parents with physical disabilities. 145 In one anecdotal report from California, a wheelchair-bound mother faced removal of her newborn because a social worker thought her disability rendered her incapable of caring for her child. 146 Once the social worker discovered the various forms of adaptive equipment available to the mother—“used to enable the mother to transfer, lift, diaper, and feed her newborn”—the social worker reversed her determination. 147

Beyond knowledge of physical equipment, social workers should be aware of other family support and parental support services in the community. 148 Increasing availability of services both ensures that parents have adequate support and provides opportunities for those parents to practice parenting skills in the home, where they may be most comfortable. 149 Scholars also call for more generalized preremoval services in order to better prepare disabled parents to care for their children. 150 One observes that TPR proceedings often occur “after the parents have struggled for several years without parenting help or supervision.” 151 Due to the lateness of court intervention, however, many parents’ needs and deficits are deeply-rooted and require more time than the “anticipated year” before TPR proceedings are initiated to repair. Early social service involvement familiarizes agencies with the unique needs of the parent in question, thus lowering the risk that the parent’s disability will be viewed as a flaw. Rather, the social worker will understand that the disability is simply part of the parent’s unique attributes and will potentially be less hostile to the parent’s request for accommodation.

Lastly, social service agencies need to ensure they have written guide-

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143. See id. at 20.
144. See id. at 19.
145. See id. at 18.
146. See id. at 20 (citing telephone interviews with Adrianna Terry, mother with a disability, Cal. (Nov. 20, 2004, to Jan. 24, 2005)).
147. Id.
149. See id.; see also Callow, supra note 13, at 19–20.
151. Id.
lines and procedures for assessing and accommodating parents with disabilities, and they must ensure social workers follow these policies. 152 These policies should include documentation assessing what services are required, why those services are appropriate, and the family’s response to those offered services. Additionally, social workers should be vigilant in documenting which modifications they have made to services in order to accommodate the parent’s disability. Often, when a social service agency is able to prove that the disabled parent received adequate accommodations, a court will reject challenges under both the ADA and ASFA. 153

2. ATTORNEYS

Attorneys working with physically disabled parents should advocate for their clients both during and outside of court proceedings. In addition to the methods previously described, the parent’s attorney can most successfully protect her client by acting both as an educator and an advocate.

One common concern in CINC proceedings is the bias and stereotyping associated with disability. 154 In one anecdotal case, a Georgia father became a “walking paraplegic” after being injured while on duty as a police officer. 155 Although no evidence indicated a danger to his three-year-old daughter or, indeed, any problematic incidents since his injury, a judge ordered that the father employ a round-the-clock nanny to assist in caring for the child. 156 The “judge assumed his parenting would be deficient based solely on his disability,” despite the fact the father had been the child’s full-time caregiver since her birth. 157

Overcoming these types of stereotypes is vital to protecting the rights of disabled parents. 158 Educating the court about a client’s disability and its effect on the client is vital in demonstrating to the court that the parent is an individual and not a stereotype. 159 Attorneys who work regularly with disabled clients suggest that such an education can be effectuated either by providing the court with articles and requesting the court take judicial notice of their contents, or by providing expert testimony. 160 Regardless of the method used, the attorney must help the court overcome any “preconceived notions of the characteristics and behaviors of persons

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152. See YOUTH LAW CENTER, supra note 139, at 63–66.
154. See Callow, supra note 13, at 17; see also Lawless, supra note 150, at 511.
155. Callow, supra note 13, at 18. The article defines a “walking paraplegic” as one who is paralyzed but with enough mobility to use a walker or other walking supports. Id. at 18 n. 52.
156. Id.
157. Id.
158. See LaFortune & DiChristina, supra note 129, at 235.
159. Id.
160. Id. at 235–36.
Moreover, attorneys should assist the court in challenging testimony or other evidence at TPR proceedings that attempts to play into these stereotypes. Attorneys must ensure that courts are “closely scrutiniz[ing] expert testimony” and object to any testimony that focuses on “the characteristics of disabled persons as a class rather than on individual behavior.” Additionally, the focus of testimony at TPR proceedings should not be on the parent’s past behavior, especially if that behavior is unrelated to his or her parenting.

In early-stage CINC proceedings, attorneys should carefully consider what services would most benefit their client. If the recommended services are inadequate or inappropriate, the attorney should object to the court ordering them. Of course, such objections require that each attorney be familiar both with her client’s disability and her client’s individual needs.

The attorney should also ensure that court-ordered services are being provided by the agency and that the agency is working appropriately with the client. If social service agencies are not living up to expectations, the attorney must be willing to raise issues with that agency, either through a complaint process or in separate litigation.

Finally, when challenging the sufficiency of services being provided, particularity is key. In one Iowa case, a mother argued that TPR should be reversed because “she was not afforded reasonable accommodation as required by the” ADA. However, the mother failed to present any specific information on what accommodations or services she required. As such, the court rejected her claim. A few years later, another panel of the Iowa Court of Appeals held the same. The more familiar an attorney is with the available services and the specific needs of her client, the more successful she will be in demonstrating what accommodations are lacking—and how agencies can overcome that deficiency.

161. Id. at 235.
163. See id.
164. See id.
165. See Glennon, supra note 52, at 299.
166. See id.
167. See id.
168. See id.
169. See id.
171. Id.
172. Id.
IV. Conclusion

Nearly one in five Americans is disabled in some way.\textsuperscript{174} With disability affecting such a high percentage of the population, it is vital that state agencies appreciate the needs of disabled parents both as a group and as discrete individuals. Although many states decline to apply the ADA to TPR proceedings, the reasonable efforts requirement of ASFA helps to ensure that disabled parents are protected in CINC contexts. Raising ADA issues in a state without existing ADA precedent may be, as Susan Stefan calls it, a “blueprint for failure,”\textsuperscript{175} but through education and zealous advocacy, attorneys can acquire positive outcomes for their disabled clients. Additionally, training and adaptation allow state child welfare agencies to better provide for the parents and children in the CINC system. The ADA’s goal of integrating disabled individuals into all aspects of community life may be a lofty one in many respects, but protecting disabled parents is certainly a dramatic leap in the right direction.

\textsuperscript{174} Waldrop & Stern, \textit{supra} note 9.

\textsuperscript{175} Stefan, \textit{supra} note 89, at 161.