Parenting in the Face of Prejudice: The Need for Representation for Parents with Mental Illness

By Colby Brunt and Leigh Goodmark

Imagine that you have just become a parent for the first time—one of the happiest events of your life. You learn to feed, comfort, protect, and care for your baby through trial and error; you make mistakes along the way but generally give your child excellent care. When you feel overwhelmed—as every new parent does—you turn to family, friends, and other systems for support and assistance. However, despite everything that you are doing for your child, representatives from a child protection agency come to investigate your home. Why? Because you, unlike a majority of parents, have a history of mental illness. And, in the eyes of some child protection agencies, that history, in and of itself, is sufficient reason to believe that your child is at risk of child abuse or neglect.

The stress of the child protection agency's intervention causes you to relapse, and your child is removed from your care. The longer you are away from your child, the worse your mental health becomes—and the less likely you are to have your child returned to you.

This is the crisis that many mentally ill parents face. Misconceptions and misgivings about the ability to parent while dealing with mental illness abound. State agencies and courts frequently intervene on behalf of the children of mentally ill parents not because the parent has harmed the child but because they believe that mentally ill individuals cannot be adequate parents. Stereotypes and assumptions about mentally ill parents predispose child welfare agencies and courts to believe that removal of a child is necessary even before the parent ever has the opportunity to care for the child. Mentally ill parents face similar problems in family court when custody evaluators, guardians ad litem, and judges refuse to believe that granting custody or visitation to a parent with mental illness can be in a child's best interest.

Parenting is wonderful, fulfilling, and joyful—and heartbreaking, demanding, and stressful. The stress of parenting is magnified for parents with mental illness. As Employment Options Inc., an organization working with mentally ill parents, reminds its clients, "Being a parent requires 100% focus and energy. Being a parent with mental illness requires even more." Although mental illness can render some individuals unfit to parent, the vast majority of mentally ill parents simply need access to services and supports that can help them parent effectively.

One important, often overlooked, service is legal assistance. Mentally ill parents need to understand their rights in the child welfare and family court systems.

1 EMPLOYMENT OPTIONS INC., FAMILY PROJECT—SUPPORTED PARENTING 1 (n.d.).

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Too often, mentally ill parents are convinced—by social workers, child protection agency workers, other professionals working with the family, and even friends and family members—to relinquish custody of their children without understanding the implications of that decision and without the benefit of impartial legal advice. Losing their children, or fighting to keep them without legal assistance, information, or support, can cause so much stress for mentally ill parents that otherwise high-functioning individuals relapse.

Legal aid lawyers can work with mentally ill individuals to ensure that they receive the necessary services and supports and to prevent child protective service agencies and dependency courts from intervening unnecessarily in their families. Legal aid lawyers also can work with mentally ill parents to ensure that they retain custody of or visitation with their children. In this article we highlight the special issues posed for parents with mental illness when they interact with the child welfare or family court systems and discuss specific strategies for attorneys to help mentally ill parents with issues of child protection, termination of parental rights, custody, visitation, and the patient-psychotherapist privilege. We also profile a model program that provides legal and psychosocial services in order to assist mentally ill parents gain and maintain contact with their children.

I. The Child Welfare System

States have a statutory obligation to protect children from child abuse and neglect. The child welfare system is the states' mechanism for performing this function. Intervention by the child welfare system can be broken roughly into two phases: child protection agency investigations, which occur before any court action, and dependency court interventions. We discuss below the special hurdles that each phase poses for parents with mental illness.

A. Investigations by the Child Protection Agency

Every state and the District of Columbia require reporting of child abuse and neglect. In some states only specified professionals are required to report; in others every citizen is a mandatory reporter of child abuse and neglect. Any individual can choose to report. While state definitions of child abuse and neglect vary, federal law establishes minimum standards for defining child abuse and neglect. The federal definition includes any recent act or failure to act by a parent that results in death, serious physical or emotional harm, or imminent risk of serious harm. States generally define child abuse as harm or threatened harm to a child's health or welfare; they usually define neglect as failure to provide adequate food, clothing, shelter, or medical care (although several states exempt parents who are unable to provide because of poverty).

Mentally ill parents come to the attention of child abuse and neglect reporters in a variety of ways. Obstetricians and maternity ward staff may have concerns—founded or unfounded—about the mentally ill new mother's ability to parent even before she leaves the hospital. Other professionals working with the mentally ill parent may feel compelled to report based on their interactions with the parent. For
example, teachers, day care providers, pediatricians, and social workers involved with the parent or child may report. In many cases, estranged noncustodial parents report their former partners to child protection agencies—both out of genuine concern for the child and out of vindictiveness or anger at the custodial parent.

After the child protection agency receives a report and determines that it must investigate that report (i.e., that the behavior alleged could constitute child abuse or neglect), the agency generally sends a child protection agency worker to the home to examine the child and meet with the custodial parent. If the worker has sufficient reason to believe that the allegations of abuse or neglect are true, the report is deemed "substantiated," "indicated," or "founded." The standards for substantiating reports vary but are much closer to "more likely than not" than "beyond a reasonable doubt." If the report is substantiated, the state enters that finding in its child abuse and neglect registry even if the case never goes to court. Substantiation can have serious ramifications for a parent. For example, an entry in the state's registry can render the parent ineligible for work with children (e.g., as a day care provider or educator).

After a case is substantiated, the child welfare agency may take one of three actions: close the case without providing services, open a case for services without referring the case to court, or ask the court to intervene. The agency also must decide whether the child can remain safely at home or whether the agency ought to place the child in out-of-home care.

There is little information on how many children enter the child welfare system as a result of a parent's mental illness. However, some data indicate that 40 percent to 75 percent of mentally ill women lose custody of one or more of their children and that mentally ill women

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7 JANE WALDFOGEL, THE FUTURE OF CHILD PROTECTION: HOW TO BREAK THE CYCLE OF ABUSE AND NEGLECT 97 (1998). A number of states are now experimenting with "differential response" programs. In these states, reports of child abuse or neglect are placed on either a traditional investigation or family assessment track. See, e.g., ARIZ. REV. STAT. ANN. § 8-816 (West 2001); DEL. CODE ANN. tit. 16, §§ 902, 906 (2001); MO. ANN. STAT. § 210.145 (West 2001); VA. CODE ANN. § 63.1-248-2.1 (Michie 2001). If the family is assessed rather than investigated, the family is offered voluntary services, and no formal finding of abuse or neglect is made. See, e.g., DEL. CODE ANN. tit. 16, § 902 (2001); VA. CODE ANN. § 63.1-248-5:1 (Michie 2001). This process encourages families who may otherwise be reluctant to accept help to participate in services that can prevent the need for a formal child protection intervention. Inst. of Applied Research, Missouri Child Protection Services Family Assessment and Response Demonstration: Impact Evaluation: Digest of Findings and Conclusions 35 (1998). For a mentally ill parent, such services may include respite care, mental health services, or parenting classes. For an in-depth examination of differential response programs, see LEIGH GOODMARK, PROMOTING COMMUNITY CHILD PROTECTION: A LEGISLATIVE AGENDA (2002).

8 WALDFOGEL, supra note 7, at 68.

9 Kate Hollenbeck, Between a Rock and a Hard Place: Child Abuse Registries at the Intersection of Child Protection, Due Process, and Equal Protection, 11 Tex. J. Women & L. 1, 14-15 (2001). In some states the standard is as low as "any credible evidence" of child abuse or neglect. Id.

10 Id. at 17.

11 Id.

12 Id. at 16.

13 Id. Nationally about 60 percent of reports made to child protective services are deemed inappropriate for investigation or unsubstantiated; about 40 percent are substantiated. Of that 40 percent, children are removed from their homes in about 5 percent of the cases. In the other 35 percent, the child stays at home "usually under the supervision of CPS [child protective services] or another agency for a period of time but in some cases with no services or oversight at all." Jane Waldfogel, Protecting Children in the 21st Century, 34 Fam. L.Q. 311, 312 (2000).
are more likely to lose custody than mothers who are mentally healthy.\textsuperscript{14} Mothers lose custody in large part because "child welfare workers and mental health providers are inadequately prepared to understand issues faced by mentally ill mothers . . . ".\textsuperscript{15} Mental health professionals fail to address the parenting role in treatment; child welfare workers assume that mentally ill parents cannot care for children in their homes when usually all that the parent needs to be successful is proper support.\textsuperscript{16} What these professionals often miss is the positive impact that parenting can have on an individual's mental illness. For example, "[b]eing a parent may serve as the mother's motivation to actively participate in a treatment plan . . . [C]hildren can be their mother's reason for staying away from destructive activities . . . ."\textsuperscript{17}

How can an attorney help a mentally ill parent as the child welfare agency decides what action to take? Attorneys can educate parents about their rights in the child welfare system and shield them from pressure by the child welfare agency, mental health professionals, and others to relinquish custody of their children. The intent of these individuals is not always malign; often they simply are concerned that the parent will be too overwhelmed by mental illness to parent effectively. However, even when these professionals mean well, too often they convince mentally ill parents to give up their children without the parents fully understanding their rights or receiving the kinds of services that could help them keep custody of their children.\textsuperscript{18}

Federal law requires child welfare agencies to make "reasonable efforts" to keep the child and parent together before the child is removed from the home.\textsuperscript{19} Attorneys can help ensure that the agency makes such efforts on behalf of the mentally ill parent and child rather than letting the agency simply assume that, because of the parent's condition, supports and services cannot prevent removal. Attorneys should take every opportunity to educate the child welfare agency about the strengths of parents with mental illness and the services available to support them and to debunk the myths about mental illness that color the agency's decisions.

Before the agency officially intervenes, attorneys can begin to advocate on the mentally ill parent's behalf by persuading the agency that it should close a case when the parent has supports and services in place. Attorneys also can work with the agency in an open case to develop a service plan that will help keep the parent and child safe and together. At this point, for the reasons we discuss in the next section, the attorney's goal should be to preempt dependency court intervention by creating a strong network of supports and services for the parent and child.

B. Intervention by the Dependency Court

Both federal and state laws pose chal-

\textsuperscript{14} Sharon G. Elstein, \textit{Maternal Mental Illness in the Child Welfare System}, 19 CHILD L. PRAC. 33 (2000) (citing studies); \textit{see also infra note 89 and accompanying text.} Very little research is available on statistics regarding fathers with mental illness and their ability to retain custody of their children. For more information on fathers with mental illness in the mental health system, see Joanne Nicholson et al., \textit{Fathers with Severe Mental Illness: Characteristics and Comparisons}, 69 AM. J. ORTHOPSYCHIATRY 13+ (1999); Thomas H. Styron et al., \textit{Fathers with Serious Mental Illness: A Neglected Group}, 25 PSYCHIATRIC REHABILITATION J. 215 (2002).

\textsuperscript{15} Elstein, supra note 14, at 38.

\textsuperscript{16} \textit{Id.}

\textsuperscript{17} \textit{Id.} However, being a parent also can prompt a mother to act in ways that are detrimental to her treatment (and ultimately, her children)—e.g., failing to take her medication in order to stay alert to care for her children. \textit{Id.}

\textsuperscript{18} \textit{See Leigh Goodmark, Keeping Kids Out of the System: Creative Legal Practice as a Community Child Protection Strategy} 42 (2001) (telephone interview with Gina Yarbrough, staff attorney, Clubhouse Family Legal Support Project); \textit{see also Elstein, supra note 14, at 38.}

Challenges for mentally ill parents who become involved with the dependency system. The federal Adoption and Safe Families Act generally governs dependency court proceedings. Intended to end "foster care drift," a situation in which children bounce between foster homes for years while courts and child protection agencies give their parents numerous opportunities to reunify with their children, the Act imposes strict time lines for achieving permanency for children in foster care. In most cases, if the child has been in out-of-home care for fifteen of twenty-two months, the Act requires the child welfare agency to attempt to terminate the parents' rights. In some cases, where the parent's current or past behavior has been sufficiently egregious, the Act does not require the child welfare agency to make reasonable efforts to reunify the parent and child.

These requirements can be especially onerous for mentally ill parents. Judges may view mental illness as lifelong and intractable—and therefore not amenable to resolution in a fifteen-month period. Given the Adoption and Safe Families Act's primary focus on child safety, judges may be unwilling to risk that a mentally ill parent can keep the child safe even if the parent has complied with treatment and shown an ability to care for the child while under the court's jurisdiction.

Within this context, after a dependency case is filed, the court must make several decisions in a fairly short time. The court must make or revisit decisions about removal and placement in out-of-home care. Should the child be removed? If the child has been removed, was that action appropriate? Did the child welfare agency initially make reasonable efforts to prevent the child's removal? Where should the child be placed—with the parent, a relative, a foster parent, or in a group home setting? What visitation, if any, should the parent have?

Later the court must decide whether the agency has proven that the child was abused, neglected, or both, and, if so, what the permanency plan for the child should be. If the plan calls for reunification of the parent and child, the court will monitor the parent's compliance with the service plan that the agency developed.

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20 The term "dependency system" refers generally to the agencies and courts that intervene in families to protect children. This system includes investigation of child abuse and neglect, provision of services to families, determination as to whether a child has been abused or neglected, and a court's assertion of jurisdiction over the parents and children involved in the abuse and neglect. After a dependency court asserts jurisdiction, children may be removed from and reunified with parents, children may be deemed abused or neglected, and parents' rights to the children may be terminated, freeing the children for adoption or other permanent placement options. See Susan Vivian Mangold, Challenging the Parent-Child-State Triangle in Public Family Law: The Importance of Private Providers in the Dependency System, 47 BUFF. L. REV. 1397, 1438-41 (1999).


oped to achieve that goal.\textsuperscript{27} If the court believes that the parent never will be fit to care for the child, the permanency plan may call for termination of parental rights and adoption or another variation that excludes the parent.\textsuperscript{28} Alternatively, the child welfare agency can engage in "concurrent planning," that is, working toward a primary goal of reunification while preparing for the child to be adopted should reunification fail.\textsuperscript{29}

Mentally ill parents face obstacles at every point after a dependency case is filed. Doubts and prejudices about parenting with mental illness may prompt judges to remove children or place them in out-of-home care despite evidence that, with support, these parents can adequately care for their children.\textsuperscript{30} Judges sometimes assume that a child is neglected \textit{per se} as a result of the parent's mental illness. Judges' attitudes about mental illness can color their perception of the parent's progress and ability to resume care for the child and lead them to determine that reunification is inappropriate given the parent's condition.\textsuperscript{31} The parent's failure to comply with the requirements of the service plan—which may conflict with the parent's mental health treatment plan—also can lead to a court finding that the parent's rights should be terminated.\textsuperscript{32}

State law and practice vary as to when a parent involved with the dependency system is entitled to a lawyer at state expense.\textsuperscript{33} However, that mentally ill parents need attorneys at every stage of a court case is clear. Attorneys can ensure that case plans account for the parent's mental health treatment and do not create conflicting responsibilities for the parent—for example, asking the parent to attend parenting classes at the same time that the parent is scheduled for sessions with the mental health treatment provider. Attorneys can fight to keep children in the parent's custody (preventing the fifteen-month clock from beginning to tick) and can address the court's concerns about whether the parent has the capacity and support to care for children on a daily basis. Attorneys can ensure that parents actually are receiving the services to which they are entitled, services that will be crucial in trying to reunify parents and children. Attorneys can argue that the agency has failed to make reasonable efforts to reunify children and parents and can bring to the court's attention infor-


\textsuperscript{28}Fiermonte, \textit{supra} note 26, at 23–27.


\textsuperscript{30}See Elstein, \textit{supra} note 14, at 33–34 (discussing a number of studies and drawing the conclusion that mentally ill mothers can successfully raise children with family and community support).

\textsuperscript{31}See Goodmark, \textit{supra} note 18, at 43 (telephone interview with Gina Yarbrough, staff attorney, Clubhouse Family Legal Support Project).

\textsuperscript{32}See, e.g., 750 ILL. COMP. STAT. ANN. § 50/1(D)(m) (West 2002) (establishing failure to comply with service plan requirements as grounds for termination of parental rights); \textit{In re Brittany S.}, 22 Cal. Rptr. 2d 50, 51 (Cal. Ct. App. 1993) (stating that "a parent's failure to comply with the service plan almost invariably leads to termination of parental rights"). E.g., the service plan could call for participation in family counseling, which could be contraindicated by the mental health treatment plan. The service plan could require the parent to seek employment to support the children, while the mental health treatment plan could require the parent to attend counseling on weekdays. The service plan could require the parent to attend frequent meetings with the caseworker, and this could cause the parent to miss mental health treatment.

mation that the child welfare agency might not be anxious to reveal.\textsuperscript{34}

The stress of litigation, especially litigation that could result in losing their children, can cause mentally ill parents to relapse or to begin to have symptoms of the mental illness serious enough that the parents ultimately relapse.\textsuperscript{35} Attorneys can shield clients from stressful situations, gauge the impact that the stress of litigation is having on their client's mental illness, and help the client deal with that stress by explaining the legal process and ensuring that the client's treatment providers understand the demands of litigation. Attorneys also can help parents develop and implement procedures in case of a relapse, so that if a parent does relapse, the court and the agency know that the child will be safe. Most parents find the dependency system confusing, disempowering, and difficult to negotiate alone; for mentally ill parents, having a representative is especially crucial.

Representation is particularly important in cases in which the mentally ill parent's rights could be terminated. Termination of parental rights has been called the death penalty of the civil law system—it kills biological families.\textsuperscript{36} In many cases, parents deserve to have their rights terminated because of their chronic abuse and neglect of their children and their unwillingness or inability to change their behavior. However, some mentally ill parents find that courts are terminating their rights not because of anything they have done but because of what they might do.

\textit{In re D.L.M.} is illustrative.\textsuperscript{37} After living with her mother for some time, D.L.M. was removed from her mother's care as a result of her mother's hospitalization for mental illness.\textsuperscript{38} Over the next several years, the mother was hospitalized on a few occasions; the child was placed first with her maternal grandmother and later with foster parents.\textsuperscript{39} The trial court, finding that the "mother suffered from an irreversible mental condition which, during periods of 'decompensation,' rendered her unable to knowingly provide D.L.M. with necessary care, custody and control," terminated the mother's parental rights.\textsuperscript{40} The court found no evidence that the mother had abused the child.\textsuperscript{41} The court finally found that the mother was unlikely to be able to reunify with the child within an ascertainable period of time.\textsuperscript{42}

That the mother suffered from schizophrenia and that schizophrenia was a permanent condition were undisputed.\textsuperscript{43} The mother also suffered from depression that stemmed primarily from the litigation and her fear of losing her daughter.\textsuperscript{44} And, as the Missouri Court of Appeals noted, the mother had a history of calling for help when facing problems related to her mental illness.\textsuperscript{45}

\textsuperscript{34} E.g., the child welfare agency may not be anxious to reveal that the parent already has taken the parenting class that the agency is ordering, that the parent independently has sought counseling and other services because the agency did not arrange for the parent to do so, that the parent is doing well in treatment, or that the parent and child have a very strong bond—anything that might undermine the agency's claim that the parent's rights should be terminated.

\textsuperscript{35} See Goodmark, \textit{supra} note 18, at 45 (telephone interview with Gina Yarbrough, staff attorney, Clubhouse Family Legal Support Project).

\textsuperscript{36} See, e.g., Bernardine Dohrn, \textit{Bad Mothers, Good Mothers, and the State: Children on the Margins}, 2 U. CHI. L. SCH. ROUNDTABLE 1, 2 (1995).

\textsuperscript{37} \textit{In re D.L.M.}, 31 S.W.3d 64 (Mo. Ct. App. 2000).

\textsuperscript{38} \textit{Id.} at 66.

\textsuperscript{39} \textit{Id.} at 66-67.

\textsuperscript{40} \textit{Id.} at 67.

\textsuperscript{41} \textit{Id.} The trial court did find that the mother sometimes had failed to give the child adequate food, clothing, shelter, or other care and control, a finding that the appellate court disputed. \textit{Id.} at 70.

\textsuperscript{42} \textit{Id.} at 67.

\textsuperscript{43} \textit{Id.} at 69.

\textsuperscript{44} \textit{Id.}

\textsuperscript{45} \textit{Id.}
mother failed to take her medication (twice in six years) and needed inpatient treatment as a result, the mother voluntarily hospitalized herself and, on at least one occasion, took her children to stay with their grandmother before going to the hospital. Based on the mother's willingness to seek help when necessary and the absence of any evidence that the mother had harmed or was likely to harm the child, the appellate court reversed the trial court's termination of the mother's parental rights.

The appellate court in In re D.L.M. prevented the permanent destruction of this mentally ill mother's tie to her daughter. Other mentally ill parents are not so lucky. While in some of those cases the mentally ill parent actually may be unable to provide a safe and permanent home for the child, in others judges may deem the fear that the child will be harmed sufficient for them to terminate parental rights. How often this occurs is impossible to know; only a fraction of all appellate cases are reported, and only in appellate decisions can advocates see what happens on the trial court level. Advocates are developing new strategies to protect the parental rights of mentally ill parents. The Americans with Disabilities Act (ADA) seemed to hold potential for protecting mentally ill parents in the dependency system. However, that potential has not been realized. The application of the ADA to cases regarding termination of parental rights is one of the most hotly contested areas of domestic law. State appellate courts are currently being asked to address this issue, and, as the cases we discuss below illustrate, there is no agreement among them.

Congress enacted the ADA in 1990 to provide "a clear and comprehensive mandate for the elimination of discrimination against individuals with disabilities." With the ADA, Congress intended to give people with disabilities protection under the law and, like the Adoption and Safe Families Act, create a baseline for state laws. Title II of the ADA is currently at the center of the controversy over proceedings regarding termination of parental rights. Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity.

The issue before many of the appellate courts is whether the ADA can be used as a defense to a petition for termination of parental rights if the parent believes that the state social services agency or state court discriminated against the parent on the basis of disability.

A few courts held that the ADA applied to cases regarding termination of parental rights or, at the very least, gave parents some recourse if they believed an ADA violation occurred in the provision of services before the filing for termination of parental rights. For example, in In re C.M. the Texas Court of Appeals held that the ADA was an affirmative defense to a petition to terminate parental rights but that it must be raised at the trial level. In Family Independence Agency v. Terry, the Michigan Court of Appeals held that the ADA required a public agency to make reasonable accommodations for individuals with disabilities. The court stated that the state child welfare agency's

46 Id.
47 Id. at 70–71. The appellate court stated that parental mental illness, per se, is not harmful to a child. Id. at 69 (citing In re C.P.B., 641 S.W.3d 456, 460 (Mo. 1982)). The appellate court also noted that the mother had repeatedly made efforts to regain custody, complied with service plans, and had a strong bond with her daughter. Id. at 71.
49 Id. at 12101(b)(1).
50 Id. § 12201(b); 28 C.F.R. § 35.103(b) (2001).
52 In re C.M., 996 S.W.2d 269, 270 (Tex. App. 1999).
reunification services and programs "must comply with the ADA." Similarly, in Stone v. Daviess County Division of Children and Family Services, the Indiana Court of Appeals held that once an "agency opts to provide services . . . the provision of those services must be in compliance with the ADA."55

Other states reached different conclusions regarding the application of the ADA to termination of parental rights. Many of these cases held that the ADA did not apply to these actions because termination proceedings did not qualify as a service, program, or activity under the ADA.56 The Massachusetts Supreme Judicial Court adopted this reasoning in Adoption of Gregory.57 Although the court ruled that the ADA did not apply to termination proceedings, it noted that the ADA and Massachusetts law required the state to accommodate parents with special needs in its provision of services before a termination proceeding.58

The court in Adoption of Gregory believed that to apply the ADA to proceedings regarding termination of parental rights would subordinate the rights of the child to those of the parents.59 Similarly, in J.T. v. Ark. Dep't of Human Services, the Arkansas Supreme Court held that the parents' rights under the ADA must be subordinated to the child's interests because the focus of all termination proceedings was the "best interests of the child."60 Other states followed this reasoning, holding that the interest of the child was paramount and that elevating the parents' interests was an abuse of discretion by the trial judge.61 Arguably these rulings directly conflicted with the U.S. Supreme Court holding in Santosky v. Kramer that a parent and child were presumed to share an interest in staying together until the parent was deemed "unfit."62 The cases also potentially contradicted Stanley v. Illinois, in which the Supreme Court held that the fundamental right to raise one's children was constitutionally protected.63

The state courts are clearly divided as to how the ADA should apply to termination proceedings. The Supreme Court likely will be asked to address this issue. Attorneys practicing in this area need to be acutely aware of this issue and raise at the trial court level any objections based on ADA violations.

II. The Family Court System

Unlike dependency cases, custody and visitation cases typically involve biological parents seeking custody of or visitation rights with (or both) the minor children. These cases can be extremely upsetting for parents with mental illness because,

Judges must determine the best interests of the child; mental illness may be a factor in this decision, but it is not determinative.

54 Id. For two cases holding that the Americans with Disabilities Act applied to reunification services that the state agency offered, see In re John D., 934 P.2d 308, 313–14 (N.M. Ct. App. 1997); In re Anthony B., 735 A.2d 893, 899 (Conn. App. Ct. 1999).
57 Adoption of Gregory, 747 N.E.2d 120, 125 (Mass. 2001).
58 Id. at 126.
59 Id. at 125.
60 J.T. v. Ark. Dep't of Human Servs., 947 S.W.2d 761, 768 (Ark. 1997).
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unlike in dependency cases, the opposing party is someone with whom they have shared a relationship. However, as in dependency cases, there appears to be an overriding presumption that parents with mental illnesses cannot adequately care for their children; these parents frequently lose custody of or contact with their children. The following cases illustrate this issue.

A. Custody Determinations

Since the 1970s, the predominant standard for determining custody has been the "best interests of the child." Judges must grant custody to the party most likely to foster the child's best interests. The "best interests of the child" standard is completely subjective; trial courts receive little guidance on making these decisions from either state statutes or case law. The looseness of the standard permits judges to weigh mental illness more heavily than other factors. The stigma associated with mental illness may color judges' perceptions of the parent's ability to further the child's best interests. As a result, parents with mental illness often must prove first that they are fit parents before arguing that granting the parents custody is in the children's best interests.

Every case and jurisdiction vary in the handling of cases involving parents with mental illnesses. Often, however, lower-court judges award custody to the parent without the mental illness on the basis of the other parent's "diagnosis, hospitalization, or treatment for mental illness." Given the presumption that an appellate court will not overturn the findings of the trial court absent a finding of an abuse of discretion by the trial judge, the rate of success on appeal for a parent who is denied custody because of mental illness is very low. The following cases illustrate how parents with mental illness are treated within the family courts.

In Willey v. Willey the Iowa Supreme Court explained how the court should determine the best interests of the child in cases involving parental mental illness. The mother in Willey suffered from a form of chronic schizophrenia. The appeal before the court related to the mother's desire to have custody of the parties' minor son. Although the court ultimately ruled in favor of the father, the court understood the importance of both parents being a part of the child's life. It found that mental illness alone did not disqualify a parent from having custody.

The Willey case is representative of those difficult cases in which both parents deeply care about their child but one has an illness that sometimes can affect that person's parenting ability. The Willey court recognized that a person with mental illness could be the primary custodian as long as the mental illness of that parent would not jeopardize the "health.

64 See supra note 14 and accompanying text and infra note 89 and accompanying text.
66 Id. at 31-32.
69 Id.
70 Willey v. Willey, 115 N.W.2d 835 (Iowa 1962).
71 Id. at 834.
72 Id. at 835.
73 Id. at 838.
74 Id. at 837.
75 Id.
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safety, and welfare of the child.\textsuperscript{76} Ultimately, although the court in \textit{Willey} stated that no clear and convincing evidence existed that the mother's mental illness would jeopardize the health, safety, and welfare of the child, the court found that granting the father custody would be in the child's best interest.\textsuperscript{77}

In \textit{A.H. v. W.P.} the Alaska Supreme Court ruled that the trial court had not abused its discretion by granting custody to the mentally healthy parent.\textsuperscript{78} In this case, the mother of the minor child suffered from an "undiagnosed mental impairment."\textsuperscript{79} The court found that her actions indicated "a significant disturbance in [her] overall cognitive and emotional functioning."\textsuperscript{80} Unlike the majority of cases involving a mentally ill parent, the court in this case focused not on the party's illness but on the party's behavior. The court specifically noted that the trial court did not "rely on a social stigma associated with A.H.'s disability. Rather, [the trial court] specifically referred to A.H.'s bizarre conduct and extremely destructive actions."\textsuperscript{81}

The court stated that "the mental health of a parent is a proper topic of inquiry at a custody hearing; however, the basis of custody determination is the best interests of the child and a parent's conduct is relevant only insofar as it has or can be expected to negatively affect the child."\textsuperscript{82} Although the court granted custody to the parent without the illness, the court based its conclusion on the facts that the mother's "behavior and condition were detrimental to the [child], and that she was unreliable and unable to care for him."\textsuperscript{83}

In some instances state statutes give courts guidance as to what factors the judge must consider when determining the best interests of the child. For example, in \textit{In re Lombaer}, the Appellate Court of Illinois reversed and remanded the trial court's decision granting the father without the mental illness custody of the minor children because the lower court failed to consider the statutory guidelines.\textsuperscript{84} Instead the trial court relied on the father's account of the mother's mental illness and her failure to take medications—without any showing of risk or harm to the children and despite the mother having been the children's primary caretaker.\textsuperscript{85}

Illinois law requires trial courts to consider, among other factors, the wishes of the child and parents; the child's adjustment to school and home; the interaction of the child and the child's siblings or other people who have a significant relationship with the child; any domestic violence between the parties; and the "mental and physical health" of the parties.\textsuperscript{86} The court held that although the trial court need not make specific findings of fact as to each factor, there "must be some indication that the court considered the various factors" in making its final determination.\textsuperscript{87} The court noted that the record contained no indication that the trial court considered the various factors and that "virtually no evidence was adduced as to the children's best interests."\textsuperscript{88} Unlike many states, Illinois's statute gives judges specific guidance on how to make a proper custody determination and requires that all the factors,
mental health being just one, must be taken into consideration.

Although the courts in a majority of cases grant custody to the party without the mental illness, one conclusion is clear from these cases—a judge may not determine the issue of custody solely on the basis of a parent's mental illness. Judges must determine the best interests of the child; mental illness may be a factor in this decision, but it is not determinative.

When litigating custody cases, attorneys need to focus on three main issues. First, attorneys need to determine which party was the child's primary caregiver. This means investigating which parent performed the day-to-day tasks such as waking the child up in the morning, cooking meals for the child, putting the child to bed at night, and taking an active role in the child's schooling. The mentally ill parent's previous involvement in the child's daily life is especially important if it shows that the parent was capable of performing all of these tasks and that the other parent was comfortable allowing the mentally ill parent to do so.

Second, attorneys need to determine what custody arrangement is in the child's best interests. Attorneys need to make clear to the court why residing with their client is better for the child. The court must understand the advantages that the mentally ill parent can offer the child that the other party cannot and why the child would be in a better position if the court granted custody to the mentally ill parent. The attorney must be clear that, although the mental illness may act to the child's detriment in certain situations, the mentally ill parent has contingency plans for those situations and is, on the whole, able to meet the child's needs.

Third, knowing that the parent's mental illness will be raised, attorneys must continually focus the judge on the legal standard for custody determinations: the best interests of the child. Attorneys should remind the judge that, although the client has an illness, that illness does not prevent the parent from being able to provide a stable and healthy environment for the child. With every case involving mentally ill parents, attorneys should take the opportunity to educate judges, custody evaluators, and others about the parenting capacity of the mentally ill and about the services and supports available for those parents.

B. Visitation

Studies show that as many as 70 percent to 80 percent of parents with mental illness lose custody of their children to other parties. As a result, many parents rely on sporadic visitation to keep in contact with their children. However, for some parents, fighting to get even sporadic access can be futile.

As in custody determinations, the standard that courts use for visitation determinations is the "best interests of the child." Willey v. Willey outlined the general view on a parent's rights to visitation. In Willey the Iowa Supreme Court stated:

The rule is well established in all jurisdictions that the right of access to one's child should not be denied unless the court is convinced that such visitations are detrimental to the best interests of the child. In the absence of extraordinary circumstances a parent should not be denied the right of visitation.

In Smith v. Smith the Iowa Supreme Court held that the father should not be denied the right to visit with his children solely on the basis of his mental illness. The trial court had denied the father visitation with the minor children because of a long, documented history of mental illness.
illness. The appellate court held that it was "not convinced the best interest of the children is served by letting them grow up under the exclusive influence of their mother and her attitude without even a chance to become acquainted with their father." The court further held that "visitation or the denial thereof should not be made to appease one parent or punish the other. Such right of visitation should be allowed or denied, according to what is best for the child. Its welfare must receive paramount consideration."

The court also held that the lower court’s ruling was improper because the custodial parent controlled if and when the father could have visitation. The court stated that

the order should not make the right of visitation contingent upon an invitation from the party having the custody of the child, or require the consent of one parent for the other to visit the child, thereby leaving the privilege of visitation entirely to the discretion of the party having the child in custody.

A number of courts stated that visitation must create a significant risk in order for a judge to deny a parent visitation. For example, in Davis v. Davis the Ohio Court of Appeals held that "the [trial] court should enforce the child’s right of visitation unless extraordinary circumstances preclude it." The court defined "extraordinary circumstances" as "circumstances which create a significant risk of serious physical or emotional harm to the child." In Davis the father appeared to have a limited capacity for parenting; a court-appointed psychiatrist stated that the father should have visits but that a trained mental health professional should supervise such visits. The trial court admitted the psychiatrist’s report into evidence but nonetheless determined that the father should not have any visitation. The appellate court, finding no evidence to indicate that visitation posed a serious danger to the child, reversed the denial of visitation.

Other cases held that the trial courts abused their discretion in denying or severely limiting mentally ill parents’ visitation. For example, in Athey v. Athey the Alabama Court of Civil Appeals held that the mother should not be denied visitation with her child even though she suffered from a mental illness. The court held that "although there was substantial testimony regarding the wife’s mental condition, there was no evidence indicating that she is a danger to the child or that it is in the best interests of the child to be denied contact with her.

Similarly, in In re Lombaer, the Appellate Court of Illinois found that although evidence existed as to the mother’s previous hospitalizations and failure to take medications, this evidence was "insufficient to meet the onerous standard of serious endangerment, particularly in light of the absence of expert testimony that the medication was necessary to prevent her from harming herself or others." The court held that to restrict a parent’s visitation rights the trial court must find that "visitation would endan-

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93 Id. at 422.
94 Id. at 424.
95 Id. (quoting Bedolfe v. Bedolfe, 127 Pac. 594 (Wash. 1912)).
96 Id. at 425.
97 Id.
99 Id.
100 Id. at 323.
101 Id.
102 Id. at 324-25.
104 Id.
105 Lombaer, 558 N.E.2d at 395.
ger seriously the child's physical, mental, moral, or emotional health.\textsuperscript{106}

In \textit{Surrey v. Surrey} the District of Columbia Court of Appeals held that although the mother was the "unfortunate victim" of paranoid schizophrenia, that alone should not prevent her from being able to visit with her children.\textsuperscript{107} The court stated that the trial court should consider the mother's mental illness but that such an illness should not be determinative on the issue of visitation.\textsuperscript{108} The appellate court noted that the trial court primarily focused on whether the mother was of sound mind and not on the proper legal standard of whether she had a right to visit with her children.\textsuperscript{109} The court vacated and remanded the lower court's findings and instructed the trial court that "the burden, if there is one, [is] on the father to show that the mother's exercise of her right to see the children should be denied because it would injuriously affect the children."\textsuperscript{110}

Again, as in custody cases, the law is that the determining issue is the child's best interests and not whether the parent suffers from an illness. Case law indicates that mental illness may be a factor in determining the scope of and restrictions on visitation, but the children's interest in maintaining a relationship with their parents must be the priority. Denying a parent access to a child requires a clear showing that visitation or contact with the parent would seriously endanger the health and welfare of the minor child.

Attorneys need to be aware of the heightened standards that protect parents' contact with their children. They need to emphasize to the court that there must be a clear showing of danger to the child and that the burden is on the opposing party to show that the court should deny visitation. Having a treating clinician testify as to the parent's current level of functioning may be beneficial for the client. Judges tend to give this testimony great weight, which improves the client's chances of obtaining visitation. Attorneys should consider requesting that the court appoint a guardian \textit{ad litem} to the case because the guardian \textit{ad litem} can conduct a more thorough investigation as to custody and visitation issues, and a complete investigation into their fitness usually is beneficial for many parents with mental illness. Ideally attorneys should request that the court appoint a guardian \textit{ad litem} or custody evaluator with a mental health or clinical background.

Attorneys representing mentally ill parents should provide for training for judges, custody evaluators, and guardians \textit{ad litem} to ensure that the people whom the court appoints as guardians \textit{ad litem} and custody evaluators are trained in working with cases involving mental illness of one of the parties. Attorneys also should educate opposing counsel during settlement negotiations by helping opposing counsel and the other parent see that the mentally ill parent will not endanger the child. Attorneys should create plans to safeguard the child should problems arise during visitation.

Mentally ill parents already face uphill battles in trying to maintain contact with their children. They should not have to fight these battles alone. Having counsel can mean the difference between a mentally ill parent being awarded appropriate visitation and the destruction of the parent-child relationship.

III. Patient-Psychotherapist Privilege

In highly contested domestic matters the admissibility of one or both parents' psychiatric records is likely to be raised.\textsuperscript{111} The statutes and case law that govern the

\textsuperscript{106} \textit{id}. (quoting \textit{ILL. REV. STAT.} ch. 40, \S 607(c) (1987)).


\textsuperscript{108} \textit{id.} at 423.

\textsuperscript{109} \textit{id.}

\textsuperscript{110} \textit{id.}

\textsuperscript{111} For cases discussing the admissibility of psychiatric records, see, e.g., \textit{Kinsella v. Kinsella}, 696 A.2d 556, 565–64 (N.J. 1997); \textit{Laznovsky v. Laznovsky}, 745 A.2d 1054, 1058–73 (Md. 2000); \textit{Lombarder}, 558 N.E.2d at 393–94.
issue of patient-psychotherapist privilege vary from state to state, but every jurisdiction has some form of the privilege. Many states also have an exception to the privilege, either through case law or statute, for cases involving child custody, visitation with a minor child, or both.

In Kinsella v. Kinsella the New Jersey Supreme Court discussed when the privilege should be waived and what the courts can do to preserve the integrity of the patient-psychotherapist privilege. The Kinsella case involved piercing the privilege for three reasons: a marital tort claim, an extreme cruelty claim for divorce, and a child custody dispute between the parties. The court denied access to the records for use in the marital tort and extreme cruelty claims; however, in the custody claim the court remanded the issue for further review consistent with the opinion.

In determining whether the patient-psychotherapist privilege should be pierced, the Kinsella court first analyzed the rationale for protecting the privilege. The court stated that effective therapy was based on a premise of trust and that litigants who were seeking this assistance needed reassurance that what they said to their therapists would remain private. The court also noted the public benefit of keeping the information privileged so that individuals with a mental or emotional illness could receive appropriate treatment. The court explained that while the privilege could be waived under some circumstances, the intrusion must be for a legitimate need, there must be no other way to obtain the information, and the information sought must be relevant and material.

In deciding whether the privilege should be waived in a custody case and to what extent, the court noted:

We recognize that in a child custody case the mental health of a parent may be a relevant issue. Where this issue is raised the trial court must maintain a proper balance, determining on the one hand the mental health of the parents as this relates to the best interest of the child, and on the other maintaining confidentiality between a treating psychiatrist and his patient.

The court stated that the best alternative in custody cases in which one or both parents suffered from a mental illness was to have the lower court appoint

\[112\] Kinsella, 696 A.2d at 566 (citing Jaffe v. Redmond, 518 U.S. 1, 13 & n.11 (1996) (Clearinghouse No. 51,222)) (listing statutes).

\[113\] Id. at 581.

\[114\] Id. at 566.

\[115\] Id. at 561.

\[116\] Id. at 584.

\[117\] Id. at 566.

\[118\] Id.

\[119\] Id. at 568 (citing In re Kozlov, 398 A.2d 882, 887 (N.J. 1979)).

\[120\] Id. at 580.
a psychiatric evaluator to determine the fitness of the parties requesting custody.\textsuperscript{121} The court held that the court-appointed evaluator’s access to past psychiatric records was an issue that must be determined on a case-by-case basis and that the patient’s privacy should always be taken into consideration.\textsuperscript{122} The court noted that allowing evaluators to have access to all records could be detrimental to the custody process.\textsuperscript{123} The effect of allowing a broad disclosure of records would be that the “threat of court-ordered disclosure can too easily become a strategic weapon for the other parent.”\textsuperscript{124} The court further remarked that disclosure of treatment records could deter parents from seeking custody or visitation with their children because of the stigma or embarrassment that the parents might feel after the release of the information.\textsuperscript{125}

Although the court in \textit{Kinsella} narrowly drew exceptions to the privilege, other courts allowed the privilege to be waived just because custody was at issue. In \textit{Owen v. Owen} the Indiana Supreme Court held that “the mental and physical health of all parties involved become subjects for consideration by the trial court” and that the mother “placed her mental condition in issue when she petitioned for and was granted custody under the original order . . . .”\textsuperscript{126} The court further held that “[w]hen a party-patient places a condition in issue by way of a claim, counterclaim, or affirmative defense, she [or he] waived the physician-patient privilege as to all matters causally or historically related to that condition . . . .”\textsuperscript{127}

Similarly, in \textit{Thompson v. Thompson}, the Alabama Court of Appeals held that if either party alleged fitness of the parent and the parent’s mental state was clearly at issue, the psychiatrist-patient privilege was waived and that the trial court had broad discretion in determining what should be allowed into evidence.\textsuperscript{128}

In \textit{Clark v. Clark} the Nebraska Supreme Court allowed the privilege to be waived but limited the scope of access.\textsuperscript{129} The court held that “when a litigant seeks custody of a child in a dissolution of marriage proceeding, that action does not result in making relevant the information contained in the file cabinets of every psychiatrist who has ever treated the litigant.”\textsuperscript{130} The court added that the determination as to admissibility of evidence was entrusted to the trial court.\textsuperscript{131} Like the Indiana and Alabama courts, the Nebraska Supreme Court held that when parental fitness was raised, waiving the privilege was in the best interest of the child, but it gave the trial court greater discretion to limit the information sought.\textsuperscript{132}

By contrast, in \textit{Laznovsky v. Laznovsky} the Maryland Court of Appeals held that the parent did not waive the psychotherapist-patient privilege when parties seeking custody asserted their fitness.\textsuperscript{133} The court held that “while the mental and physical health of a party is an issue to be considered by the trial court, a person seeking an award of child custody that claims to be a fit parent, does not, without more, waive the confidential psychiatrist/psychologist-patient privilege.”\textsuperscript{134}

\textsuperscript{121}Id.
\textsuperscript{122}Id. at 584.
\textsuperscript{123}Id.
\textsuperscript{124}Id. at 582.
\textsuperscript{125}Id.
\textsuperscript{126}Owen v. Owen, 563 N.E.2d 605, 608 (Ind. 1990).
\textsuperscript{127}Id.
\textsuperscript{129}Clark v. Clark, 371 N.W.2d 749, 753 (Neb. 1985).
\textsuperscript{130}Id.
\textsuperscript{131}Id.
\textsuperscript{132}Id.
\textsuperscript{133}Laznovsky, 745 A.2d at 1068.
\textsuperscript{134}Id. at 1073.
In reaching this conclusion, the court looked at the legislative background of the psychotherapist-patient privilege. The court noted that the Maryland legislature intentionally repealed the exemption that allowed privileged information to come into evidence in custody cases. The court observed that the Maryland legislature was fully aware of the ramifications of repealing the child custody exception and that, when it did so, the legislature was balancing the interest in the privilege with the best interests of the child. In examining the legislative history of other states, the court stated, "[W]e have found in our research no case in which a foreign state's legislative body has specifically balanced the competing interests of the needs of proper mental health and the needs for courts to have such information in child custody matters . . . ." Maryland, unlike most states, has actively limited the availability of patients' records and helped preserve the original intent of the psychotherapist-patient privilege.

Although accessing psychiatric records is relatively easy, attorneys for mentally ill parents should argue that the court should limit the scope of this access. Health records are one of the few private aspects of mentally ill parents' lives. To disclose the information in these records would be extremely detrimental to the parent's continued therapeutic treatment.

The best way for an attorney to limit the scope of access to this information, if the records must be produced, is to request that the court appoint a guardian ad litem to serve as an investigator. The guardian ad litem is then the only third party with full access to the records. Attorneys should request guardians ad litem with clinical backgrounds; such guardians are more likely to be sensitive to the mental health issues and understand the client's desire to keep the records as confidential as possible. Counsel also can request that a judge other than the one sitting on the case view the records in camera to determine to which portions of the records the opposing party is entitled.

Attorneys for parents with mental illness are crucial at this stage in the litigation because the issue of privilege is such a complex legal matter. Without an attorney advocating to protect the client's privilege, the parent's records may inappropriately be given to the opposing party and certainly will be used as a weapon throughout the case. As we mentioned previously, educating judges about mental illness is crucial if they are to understand the records in context.

IV. A Model Program Assisting Parents with Mental Illness

Parents with mental illness face much adversity in their quest to keep custody of and contact with their children. One leader in assisting parents with mental illness is the Clubhouse Family Legal Support Project at Employment Options Inc. in Marlborough, Massachusetts. This innovative program works with parents to gain and maintain contact with their children. The program provides weekly parenting meetings, supervised visitation, one-on-one family counseling, and legal services to mentally ill parents. The program is part of an array of psychosocial services available to mentally ill "members" through Marlborough's clubhouse. At the clubhouse staff and members work together to create an environment in which members can obtain the skills and support that they need to manage jobs, families, and their recovery. The project, in addition to giving individual members legal assistance, educates and trains the state Department of Mental Health, the courts, and legal aid providers on the misconceptions and abilities of parents with mental illness.

Susan was one of the project's clients. As a result of her divorce, Susan lost custody of her child. When Susan first talked with the Clubhouse Family Legal

\[135\] Id. at 1059.
\[136\] Id. at 1061.
\[137\] Id. at 1066.

\[138\] For more information on Employment Options Inc., see www.employmentoptions.org.

\[139\] We changed the name of this client to protect her identity and confidentiality.
Support Project attorney, she just had left a state hospital after a long psychiatric stay. Just before Susan's hospitalization, her ex-husband obtained a protective order, which prohibited her from contacting her son. With the help of her attorney, Susan was granted telephone contact and supervised visitation. Over the next eighteen months, with support from the clubhouse and her attorney, Susan was able to obtain unsupervised overnight visitation.

Susan's successes would not have been possible if she had not been involved with the Clubhouse Family Legal Support Project. Through the project she obtained an attorney, had staff members supervise her visitation, and received assistance through weekly parenting meetings. Susan and her son were able to spend quality time together as mother and son without the issue of Susan's mental illness constantly looming in the background.

The success of the Clubhouse Family Legal Support Project shows that empowering parents with mental illnesses is possible. The model emphasizes the need to treat the whole person—assisting people on basic parenting skills, providing respite care and support groups, and helping parents obtain legal assistance when necessary.

V. Conclusion
Parenting is one of the most rewarding experiences a person can have, but parents with mental illness sometimes are denied this experience solely because of their illness. These parents must prove to family members, social workers, educators, lawyers, and judges that they are fit parents and that they deserve to raise their own children. Given the obstacles they face and the complexity and confusing nature of the child welfare and family court systems, parents with mental illness must have skilled and knowledgeable representation when the issues of child protection, termination of parental rights, custody, visitation, and the patient-psychotherapist privilege arise. When the stakes are as high as losing a child to another party or the state and the decision makers already may be biased against them, parents with mental illness deserve the best representation available.

Unquestionably, a stigma is associated with mental illness. However, the legal system must realize that mentally ill parents still deserve the right to be a part of their children's lives. As the cases we discuss in this article illustrate, the law affecting parents with mental illness is not black and white but gray, and many times this gray area works against people with mental illness. Lawyers and judges must be educated in issues involving mental illness so that they can provide able representation and justice for parents with mental illness.