No._____

IN THE

SUPREME COURT OF THE UNITED STATES

TARA DAWN CHAPMAN
Petitioner,

vs.

STATE OF TENNESSEE DEPARTMENT OF CHILDREN'S SERVICES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE TENNESSEE SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED:

The question presented is whether the Americans with Disabilities Act (ADA) applies to termination of parental rights cases in state courts. And, if so, whether a parent with a mental disability should be allowed to retain her fundamental right to parent, when the parent herself is under a guardianship due to her medical condition, and has shown the ability to care for a child with said guardianship in place.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

State of Tennessee, Department of Children's Services vs. Tara Dawn Chapman. Case No. J39995, Sullivan County Tennessee Juvenile Court at Kingsport. Order Terminating Parental Rights and Awarding Full Guardianship. March 15, 2023.

In Re K. H. et. al., No. E2023-00497-COA-R3-PT. Tennessee Court of Appeals, Eastern Section. Judgment affirming trial court decision. February, 22, 2024. Not reported.

In Re K. H. et al., No. E2023-00497-SC-R11-PT. Tennessee Supreme Court. Cert denied. May 8, 2024.

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SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The Tennessee Supreme Court denied certiorari in this case. A copy of the denial appears at Appendix C.

The opinion of Tennessee Court of Appeals, Eastern Section, appears at Appendix A and is unpublished.

The opinion of the Juvenile Court of Sullivan County, Tennessee at Kingsport appears at Appendix B.

JURISDICTION

The Tennessee Supreme Court denied certiorari in this case on May 8, 2024. The jurisdiction of this court is invoked under 28 U.S.C. § 1257(a) as this case involves the application of federal law in state court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Americans with Disabilities Act (42 U.S.C. §§ 12101, et seq.).

STATEMENT OF THE CASE

This case began with a report in 2010 to DCS that the Petitioner ("Mother"), was the victim of domestic violence. *T.R. Vol.1, page 1.* At the time, she had two small children and was pregnant with her third child. *Id.* Mother was compliant with DCS's request to seek a restraining order against the abuser ("Father"), but ultimately had her children removed shortly after the birth of her third child, when she took the newborn baby to meet extended family on Father's side, and the father showed up, in violation of the restraining order. *Petition for a Restraining Order and Court Ordered Services ..... T.R Vol.1, page 26, July 5, 2011.* Losing her children was so traumatic to her that it triggered a mental health crisis which required hospitalization, more than once over the years. *Order Terminating Parental Rights page 9, paragraph d.* Her medical records recount the despair she endured, having psychotic episodes in which she believed various fantastical stories regarding the whereabouts of her children, even breaking out of at least one mental health facility on foot to try and find her children. *Trial Exhibits, Volume 18, Exhibit 1* and *Volume 18, Exhibit 21 - 2 volumes.* The record reflects that DCS had not been aware of her previous mental health struggles when the case first began, and that after learning of the mental health diagnosis, DCS sought to terminate her parental rights. *(While Mother was hospitalized, on January 24, 2014, DCS filed a Petition for Termination of Parental Rights, T.R. Vol. 1, page 118).*

During the pendency of the case, Mother's mother sought and was granted a conservatorship over Mother for the purposes of forcing Mother into medical care for a mental health crisis. *(In 2016, while Mother was hospitalized, she wanted to leave treatment to look for her children, so her mother applied for the conservatorship in order to force her to remain in treatment). T.R. Exhibits, Vol.5, Exhibit 10, Order of*

Conservatorship was entered on May 20, 2016. As referenced in T.R. Exhibits, Vol 5 Exhibit 10. As with many mentally ill people, it is difficult for the person experiencing a mental health crisis to realize they are in crisis, and thus, they often fail to seek treatment when needed. As a result, many people with mental health disabilities are under guardianships by family members who can arrange for medical treatment when needed, as is the case with Mother here. *Id. (The conservatorship was dropped, and a guardianship established after the family moved to another state in 2019, placing Mother's mother and sister as co-guardians). See Order Appointing Guardian, Trial Exhibit Vol.17, Exhibit 7.* The guardianship ensures that Mother takes her medicine as directed and that she will receive prompt medical care in the case of crisis.*T.R. Exhibits Vol. 17, Exhibit 13, page 2.* With this help, Mother's illness is well managed and she lives a normal life with her 4th child, her mother and sister, and other extended family members. *Id.* Testimony at trial revealed that Mother had not required hospitalization for the preceding 3 years. *Id.*

Despite the improvement in her condition, the trial court found that:

> "Mother's diagnosis reflects, and this Court so finds that her mental impairment is most likely a permanent one. She has demonstrated over the years that she is not capable of maintaining her medication and treatment on her own and has done better recently due to her guardians overseeing her care. This has been for a limited time of approximately two years of a thirty-year mental impairment." *T.R. Vol.5, Page 607,* Order Terminating Parental Rights, *page 12, paragraph 36.*

This finding by the trial court was made despite the fact that there was no testimony from any medical professional suggesting that Mother could not care for her children. *See trial transcript, generally.* In actuality, the testimony reflected that Mother was indeed able to raise a child, and that she in fact had been raising her 4th child (a

daughter) in the family home, for the past 9 years, without incident and that her daughter is flourishing in school. *Trial Transcript, Vol.11, Page 147 - 150.*

On review, the Tennessee Court of Appeals, in upholding the trial court's decision, further opined that the guardianship essentially meant that Mother could not be responsible for her own care, much less that of her children. *In Re K. H. et. al., No. E2023-00497-COA-R3-PT. Tennessee Court of Appeals, Eastern Section. Judgment affirming trial court decision. February, 22, 2024, pp.22-26, generally.* The Tennessee Court of Appeals noted that it was without precedential guidance on the matter, and adopted the opinions of other states that the ADA does not apply to TPR cases. *Id. at 24-25.*

It should be noted that Petitioner's rights were not terminated due to harming her children, threatening to harm or children, or due to neglecting her children. Her rights were terminated based solely upon one ground: the ground of mental incompetence. *T.R. Volume 5, pp 607-636, Order Terminating Parental Rights p.27, paragraph 3.* Mental incompetence is defined in Tennessee statute as follows:

> (i) The parent or guardian of the child is incompetent to adequately provide for the further care and supervision of the child because the parent's or guardian's mental condition is presently so impaired and is so likely to remain so that it is unlikely that the parent or guardian will be able to assume or resume the care of and responsibility for the child in the near future;... *Tennessee Code Section 36-1-113(g)(8).*

Mother is not mentally incompetent. She simply needs help with medication compliance and with recognizing when she needs urgent medical assistance. *See Order Appointing Guardian, Trial Exhibit Vol.17, Exhibit 7.* She gets these things through the guardianship, and is thus able to be largely free from the symptoms of her mental illness. *Trial Exhibits Vol. 17, Exhibit 13.* She is a college educated woman who holds a

job. *Id.* She helps with household maintenance, cooking and cleaning. *Id.* She helps her own child, and other minor family members, with homework, baths, and other daily tasks. *Id.*

Mother requested ADA accommodation from the trial court. In addition to formally making the request in a written motion prior to trial, she also testified that she could parent her children with the help of her extended family and requested this accommodation. *Motion to Intervene for Guardianship and Establishment of ADA Protections. T.R. Vol.3, page 345, and also Trial Transcript, Mother's testimony.* The extended family members testified that they were ready, willing, and able to provide the help. *Trial Transcript, Vol. 12, page 32.* The Court denied this request.

Mother appealed the ruling to the Tennessee Court of Appeals, which ultimately upheld the decision. Mother argued to the appellate court that her case should have been treated like another case decided in the Tennessee Court of Appeals involving a disabled person who required the assistance of another adult in order to parent her child. *State Dept. Ch. S. v. Whaley. Tn. Ct. App., Case No. E2001-00765-COA-R3-CV, May 30, 2002. STATE DEPARTMENT OF CHILDREN SERVICES v. In the Matter of N.B., C.B., & T.B. (2008). Also See In Re K. H. et. al., No. E2023-00497-COA-R3-PT. Tennessee Court of Appeals, Eastern Section. February, 22, 2024. Not reported, for a discussion of how the court distinguished the two cases.* In *Whaley*, the mother was blind and had a baby that required constant monitoring for a life threatening medical condition, which the mother obviously could not provide. *Id.* Due to mother's disability, she also was not able to provide transportation for the child in times of medical emergency. *Id.* The trial court terminated her parental rights and she appealed to the Tennessee Court of Appeals. The appellate court reversed because the

mother had engaged the assistance of another adult (a mere friend, not a family member) who could help her with her child, and thus allowed her to parent. *Id.* The difference between the mother in *Whaley* and Mother, here, is the nature of their disabilities. This is further evidence of discrimination against parents with mental disabilities in state courts.

After the Tennessee Court of Appeals affirmed the decision of the trial court, indicating that the Americans with Disabilities Act does not apply to parental rights termination proceedings, the Tennessee Supreme Court declined to review the case. *In Re K. H. et. al., No. E2023-00497-COA-R3-PT. Tennessee Court of Appeals, Eastern Section. February, 22, 2024. Not reported.; In Re K. H. et al., No. E2023-00497-SC-R11-PT. Tennessee Supreme Court. Cert denied. May 8, 2024.*

REASONS FOR GRANTING THE PETITION

Discrimination in state courts impedes disabled parents from their fundamental right to parent their own children. Although Congress passed the Americans with Disabilities Act (ADA) in 1990 to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," nearly twenty five years later, discrimination is still rampant in state family courts. *See ADA, 42 U.S.C. §§ 12101, et seq.* A recent law review article which studied the failure of courts to apply the ADA in TPR cases found that parents with mental disabilities are three times more likely to have their parental rights terminated than parents without a disability. *The Parent Trap: Parents with Disabilities and the Flaws within the Termination of Parental Rights Proceedings, University of Cincinnatti Law Review, October 20, 2021, by E. Mackie Anderson.* The study found that children of disabled parents are removed

at rates as much as 80 percent higher than children of non-disabled parents. *Id. at p.1319.* Of the 94,300 parents with mental disabilities in the U.S., up to 80% of those parents lose custody of their children at some point in their lifetime. *Id.* This is despite the fact that parents with mental disabilities are typically compliant with the requirements of their reunification plans and have the "lowest incidence of previous legal problems," making parents with disabilities objectively the best candidates for reunification with their children. *Id.* Yet, as indicated above, this is not the case, and the reason why lies in the old preconceived notion that mentally ill individuals are unfit to raise their children, and that they would be better off with other families. *Id.* This results in well meaning DCS workers and family courts removing children from loving homes with their biological families.

To address the ongoing discrimination against parents with disabilities in family courts, the Department of Justice (DOJ) and Health and Human Services (HHS) jointly issued "Technical Assistance" (TA) in 2015. *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 9 (2015) [hereinafter TECHNICAL ASSISTANCE], Available online at https://www.hhs.gov/sites/default/files/disability.pdf.* The guidance followed an investigation spurred by a specific complaint and recognized the continued

disproportionate separation of parents with disabilities from their children. *Id.* The TA is clear, specific, and unequivocal: the ADA applies to the programs, services, and activities conducted by state family regulations agencies and proceedings in family court. *Id.* Nine years since the issuance of the TA, State courts continue to ignore it, or many may not even know of its existence, as courts specifically look to precedence for guidance. There is no guidance from the Supreme Court on this issue, and states are treating ADA application in TPR cases in a myriad of ways.

The California Law Review published a study in 2022 of family court decisions from all fifty states that were issued since the 2015 TA. *Unaccommodated: How the ADA Fails Parents, California Law Review, 2022, by Sarah H. Lorr.* Its study found that the applicability of the ADA varies even within individual states, making generalizations on a state-by-state basis difficult. However, four main categories emerged: (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. *Id.* The last category is the largest, containing decisions from at least seventeen states. *Id.* The analysis

provided in the article is reproduced here in its entirety in the following 4 numbered sections (the quote is not single spaced for purposes of readability):

1. The ADA Actually Applies

Three state courts have engaged in robust and clear application of the ADA. *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.* 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. *In re Hicks/Brown, 893 N.W.2d at 637-39.* 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 services, which the State never provided. *Id. at 639.* 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. *Id*. 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. *Id at 642*. 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.'" *Id at 640*. 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 State's obligation to make reasonable efforts cannot have been met and the termination was improper.' *Id.* 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, *In re S.K.* 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. *In re S.K., 440 P.3d at 1249.* The *S.K.* court was also clear that lower family courts should make a specific finding as to whether an accommodation was made.' *Id. at 1250 & n. 4. See also id. at 1248.* 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 Department makes available to parents through a dependency and neglect proceeding before termination.'" *Id at 1248. See In re B.A., 407 P.3d 1053, 1056 (Utah Ct. App. 2017) (stating "[t]here is no doubt that the ADA applies to the government's provision of reunification services.").*

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. *See, e.g., In re Lacce L., 114 N.E.3d 123, 129-30 (N.Y. 2018); Ronald H. v. State, Dep't of Health & Soc. Servs., Off. Of Child.'s Servs., 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 re 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 re Parental Rights to M.A., No. 32948-8-iI, 2016 Wash. App. LEXIS 1208, *9-10 (Ct. App. May 24, 2016); S.C. Dep't of Soc. Servs. V. Mother, 651 S.E.2d 622, 627-29 (S.C. Ct. App. 2007); In re 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., No. COA17-387, 2017 WL 5147347 (N.C. Ct. App. Nov. 7,2017); Commonwealth v. K.S., 585 S.W.3d 202, 228 (Ky. 2019).* These decisions focus on the question of whether or not the state has made reasonable efforts to reunify the family, as required by ASFA. *See supra note 122-125.*

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. 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.' *In re Lacee L., 114 N.E.3d at 129-130 ("To be sure, ACS must comply with the ADA.")*. Prior to the Federal TA, numerous family courts in New York had previously ruled that the ADA did not apply to family court proceedings.' *In re La'Asia Lanae, 803 N.Y.S.2d 568, 569 (N.Y. App. Div. 2005); In re Chance Jahmel B., 723 N.Y.S.2d 634 (N.Y. Fam. Ct. 2001)*. 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. *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, No. 18-P-62, 2018 WL 3554138, at *3 (Mass. App. Ct. July 25, 2018). See also In re Doe, 60 P.3d 285, 290-93 (rejecting the ADA as a defense in termination proceedings but considering a parent's disabilities in evaluating reunification efforts); In re 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 243, 245-46 (Wis. Ct. App. 1994) (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)*. 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.'" *Lacee L., 114 N.E.3d at 130.* 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 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." *Id at 129.*

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. *In re Elijah C., 165 A.3d 1149,1154-55 (Conn. 2017).* The family court rejected the department's claim that the ADA does not apply to child protection cases, *Id at 1164,* but nonetheless concluded that the department had provided services that amounted to reasonable efforts toward reunification in this case. *Id. at 1149, 1153-56.* 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. *Id at 1153-56.* 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 incorporated by reference into our state's own stringent anti discrimination statutes, in adjudicating the neglect and termination petitions in the present case." *Id. at 1167.* 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.'" *Id.* 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 anti discrimination 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." *In re Child.'s Aid Soc'y for Guardianship of Xavier Blade Lee Billy Joe S., No. B-XXXXXXX-14, 2019 WL 348385, at *13 (N.Y. Fam. Ct., Jan. 9, 2019).* 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. (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 note 103, at 10.* In this case, the Family Court apparently looked to EEOC for possible accommodations. *See In re Children's Aid Soc'y., 2019 WL 348385, at * 14.* In affirming this 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. *In re Xavier Blade Lee Billy Joe S., 131 N.Y.S.3d 541, 542 (N.Y. App. Div. 2020) (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.").*

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. *In re M.A.S.C.,*

*486 P.3d 886, 893-94 (Wash. 2021); In re Adoption of Beatrix, No. 15-P933, 2016 WL 3912083, at *5 (Mass. App. Ct. Jul. 20, 2016) ("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)).*

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." *In re K.L.N., 482 P.3d 650, 659-60 (Mont. 2021) (holding that "ADA requirements [. ..] are consistent with -and generally subsumed within" the state's "reasonable efforts" requirement); Lucy J. v. State, Dept. of Health & Soc. Servs., Off. of Child.'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.").

As Alaska's Supreme Court 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.'" *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.* Courts in Montana, Iowa, North Carolina, and California have reached similar conclusions.' *In re K.L.N., 482 P.3d at 660; In re J.L., 868 N.W.2d 462,467; In re S.A., No. COA17-387, 2017 WL 5147347, at *2 (N.C. Ct. App. Nov. 7, 2017).; 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. 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 reasonable modifications requirement and related inquiries. *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. § 12131(2) (prohibiting discrimination by public entities).*

While it offers family courts the benefit of efficiency, it appears to flout congressional intent to provide specific protections for people with disabilities. *42 U.S.C. § 12101.*

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. *See supra text accompanying note 167 (collecting cases).* Among these states exist different rationales for fording 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. Numerous family courts across the country have held that the ADA is not a "defense" to a TPR. *See, e.g., N.J. Div. of Child Prot. & Permanency v. L.M.W., No. A-2850-15T4, 2017 N.J. Super. Unpub. LEXIS 2679, at *22; In re A.L., No. 2017-319, 2018 WL 722521, at *4; Adoption of Yolanc, No. 16-P-1525, 2017 WL 5985018, at *4 (Mass. App. Ct. Dec. 4, 2017); In re D.A.B., 570 S.W.3d 606,622 (Mo. Ct. App. 2019); In re B.A., 73 N.E.3d 1156, 1159 (Ohio Ct. App. 2016). 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.,*

*No. A-1-CA-38068, 2020 N.M. App. Unpub. LEXIS 42, at *3 (Ct. App. Jan. 29, 2020); In re L.M., 111 N.E.3d 1242, 1252-53 (Ohio Ct. App. 2018); In re A.E., No. A149302, 2017 WL 2537236, at *8 (Cal. Ct. App. 2017); In re Jeanette L., 69 N.E.3d 918, 921 (I1. App. Ct. 2017); Adoption of Yolanc, No. 16-P-1525, 2017 WL 5985018, at *4 (Mass. App. Ct. Dec. 4,2017); In re A.A., No. 112,254, 2014 WL 7575375, at *7 (Kan. Ct. App. Dec. 19, 2014).* 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. *In re. A.L., 2018 WL 722521, at *4 (Vt. Feb. 2, 2018) (citing In re B.S., 693 A.2d 716, 720 (Vt. 1997)).* 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 time." *Id.* 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. *Id (quoting In re B.S., 693 A.2d at 720).* Courts in several other states have expressed similar views. *See, e.g., N.J. Div. of Child Prot. & Permanency v. L.M.W., No. A-2850-15T4, 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 re 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. v. Dep't of Child. And Fams., 750 So. 2d 705, 705 (Fla. Dist. Ct. App. 2000) (rejecting ADA defenses in TPR proceedings on the grounds that "dependency proceedings are held for the benefit of the child, not the parent."); In re Kayla N., 900 A.2d 1202, 1208 (R.I. 2006) (quoting and adopting the reasoning of the M.C. court in rejecting ADA defenses); In re John D., , 934 P.2d 308, 315 (N.M. 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., No. H043712, 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 1156, 1159-60 (Ohio Ct. App. 2016) (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).*

A different, but often overlapping, strain of decisions has held that TPRs are not a service so the ADA does not apply. . *See, e.g., Adoption of Yolane, No. 16-P-1525, 2017 WL 5985018, at *4 (Mass. App. Ct. Dec. 4, 2017) ("[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. 918, 922 (111. App. Ct. 2017) ("Parental rights termination proceedings are not 'services, programs, or activities' that would subject them to the requirements of the ADA.") (internal quotation marks omitted); S.G. v. Barbour Cnty. Dep't of Hum. Res., 148 So. 3d 439, 447 (Ala. Civ. App. 2013) ("[W]e hold that a termination-of parentalrights 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.").* This finding is in direct

contravention to the DOJ/HHS TA, which articulated specifically that termination of parental rights proceedings are covered by the ADA. *TECHNICAL ASSISTANCE, supra note 19, at 3.* These decisions point to the frailty of the 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. *In re Lacce L., 114 N.E.3d 123, 130 (N.Y. 2018); Adoption of Vicky, No. 18-P-62, 2018 WL 3554138, at *2 (Mass. App. Ct. July 25, 2018). 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 re Moore, No. CA99-09-153, 2000 WL 1252028, at *7 (Ohio Ct. App. Sept. 5, 2000) ("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 243, 246 (Wis. Ct. App. 1994) ("[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., 98 Cal.Rptr.2d. 715, 722 (Cal. Ct. App. 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.").*

> 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. *Diamond H., 98 Cal.Rptr. at 722; In re Ivan M., No. E039029, 2006 WL 1487173, at *6 (Cal. Ct. App. May 30, 2006).* As explored in Part IlI.C., reliance on federal courts to seek vindication of rights under the ADA offers parents only a marginal path forward.
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> END OF QUOTE

CONCLUSION

This is an important issue affecting thousands of disabled parents, their children, extended family members, and communities in this country. Supreme Court intervention is needed to ensure that the states consistently apply the protections of the ADA to all disabled persons to protect their fundamental right to parent their own children, and to ensure that the goal of family reunification is a viable option for disabled parents in state family courts.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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