

**Court of Appeals
of the
State of New York**

In the Matter of
Lacee L.,

A Child Under Eighteen Years of Age
Alleged to Be Neglected by

Stephanie L.,
Respondent-Appellant
-against-

New York City Administration for Children's
Services
Petitioner-Respondent

**Amicus Curiae Brief of the Human Rights and Gender Justice Clinic of the
City University of New York School of Law, Women Enabled International,
and Amnesty International**

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CORPORATE DISCLOSURE STATEMENT

Amici curiae the Human Rights and Gender Justice Clinic at the City University of New York Law School (HRGJ) is a law school clinical program that operates under the umbrella of Main Street Legal Services, a nonprofit corporation with no parent or subsidiary entities. Amicus curiae Women Enabled International is a nonprofit organization with no parent or subsidiary entities. Amicus curiae the International Secretariat of Amnesty International (Amnesty International Limited; hereinafter referred to as Amnesty International), is a UK not-for-profit company limited by guarantee. It has no parent companies, and has as subsidiaries Amnesty International Charity Limited (UK), and six of its 20 regional offices: Amnesty International – European Association (Brussels), Amnesty International Asia-Pacific Regional Office Limited (Hong Kong), *Oficina Regional de Amnistía Internacional* (Mexico City), Centre for the Protection of Human Rights and Social Justice of Amnesty International Nigeria (Abuja), Amnesty International South Asia (Colombo), and Amnesty International Afrique du Nord (Tunis). AIL also operates two language resource entities which are subsidiaries, *Centre de Ressources Linguistiques d’Amnesty International – Unité Chargé de la Langue Française* (Paris) and *Centro de Lenguas de Amnistia Internacional* (Madrid). The Amnesty Movement, of which Amnesty International is a part, additionally

consists of 70 independent, national membership-based entities, which are not represented as amici in this matter.

STATEMENT OF INTEREST

Amici curiae Women Enabled International (WEI), the Human Rights and Gender Justice Clinic at the City University of New York Law School (HRGJ) and Amnesty International are human rights organizations that engage in litigation, education, and advocacy to promote respect for and adherence to international human rights law and principles by all nations, including the United States, with particular expertise on laws and policies concerning women's rights and reproductive justice. Through advocacy and education in collaboration with women with disabilities, WEI works to advance the rights of women and girls with disabilities around the world. HRGJ works to advance gender equality through human rights advocacy at the international, federal, and state level, and to encourage all government to respect, protect, and fulfill human rights. Amnesty International is a non-governmental, non-profit organization with a global support base of more than 7 million members, supporters and activists in more than 150 countries and territories, and domestic entities set up in more than 70 countries and territories. Amnesty International's vision is of a world in which every person enjoys all of the human rights enshrined in the Universal Declaration of Human Rights and other international human rights instruments. *Amici* submit this brief to bring to the Court's attention international law and human rights standards

concerning the right to equality and non-discrimination for persons with disabilities and the right to family life and access to justice for parents and their children. This brief provides the Court with standards and comparative models to assist its analysis of the New York Family Court's obligations to provide reasonable accommodations to parents with disabilities in neglect proceedings.

SUMMARY OF ARGUMENT

The right to family life is a fundamental human right that all persons should enjoy without discrimination. Yet, in the U.S. and around the world, there is growing recognition that stereotypes about persons with disabilities unfairly influence decisions and judgments about the ability to be a good parent. As a result, persons with disabilities face societally-created barriers that result in discrimination. Persons with disabilities are also often denied access to justice because, unless accessibility measures and accommodations are made to facilitate their participation, they may be unable to fully and fairly participate in judicial proceedings that affect essential rights. In order to protect the rights of persons with disabilities from discrimination, both human rights law and the American with Disabilities Act (hereinafter ADA) require that governments take action to combat stereotypes and provide persons with reasonable accommodations to prevent discrimination and promote equality.

Discrimination against a person with a disability is always harmful, but it is particularly damaging in this case because it may result in the improper separation of a family. The right to family life – a right that is fundamental for parents, both with and without disabilities, and their children - is a basic tenet of international human rights law, protected by the U.S. constitution and legal systems around the world. Given the importance of family relationships and the irreparable harm that results when the state takes a child from his or her parents, human rights law—like most jurisdictions in the U.S.—recognizes the need for the state to take affirmative measures to assist parents and emphasizes that family separation is a drastic measure and should only occur to protect a child in danger and only after considering less drastic measures.

ARGUMENT

I. This Court should consider human rights law in determining the Administration of Child Services’ obligation to provide reasonable accommodation to a parent with a disability in child neglect proceedings.

This case requires the Court to consider a variety of recognized human rights, including the rights to non-discrimination and equality before the law, due process, and private and family life, and reconcile them with the state’s power to intervene in families in the name of child protection. In deciding matters of human rights, this Court should consider international human rights law, including decisions of human rights courts and bodies with power to issue authoritative

interpretations of law.¹ *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 710, n. 8, 718 n.16 (1997) (noting other countries’ approaches to physician-assisted suicide); *see also Lawrence v. Texas*, 539 U.S. 558, 573 (2003) (citing a European Court of Human Rights (ECtHR) decision as evidence that decriminalizing homosexuality does not offend Western Civilization and Judeo-Christian values). Indeed, the U.S. Supreme Court regularly considers international and comparative foreign law when addressing legal problems common around the world. *See Printz v. United States*, 521 U.S. 898, 977 (1997) (“ . . . [the laws of other nations] may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem”) (Breyer, J., dissenting). In particular, U.S. courts have considered international human rights law in cases implicating the right to family life, recognizing it “is not only a fundamental value of American society and constitutional law, but also is protected by international law.” *Nicholson v. Williams*, 203 F. Supp. 2d 153, 234 (E.D.N.Y. 2002) (considering provisions for the right to family within the Universal Declaration of Human Rights (UDHR),²

¹ While international law is often used as persuasive authority, ratified treaties create binding international legal obligations and are the “supreme law of the land.” *See* U.S. Const., art. VI, cl. 2. In addition, the U.S. has an obligation to refrain from acts that defeat the object and purpose of treaties it has signed, even if not yet ratified. *See* Vienna Convention on the Law of Treaties, art. 18(a), opened for signature May 23, 1969, 1155 U.N.T.S. 331.

² U.N. Gen. Assembly, *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. Doc. A/810 (1948) [hereinafter UDHR].

the International Covenant on Civil and Political Rights (ICCPR),³ and the Convention on the Rights of the Child (CRC)⁴ in holding that the Administration of Child Services (ACS) violated the rights of mothers by removing their children solely because the mothers experienced partner abuse); *see also Duchesne v. Sugarman*, 566 F.2d 817, 824 (U.S. 2d Cir. 1977) (stating that “the private realm of family life . . . has its source . . . not in state law, but in intrinsic human rights”). Similarly, a New York Family Court has considered the CRC’s protection of children’s human rights in determining a child’s right to attend a permanency hearing. *See In re Pedro*, 21 Misc. 3d 645, 648 n. 8 (Albany County Fam. Ct. 2008).

The New York Surrogate’s Court, too, regularly considers international human rights law protections of persons with disabilities in its decisions.⁵ In *In re Mark C.H.*, the New York County Surrogate’s Court found that “international human rights norms derived from treaties signed and ratified by the U.S. have relevance to . . . the situation of persons with intellectual disabilities, by virtue of the Supremacy Clause.” *In re Mark C.H.*, 28 Misc.3d 765, 783 (N.Y. County Surr.

³ International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, U.N. Doc. A/6316 (1966) [hereinafter ICCPR].

⁴ Convention on the Rights of the Child, 3 U.N.T.S. 1577, U.N. Doc. A/44/49 (1989) [hereinafter CRC]. The United States signed the CRC on Feb. 16, 1995 and is the only country in the world which that has not ratified it.

⁵ *See* N.Y. Const. Art. VI, § 12, cl. (d) (defining subject matter jurisdiction of Surrogate Courts); *see also* Id. at § 13, cl. (b) (defining subject matter jurisdiction of Family Courts).

Ct. 2010). The court considered international law reflected in human rights treaties in holding that Article 17-A guardianships must be subject to periodic review. It noted that failure to provide review violated the ICCPR (which has been ratified by the U.S. and is therefore binding), as well as U.S. obligations under the Convention on the Rights of Persons with Disabilities (CRPD)⁶ to provide regular review of measures relating to the exercise of legal capacity. *Id.* at 785 (citing Vienna Convention art. 18(a)).

In re Mark C.H. is not a standalone case. The Surrogate’s Court has repeatedly relied on the CRPD when making decisions about whether to terminate or limit the rights of persons with intellectual disabilities. *See In re Guardianship of Dameris L.*, 38 Misc.3d 570, 579-580 (N.Y. County Surr. Ct. 2012) (“While the CRPD does not directly affect New York’s guardianship laws, international adoption of a guarantee of legal capacity for all persons . . . is entitled to ‘persuasive weight’ in interpreting our own laws and constitutional protections”); *In re Guardian for Michelle M.*, 52 Misc.3d 1211(A), 2016 WL 3981204 (Kings County Surr. Ct. 2016) (considering both the CRPD and ADA when determining the rights of a person with intellectual disabilities in a guardianship case); *Proceeding for the Appointment for a Guardian for Leon Pursuant to SPCA Article*

⁶ Convention on the Rights of Persons with Disabilities, 2515 U.N.T.S. 3, U.N. Doc. A/61/49 art. 8(1)(b) (2006) [hereinafter CRPD].

17-A, 53 Misc. 3d 1204(A), 2016 WL 5724234 (Kings County Surr. Ct. 2016) (citing the ADA and CRPD to support the right of persons with disabilities to equal opportunity and equal recognition before the law); *In re Zhuo*, 53 Misc.3d 1121 (Kings County Surr. Ct. 2016) (same).

II. International human rights law recognizes the need to end discrimination and stereotypes against persons with disabilities.

International human rights law recognizes that all people, including persons with disabilities, have fundamental rights and that no person should be subject to discrimination based on disability or other prohibited grounds.⁷ Recognizing the need to articulate the rights of persons with disabilities in detail, the CRPD, which was modeled in part on the ADA,⁸ was adopted in 2006. The CRPD “reaffirms that all persons with all types of disabilities must enjoy all human rights and fundamental freedoms” and clarifies “areas where adaptations have to be made for persons with disabilities to effectively exercise their rights and areas where their rights have been violated, and where protection of rights must be reinforced.”⁹ *Cf.* ADA, 42 U.S.C.A. § 12101 (finding that disabilities “in no way diminish a person’s right to fully participate in all aspects of society” and that forms of

⁷ This is consistent with the mandates of the ADA. *See* 42 U.S.C.A. §12101.

⁸ U.S. Int’l Council on Disabilities, *What is the Convention on the Rights of Persons with Disabilities*, <http://usid.org/index.cfm/crpd>.

⁹ U.N. Dep’t of Econ. & Soc. Affairs, Div. for Inclusive Soc. Devel., *Convention on the Rights of Persons with Disabilities (overview)*, <http://bit.ly/2KfvzWB>.

discrimination include “discriminatory effects of [barriers and] failure to make modifications to existing facilities and practices [and] exclusionary qualification standards”). Underscoring widespread agreement and acceptance of the importance of recognizing and protecting the rights of persons with disabilities, the CRPD was “not only the most rapidly negotiated human rights treaty in history, but it also garnered more signatories on its opening day than any other treaty in the history of the U.N.”¹⁰ As of June 25, 2018, the treaty has been ratified by and is binding law in 177 countries.¹¹

A. States have an obligation to combat stereotypes against persons with disabilities.

The CRPD requires states to combat stereotypes against persons with disabilities and explicitly recognizes that women and girls with disabilities face multiple barriers and discrimination based on both gender and disability.¹² In particular, the CRPD Committee, a body of independent human rights experts who monitor implementation of the CRPD, has recognized that women with disabilities are frequently “discouraged or prevented from realizing their right to motherhood”

¹⁰ Arlene S. Kanter, *The Americans with Disabilities Act at 25 Years: Lessons to Learn From the Convention on the Rights of People with Disabilities*, 63 Drake L. Rev. 819, 823 (2015).

¹¹ See U.N. Treaty Collection, Current Status of CRPD (updated June 28, 2018 7:30 EDT), <http://bit.ly/2tN2NS4>

¹² Comm. on the Rights of Persons with Disabilities (CRPD Comm.), *Gen. Comment No. 3 — Article 6: Women and Girls with Disabilities*, U.N. Doc. CRPD/C/GC/3 ¶ 39 (2016) [hereinafter *Women and Girls with Disabilities*].

due to “harmful eugenic stereotypes.”¹³ In light of such pervasive stereotypes and the human rights violations that stem from them, the CRPD Committee has emphasized that “it is particularly important to reaffirm . . . that women with disabilities have the right to found a family and be provided with appropriate assistance to raise their children.”¹⁴

Parents with disabilities are disproportionately subject to state intervention in their parental role as a result of discrimination and stereotypes. According to the CRPD Committee, “[h]armful gender and/or disability stereotypes such as incapacity and inability, can lead to mothers with disabilities facing legal discrimination. As such, they are significantly overrepresented in child protection proceedings and disproportionately lose contact and custody of their children[.]”¹⁵ This concern is reflected in practices in the U.S., where rather than being presumed to be fit parents, parents with disabilities, especially those with intellectual disabilities, must prove their competence as parents in the face of harmful and pernicious stereotypes.¹⁶ As a result, the U.S. removal rate of children when a parent has an intellectual disability ranges from 40 to 80 percent.¹⁷

¹³ *Id.*, at ¶¶ 38-39.

¹⁴ *Id.*, at ¶ 45.

¹⁵ *Id.*, at ¶ 46.

¹⁶ Nat’l Council on Disability, *Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children* 94 (Sept. 27, 2012).

¹⁷ *Id.*, a 2.

The CRPD requires that states adopt effective and appropriate measures to “combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age in all areas of life”¹⁸ and to promote, “awareness-training programmes regarding persons with disabilities and the rights of persons with disabilities.”¹⁹

B. States must change discriminatory practices and ensure that services are accessible to parents with intellectual disabilities and that reasonable accommodations are provided to them.

International human rights law recognizes disability as resulting “from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.”²⁰ CRPD Article 23 explicitly states that “[i]n no case shall a child be separated from parents on the basis of a disability...of the parents,”²¹ and requires that states provide “appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities.”²² Thus, not only is

¹⁸ CRPD, *supra* note 6, art. 8(1)(b).

¹⁹ *Id.*, art. 8(2)(d).

²⁰ CRPD, *supra* note 6, preamble (e). *See also* “‘Discrimination on the basis of disability’ is defined in article 2 of the Convention as any distinction, exclusion or restriction on the basis of disability that has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.” CRPD Comm., *Women and Girls with Disabilities*, *supra* note 12, ¶ 14.

²¹ CRPD, *supra* note 6, art. 23(4).

²² *Id.*, art. 23(2).

disability an impermissible grounds for termination of parental rights, but states should take action to help parents with disabilities retain their parental rights. In order to enable persons with disabilities to fully enjoy their human rights, such as the right to family life (discussed *infra.* sec. IV), states must adopt or modify laws, policies, and programs to eliminate discrimination.²³

The elimination of discrimination against persons with disabilities in both law and practice requires states to: (i) make information and services (including public institutions and authorities) accessible to people across a range of disabilities, and (ii) provide reasonable accommodations to individuals to ensure that they can access such information and services.

As the CRPD Committee has explained, accessibility and reasonable accommodations are two distinct but interrelated concepts: “Accessibility is related to groups, whereas reasonable accommodation is related to individuals.”²⁴ Thus, ACS is responsible for providing an accessible environment, including accessible information, to parents with intellectual disabilities generally and providing individualized reasonable accommodations to parents with intellectual disabilities when they need to interact with such services.

²³ *Id.* note 6, art. 4(1).

²⁴ CRPD Comm., *Gen. Comment No. 2 — Article 9: Accessibility*, U.N. Doc. CRPD/C/GC/2 ¶¶ 25-26, (2014) [hereinafter *Accessibility*].

1. *States must ensure that information and services are accessible to persons with intellectual disabilities to eliminate discrimination.*

Under international human rights law, accessible services and supports are a precondition for persons with disabilities to live independently and participate fully and equally in society.²⁵ Denial of access is considered to be a discriminatory act.²⁶ States must thus “take measures to tackle discrimination and barriers against women in accessing social services and support.”²⁷

The CRPD expressly recognizes intellectual impairments as a form of disability.²⁸ The particular discrimination that persons with intellectual disabilities face has been well documented.²⁹ According to the U.N. Special Rapporteur on the Rights of Persons with Disabilities, accessibility standards and guidelines often do

²⁵ CRPD, *supra* note 6, art. 9; CRPD Comm., *Accessibility*, *supra* note 24, ¶¶ 1, 26.

²⁶ *Id.*, at ¶ 13.

²⁷ CRPD Comm., *Gen. Comment No. 5 — Article 19: Right to Independent Living*, U.N. Doc. CRPD/C/GC/5, ¶ 73, (2017)[hereinafter *Independent Living*].

²⁸ CRPD, *supra* note 6, art. 1 (“Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”).

²⁹ See U.N. Secretary-General, *Report of the Special Rapporteur on the Rights of Persons with Disabilities: Sexual and Reproductive Health and Rights of Girls and Young Women with Disabilities*, U.N. Doc. A/72/133 ¶¶ 18, 22, 25 (July 14, 2017) (by Catalina Devandas-Aguilar); U.N. Secretary-General, *Report of the Special Rapporteur on the Rights of Persons with Disabilities: Access to Rights-Based Support for Persons with Disabilities*, ¶ 18, U.N. Doc. A/34/58 (Dec. 20, 2016) (by Catalina Devandas-Aguilar); CRPD Comm., *Women and Girls with Disabilities*, *supra* note 12, ¶¶ 17(a), 33, 41, 43, 44, 45; The Arc, *Parents with Intellectual Disability* (Rev. Mar. 2011), <http://bit.ly/2KwyhmL>.

not reflect the needs of individuals with intellectual disabilities and “significant gaps remain in relation to persons with intellectual disabilities”³⁰

For ACS to be accessible to parents with intellectual disabilities, information about how to inform ACS about one’s disability, how to request reasonable accommodations, and how to file a complaint for denial of reasonable accommodations must be accessible.³¹ Measures to ensure accessibility for a person with an intellectual disability include live assistance, intermediaries, information and communications in Easy Read and Plain English formats,³² and training for ACS staff about parents with intellectual disabilities.³³ Failure to ensure accessible information about how to navigate a service can render the entire service inaccessible to a person with an intellectual disability.

³⁰ U.N. Secretary-General, *Report of the Special Rapporteur of the Human Rights Council on the Rights of Persons with Disabilities*, U.N. Doc. A/71/314 at ¶ 36 (Aug. 9, 2016) (by Catalina Devandas-Aguilar).

³¹ CRPD Comm., *Accessibility*, *supra* note 24, ¶¶ 17, 19, 21, 37-38.

³² Easy Read information is a form of plain-language writing, supported by pictures, developed to support people with intellectual disabilities. See People First NZ, *Make it Clear: What Why When. A Guide to Making Easy Read Information* (2017), <http://bit.ly/2KufVTe> (PDF). This is similar to, but separate from Plain English, which uses everyday language and short sentences to convey meaning concisely. Making it Clear, *Plain English* (2018), <http://makingitclearuk.com/plain-english/>.

³³ CRPD Comm., *Accessibility*, *supra* note 24, ¶ 21.

2. *States must provide parents with intellectual disabilities with reasonable accommodations to avail themselves of information and services to eliminate discrimination.*

To meet the requirements of a disability-inclusive framework for parents with intellectual disabilities, states must ensure that reasonable accommodations tailored to the needs and situation of the parent are available to enable them to benefit from all policies and programs on an equal basis with others.

Individualized supports and services are often required to empower parenthood, which “must be considered a right rather than a form of medical, social or charity care.”³⁴

By requesting reasonable accommodations through an accessible process, a parent with an intellectual disability must be able to identify and access the accommodations that they require. For example, necessary reasonable accommodations may include access to a support person to assist them in remembering appointments with ACS and the Court, obtaining evaluations and historic records, and attending parenting classes.³⁵ International human rights law emphasizes the need for reasonable accommodations such as these to parents with intellectual disabilities so that they may equally participate in programs and to support their ability to parent their children in their communities.

³⁴ CRPD Comm., *Independent Living*, *supra* note 27, ¶¶ 28-29.

³⁵ *Id.* at ¶¶ 28-29; CRPD Comm., *Accessibility*, *supra* note 24, ¶¶ 19, 21.

III. Parents with disabilities are equal before the law and have a right of equal access to all legal proceedings.

International human rights law requires that states provide parents with due process protections in judicial proceedings where a parent may be separated from a child. Parents with disabilities must be provided accommodations to facilitate their effective participation in all phases of proceedings, including preliminary and investigatory stages.³⁶

Access to justice,³⁷ equal protection, fair trial, and the right to an effective remedy for rights violations are fundamental principles of international law.³⁸ The CRPD reiterates these rights and articulates what they require for persons with disabilities.³⁹ Under CRPD Article 13, access to justice requires both the removal of barriers to legal proceedings to ensure equal footing with others and the

³⁶ CRPD, *supra* note 6, art. 13(1).

³⁷ Access to justice is a broad concept, encompassing peoples' effective access to the systems, procedures, information, and locations used in the administration of justice. *See* Stephanie Ortoleva, *Inaccessible Justice: Human Rights, Persons with Disabilities and the Legal System*, 17 ILSA J. Int'l & Comp. L. 281, 284 (Spring 2011).

³⁸ UDHR, *supra* note 2, arts. 7, 8, 10; ICCPR, *supra* note 3 at Articles 2(3), 14, 26; American Convention on Human Rights, Pact of San Jose, Costa Rica, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, OAS/Ser. L/V/I.4 rev. 7 at arts. 8(1), 24, 25 (1969)[hereinafter *American Convention*]; Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. No. 5, 213 U.N.T.S. 222 at arts. 6, 13 (1950) (hereinafter *European Convention*); African (Banjul) Charter on Human and Peoples' Rights, , 21 I.L.M. 58, OAU Doc. CAB/LEG/67/3 rev. 5 at arts. 3, 7 (1981).

³⁹ CRPD, *supra* note 6, arts. 5(1) ("all persons are equal before and under the law and are entitled without discrimination to the equal protection and benefit of the law"); 12(2) (stating that persons with disabilities have the right to "enjoy legal capacity on an equal basis with others in all aspects of life"); 13 (requiring that states "ensure effective access to justice for persons with disabilities on an equal basis with others").

promotion of active participation of persons with disabilities at every stage of a proceeding affecting their rights.⁴⁰

Mothers with disabilities face discrimination in all types of proceedings related to their parental rights. Harmful stereotypes about their abilities as parents by social service and legal professionals pose particular barriers to women with disabilities,⁴¹ and a lack of accommodation in legal proceedings can undermine their ability to protect their rights. Under the CRPD, effective access to justice requires the training of key personnel working with persons with disabilities,⁴² which would include ACS case workers. The ECtHR has held that states must ensure that parents with disabilities are able to participate effectively in proceedings regarding the placement of their children.⁴³

Persons with intellectual disabilities face particular challenges in accessing justice.⁴⁴ Accessible information and materials, such as those in Easy Read or

⁴⁰ U.N. Human Rights Council, *Report of the Office of the U.N. High Comm'r for Human Rights on Right to Access to Justice Under Article 13 of the Convention on the Rights of Persons with Disabilities*, U.N. Doc. A/HRC/37/25, at ¶12 (December 27, 2017).

⁴¹ Women Enabled Int'l, *Submission to Office of the High Comm'r for Human Rights (OHCHR) for Report on Access to Justice for Persons with Disabilities 5* (2013) <https://bit.ly/2q5Z688> (PDF).

⁴² CRPD Comm. Gen. Comment No. 1 — *Article 12: Equal Recognition Before the Law*, U.N. Doc. CRPD/C/GC/1, at ¶ 39 (2014) [hereinafter *Equal Recognition*].

⁴³ European Court of Human Rights, *Case Law Guide on Article 8 of the European Convention on Human Rights Right to Respect for Private and Family Life*, at ¶ 75 (Dec. 31, 2016) (citing *K. and T. v Finland* [GC] App. No. 25702/94 ECtHR (July 12, 2001) and *B. v. Romania*, no. 1285/03, ECtHR ¶ 117 (Feb. 19, 2013)).

⁴⁴ Conference of States Parties to the CRPD, *Report of the Ninth session of the Conference of States Parties to the CRPD*, U.N. Doc. CRPD/CSP/2016/5, at Round Table 2 ¶¶ 16-22 (Aug. 16,

Plain English formats, are seldom available, and women with disabilities, in particular, often lack knowledge about their rights to and within the justice system.⁴⁵

To ensure the rights to a fair trial and to participate in the administration of justice, states must ensure that legal proceedings are accessible and must provide individualized reasonable accommodations to parents with disabilities.⁴⁶ There are a number of steps that states can take to ensure both accessibility and reasonable accommodation for people with intellectual disabilities. For example, states could provide legal information or translate judgments concerning the rights of persons with disabilities into Easy Read formats⁴⁷ and provide training to law enforcement officials, health care personnel and other service providers on providing reasonable accommodations for persons with intellectual disabilities.⁴⁸ The international community has recognized the dangers of inadequate accommodations for individuals with intellectual disabilities in judicial proceedings.⁴⁹ One example held up by the international community was developed in the U.S.: *The Best*

2016), available at <http://bit.ly/2KhwUMp> (PDF). See also *Report of the Special Rapporteur of the Human Rights Council*, *supra* note 30, at ¶ 6.

⁴⁵ Women Enabled Int'l, *supra* note 41, at 4, (citing Ortoleva, *Inaccessible Justice*, *supra* note 37, at 300).

⁴⁶ *Report of the Office of the U.N. High Comm'r for Human Rights*, *supra* note 40, at ¶24.

⁴⁷ *Id.*, at ¶¶ 22, 24.

⁴⁸ *Id.*, at ¶ 48.

⁴⁹ *Id.*, at ¶ 31 (citing data from Florida that showing that “limited support in terms of procedural accommodations for persons with intellectual and psychosocial disabilities in criminal proceedings results in their overrepresentation among persons sentenced to the death penalty.”).

Practices Tool Kit for State and Local Governments under the Americans with Disabilities Act, which offers guidance on how to provide procedural accommodations.⁵⁰

IV. Every person has a human right to family life.

Under international human rights law, all persons, including persons with disabilities and their children, have the right to family life. Families are recognized as the natural and fundamental group units of society and have the right to be free from arbitrary and unjust state interference and to receive protection, support and assistance from the state.⁵¹ The idea that children and parents are entitled to liberty, privacy, and dignity in family life is also echoed in U.S. constitutional jurisprudence and New York case law.⁵² Because the right to family life is so fundamental, the CRPD requires that state parties take effective and appropriate measures to ensure the right of persons with disabilities to found a family, and

⁵⁰ *Id.*, . ¶ 30.

⁵¹ CRC, *supra* note 4, Preamble. *See also* UDHR, *supra* note 2, arts. 16(1), 16(3); International Covenant on Economic, Social, and Cultural Rights (ICESCR), 993 U.N.T.S. 3, U.N. Doc. A/6316 at art. 10(1) (1966); ICCPR, *supra* note 3 at art. 23(1); *European Convention*, *supra* note 38, at art. 8 (“Everyone has the right to respect for his private and family life, his home and his correspondence.”).

⁵² *See, e.g., Troxel v. Granville*, 530 U.S. 57, 66 (2000) (stating that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents as to care, custody, and control of their children) (O’Connor, J. writing for the plurality). *See also Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (“The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State”); *Bennett v. Jeffreys*, 40 N.Y.2d 543, 546 (1976) (“The parent has a ‘right’ to rear its child, and the child has a ‘right’ to be reared by its parent”).

eliminate all discrimination against them in matters relating to families and parenting.⁵³ The state must ensure that children are not improperly taken away from parents with disabilities and provide support to foster their ability to live independently within the community.⁵⁴

A. All parents, including parents with disabilities, have a right to state protection of the family unit and support and assistance in raising children.

International human rights law recognizes a state obligation to support and assist parents in raising children that includes providing appropriate assistance with child-rearing responsibilities to persons with disabilities.⁵⁵ The International Covenant on Economic, Social, and Cultural Rights (ICESCR) provides that families should be accorded the “widest possible protection and assistance,” particularly for establishing the family and “for the care and education of dependent children.”⁵⁶ The CRC also requires that states render appropriate assistance to parents in the performance of their child-rearing responsibilities.⁵⁷ The CRPD, CRC, and the Convention on the Elimination of All Forms of

⁵³ CRPD, *supra* note 6, art. 23(1).

⁵⁴ CRPD Comm., *Independent Living*, *supra* note 27, ¶ 87; *see also* CRPD, *supra* note 6, art. 19.

⁵⁵ *Id.*, art. 23(2).

⁵⁶ ICESCR, *supra* note 51, at art. 10(1). The United States signed ICESCR on Oct. 5, 1977 but has not ratified it.

⁵⁷ CRC, *supra* note 4, at art. 18(2).

Discrimination Against Women (CEDAW)⁵⁸ require that states should provide parents with adequate education and information to properly plan and care for their families.⁵⁹

B. All families, including parents with disabilities and their children, have a right to family life free from arbitrary or unjust state interference.

The UDHR states that “[n]o one shall be subjected to arbitrary interference with his privacy, family, [or] home . . . Everyone has the right to the protection of the law against such interference or attacks.”⁶⁰ The right to privacy and freedom from undue interference by the state in private or family life is recognized in international and regional human rights treaties, including the ICCPR,⁶¹ the European Convention on Human Rights (ECHR),⁶² the CRC,⁶³ the African Charter

⁵⁸ Convention on the Elimination of Discrimination Against Women, 1249 U.N.T.S. 13, U.N. Doc. A/34/46 (1979)[hereinafter CEDAW]. The United States signed CEDAW on Jul. 17, 1980 but has not ratified the Convention.

⁵⁹ See CRPD, *supra* note 6, at art. 24; *see also* CRC, *supra* note 4, at art. 24(2); CEDAW, *supra*, note 58, at art. 10(h).

⁶⁰ UDHR, *supra* note 2, art. 12.

⁶¹ ICCPR, *supra* note 3 at art. 17. The ICCPR was ratified by the US in 1992.

⁶² *European Convention*, *supra* note 38, at art. 8 (“Everyone has the right to respect for his private and family life, his home and his correspondence”).

⁶³ CRC, *supra* note 4, at art. 16.

on the Rights and Welfare of the Child,⁶⁴ and the American Convention on Human Rights.⁶⁵

The right to freedom from unlawful or arbitrary state interference in privacy, family, or the home is also specifically guaranteed to persons with disabilities under the CRPD.⁶⁶ In the case of such interference, “legal remedies and relief must be available for all persons with disabilities using support services.”⁶⁷ (See Section III, *supra*, on “Access to Justice”).

In interpreting Article 8 of the ECHR, the ECtHR provides the most developed international jurisprudence on state obligations with respect to the protective removal of children.⁶⁸ The ECtHR has emphasized that the total separation of a family is the most drastic measure that is warranted only in the most serious cases and only after considering less drastic measures, such as advising and guiding parents and other ways of overcoming difficulties.⁶⁹ An

⁶⁴ African Union, African Charter on the Rights and Welfare of the Child, Doc. No. CAB/LEG/24.9/49 at art. 10 (1990) (“No child shall be subject to arbitrary or unlawful interference with his privacy, family home or correspondence, or to the attacks upon his honour or reputation, provided that parents or legal guardians shall have the right to exercise reasonable supervision over the conduct of their children. The child has the right to the protection of the law against such interference or attacks.”) [hereinafter ACRWC].

⁶⁵ *American Convention*, *supra* note 38, at art. 11(2).

⁶⁶ CRPD, *supra* note 6, at art. 22(1).

⁶⁷ CRPD Comm., *Independent Living*, *supra* note 27, ¶ 86.

⁶⁸ Sonja Starr & Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 Berkeley J. Int. L. 213, 220 (2003) (“The [ECtHR] has interpreted Article 8 to provide fairly robust privacy protection generally, and specifically to protect family integrity against state interference.”)

⁶⁹ *Wallová and Walla v. the Czech Republic*, Eur. Ct. H.R., App. No. 23848/04 (final decision Mar. 26, 2007) (available only in French, Icelandic, Czech, and Ukrainian) (finding a violation

interference in family life is not justified solely on the basis that a “child would be better off if placed in care.”⁷⁰ The ECtHR expressed particular concern about removal of an infant immediately after birth stating that removal requires “extraordinary compelling reasons” given the “shock and distress” inflicted upon the mother and requires that authorities examine “some less intrusive interference into family life, at such a critical point in the lives of the parents and child.”⁷¹

Further, once an authority places children in the care of the state, the ultimate aim should be to reunite the parents and the child. While the duty to facilitate reunification must be balanced with the duty to consider the best interests of the child, as time passes the duty to facilitate family reunification will weigh upon the state “with progressively increasing force.”⁷²

of Art. 8 where the fundamental problem was the lack of suitable housing which could have been resolved without separating the family).

⁷⁰ *Olsson v. Sweden*, 11 Eur. Ct. H.R. 259 at ¶ 72 (1992).

⁷¹ *K and T v. Finland*, 2001-VII Eur. Ct. Hr. 191 ¶ 168 (2001) (holding that that an emergency care order taking a newborn from a mother with a history of schizophrenia was improper where there was no indication that the government considered alternatives to separation for protecting the baby from physical harm).

⁷² *Id.*, at ¶ 178 (holding that Finland violated its Article 8 affirmative obligation to facilitate family reunification where the state failed to take steps to possibly reunify the family once the applicant’s situation improved); *Olsson*, 11 Eur. Ct. H.R. 259 at ¶ 81 (holding that Article 8 was not violated by taking the children into state care, but it was violated by the implementation of the care decision where it separated all three children at great distances from each other and their parents, and placed extreme restrictions on the parents’ visits).

C. The children of parents with disabilities have a right to family life and separation should only occur as a last resort when a child faces imminent harm.

International human rights law recognizes that children have a right to family life⁷³ and providing appropriate supports to families to enable them to stay together is in the child’s best interest. The CRC, the leading treaty on the children’s human rights, ratified by every country in the world except the U.S., emphasizes that in all actions concerning children, “whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration.”⁷⁴ The CRC Committee, the expert body that monitors CRC compliance, has stated that, in child removal decisions, “[d]ue consideration of the

⁷³ CRC, *supra* note 4, at Preamble (stating that “for the full and harmonious development of his or her personality, [a child] should grow up in a family environment), art 8(1) (recognizing the right of the child to preserve his or her identity, including . . . family relations”). The CRC also recognizes that in matters concerning children, states should take into account and respect responsibilities, rights and duties of parents. *Id.*, at arts. 3(2), 5; U.N. Gen. Assembly, *Declaration of the Rights of the Child*, at prin. 6, G.A. res. 1386(XIV) 14 U.N. GAOR Supp. (No. 16), U.N. Doc. A/4354 at 19 (1959) (“The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents . . . a child of tender years shall not, save in exceptional circumstances, be separated from his mother”); African Union, ACRWC, *supra* note 64, at art. 19 (“Every child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents.

⁷⁴ CRC, *supra* note 4, at art. 3(1).

child's best interests implies that the child have access to . . . [their] family of origin."⁷⁵

Recognizing the importance of family to a child's development, the CRC protects children from unlawful or arbitrary state interference in their family life⁷⁶ and emphasizes that separation should only occur as a last resort when less intrusive measures, including the provision of appropriate supports, cannot protect the child from situations such as the danger of imminent harm.⁷⁷ Under the CRC, states must "ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child."⁷⁸ The U.N. Guidelines for the Alternative Care of Children emphasize that families must be provided adequate support to avoid separation and that the state cannot step in as caregiver unless "the

⁷⁵ Comm. on the Convention on the Rights of the Child (CRC Comm.), *Gen. Comment 14 on the Right of the Child to Have His or Her Interests Taken as a Primary Consideration*, U.N. Doc. CRC/C/GC/14 art. 3, ¶¶ 1, 56 (2013) [hereinafter *Best Interests*].

⁷⁶ CRC, *supra* note 4, at art. 16, Nov. 20, 1989, 3 U.N.T.S. 1577. *See also* African Union, ACRWC, *supra* note 64, at art. 10 ("No child shall be subject to arbitrary or unlawful interference with his privacy, family home or correspondence, or to the attacks upon his honour or reputation, provided that parents or legal guardians shall have the right to exercise reasonable supervision over the conduct of their children. The child has the right to the protection of the law against such interference or attacks").

⁷⁷ CRC Comm., *Best Interests*, *supra* note 75, ¶ 61. *See* U.N. General Assembly, Guidelines for Alternate Care of Children, G.A. Res. 64/142, U.N. Doc. A/RES/64/142 ¶ 14 (2010), ("Removal of a child from the care of the family should be seen as a measure of last resort and should, whenever possible, be temporary and for the shortest possible duration.")

⁷⁸ CRC, *supra* note 4, at art. 9.

child's own family is unable, even with appropriate support, to provide adequate care for the child."⁷⁹ Further according to the CRC Committee, separation of a child from a parent with a disability "may be considered only . . . where the necessary assistance to the family to preserve the family unit is not effective enough to avoid a risk of neglect or abandonment of the child or a risk to the child's safety."⁸⁰ The state also has an obligation that "all interested parties shall be given an opportunity to participate in the proceedings and make their views known."⁸¹

International human rights law recognizes that providing reasonable accommodations that would enable a child to maintain his or her relationship with the child's mother is in the child's best interests. Absent accessible services and reasonable accommodations for parents with disabilities, separation is inconsistent with the best interest of the child. Moreover, as discussed *supra* in Section III, a parent with an intellectual disability cannot participate in proceedings that are inaccessible and where necessary reasonable accommodations are not provided.

⁷⁹ Guidelines for Alternate Care of Children, *supra* note 77, ¶ 5 (2010). The guidelines state that in order to prevent separation the state should ensure appropriate measures to "support family caregiving environments whose capacities are limited by factors such as disability." *Id.* at ¶ 9(a).

⁸⁰ CRC Comm., *Best Interests*, *supra* note 75, ¶ 63.

⁸¹ CRC, *supra* note 4, at art. 9(2).

CONCLUSION

The right to family life is a basic fundamental right of all parents and their children. The ADA reflects well-respected human rights principles recognized in the CRPD and by countries around the world that a parent with a disability must be provided accessible services and reasonable accommodations when needed, and that separation of a parent and child where the state has failed to provide accessible services and reasonable accommodations is improper and may not therefore serve the best interest of the child.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word 365, and according to that software, it contains 6,748 words, excluding the cover, tables, corporate disclosure, and this certificate.

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